

STATE OF NORTH CAROLINA
BOARD OF REVIEW



IN THE MATTER OF:

Higher Authority Decision No.

ATTN:

Claimant

Employer

Pursuant to N.C. Gen. Stat. § 96-15(e), this cause came before the Board of Review (“Board”) to consider the **employer’s appeal** from Appeals Decision No. . The record evidence and any briefs or written arguments timely submitted have been reviewed in their entirety.

The Adjudication Unit of the Division of Employment Security (“Division”) mailed an *Appeals & Hearings: Level 1-Appealing an Initial Determination* pamphlet to each party with a copy of Determination by Adjudicator Docket No. on . Panel 6 and 7 of the pamphlet placed the employer on notice that there are special requirements for cases involving separation from employment caused by the results of an alcohol and/or controlled substance/drug test. Specifically, the pamphlet states:

The Controlled Substance Examination Regulation Act (CSERA), N.C. Gen. Stat. 95 §§ 230-235, requires that tests comply with its procedural requirements, unless the test was administered by the U.S. Department of Transportation or Nuclear Regulatory Commission. An employer must establish: (1) that an employee tested positive for a controlled substance; (2) the chain of custody of the drug-testing sample; (3) the reliability of the controlled substance examination; and (4) exactly how the employee violated the employer’s policy. Instead of live testimony from a laboratory representative at a hearing, an affidavit from the lab’s authorized representative may be presented to prove controlled substance examination results, chain of custody and compliance with applicable testing and retesting required by law. A positive result from a controlled substance examination constitutes misconduct connected with work if an employer shows compliance with CSERA. Similarly, an employee’s refusal to comply with a reasonable and properly implemented drug testing policy, without good cause, constitutes misconduct. The results of a controlled substance examination and compliance with statutory or regulatory procedural requirements may be deemed proven if the claimant admits or stipulates to them during the hearing, or by affidavit. *See* N.C. Gen. Stat. § 96-14.6 and 04 N.C. Admin. Code 24C .0211.



The employer, in its appeal, offers information that was not included in any testimony and/or document presented under oath and subject to appropriate cross-examination at the evidentiary hearing held in this case before Appeals Referee . Prior to the hearing, the Appeals Section of the Division mailed a Notice of Hearing, Exhibit No. __, along with a copy of the documents contained in the Appeals Referee's file to each party pursuant to 04 N.C. Admin. Code 24C .0204. The Notice and accompanying documents were mailed to all parties on . Among other things, the Notice stated:

HOW TO GIVE EVIDENCE: Sworn testimony is required. If you want witnesses to testify, they must do so at the hearing. If you have documents, electronic recordings or other evidence that you want considered by the hearing official, you must mail or deliver them to the hearing official and to each party. The evidence must be received before the hearing.

Pursuant to N.C. Gen. Stat. §§ 95-230 through 235 and 04 N.C. Admin. Code 24C .0211, the Notice also placed the parties on notice of the evidentiary requirements for separations involving alcohol and controlled substance/drug tests, and stated:

DRUG AND/OR ALCOHOL-RELATED SEPARATIONS: There must be evidence to prove or disprove any test and its results. Evidence should also include work rules and/or policies. In North Carolina, the Controlled Substance Examination Regulation Act, N.C.G.S. 95-230 – 235, requires that tests comply with its procedural requirements, unless the test was administered by the U.S. Department of Transportation or Nuclear Regulatory Commission. Instead of live testimony from a laboratory representative at the contested claims hearing, an affidavit from the lab's authorized representative may be presented to prove controlled substance examination results, chain of custody and/or compliance with all testing and retesting required by federal or state law. Test results may be deemed proved if the claimant admits or stipulates to them during the hearing or by affidavit. Any documents submitted to the hearing official must also have been provided to the other party before the hearing. If you have questions, contact the Chief Appeals Referee.

It is clear from the foregoing written notice that the employer was made aware of the obligation to appear at the evidentiary hearing to present all testimony and other evidence. The employer had a duty, and was placed on notice of its duty, to provide competent evidence including live testimony, or an affidavit from the lab's authorized representative to prove controlled substance results, chain of custody, and compliance with the testing and retesting procedures required by law. The record is absent any indication that the employer was prevented from presenting all testimony or documentary evidence, or requesting a rescheduling of the hearing pursuant to 04 NCAC 24C .0207 for good cause shown. Good cause must be a legally sufficient reason amounting to a legal excuse for failing to perform an act required by law in the exercise of due diligence. See N.C. Gen. Stat. § 96-15(d1) and 04 N.C. Admin. Code 24A .0105(26).

Where there is evidence in the record that supports a conclusion on a material issue, the Board may not grant an employer more than one opportunity to produce evidence to prove that a claimant is disqualified from receiving unemployment insurance benefits. To do otherwise would impact a claimant's right to due process, and allow employers repeated opportunities to meet their burden of proving that an employee should be disqualified from receipt of unemploy-



ment benefits. See Dunlap v. Clarke Checks, Inc., 92 N.C. App. 581, 375 S.E.2d 171 (1989). As such, the Board concludes that the employer was afforded procedural due process. The Board elects not to reopen this matter merely because the employer did not safeguard its right to present testimony or other evidence, or ensure that all witnesses attended the hearing. See Douglas v. J.C. Penney Co., 67 N.C. App. 344, 313 S.E.2d 176 (1984). In this case, the Board is restricted to considering only that evidence presented at the hearing. See Patrick v. Cone Mills Corp., 64 N.C. App. 722, 308 S.E.2d 476 (1983).

As the ultimate fact finder in cases involving contested claims for unemployment insurance benefits, the Board concludes that the facts found by the Appeals Referee are supported by competent and credible evidence contained in the record, and adopts them as its own. Furthermore, the Board concludes that the Appeals Referee properly and correctly applied the Employment Security Law (N.C. Gen. Stat. § 96-1 et seq.) to the facts as found, and the resultant decision was in accordance with the law and facts.

The decision of the Appeals Referee is (**AFFIRMED**)(**REVERSED**)(**MODIFIED**).

The claimant is **DISQUALIFIED** for unemployment insurance benefits beginning .
(**NOT DISQUALIFIED** and will receive unemployment insurance benefits beginning .

Board of Review members Susan Doe and John Doe participated in this appeal and concur with this decision.

This the .

BOARD OF REVIEW

Chairman

NOTE: This Higher Authority Decision will become final thirty (30) days after mailing unless a petition for judicial review is filed with the superior court as indicated below. The date of mailing is found on the last page of this decision. Although the Board does not impart legal advice, please see the enclosed pamphlet for additional guidance on how to appeal a Higher Authority Decision. The pamphlet is available in the public employment offices throughout the State, and on the Division of Employment Security's website. You may also visit the *Frequently Asked Questions* section on the Division of Employment Security's website at www.des.nc.gov, and consult an attorney of your choosing.

APPEAL RIGHTS FOR JUDICIAL REVIEW

Appeals from this Higher Authority Decision must be filed with the Clerk of Superior Court by the petitioner in the county in which he or she resides, or in which the petitioner has its principal place of business. If a party does not reside in any county or have a principal place of business in any county in North Carolina, appeals must be filed with the Clerk of Superior Court of Wake County, North Carolina *or* with the Clerk of Superior Court of the North Carolina county in which the controversy arose.

This Higher Authority Decision will become final thirty (30) days after mailing unless a timely petition for judicial review is filed with the superior court pursuant to N.C. Gen. Stat. §§ 96-15(h) and (i).



Copies of any Petition for Judicial Review filed with the Clerk of Superior Court must be served upon the Division of Employment Security (“Division”) and upon all parties of record to the proceedings within ten (10) days of the filing of the petition. Copies of the petition must be served by personal service or by certified mail, return receipt requested. Petitions for superior court review must be served on and addressed to the registered agent for service of process for the Division:

Frank Doe
Chief Counsel
North Carolina Department of Commerce
Division of Employment Security
Mailing Address: Post Office Box 25903, Raleigh, NC 27611-5903
Physical Address: 700 Wade Avenue, Raleigh, NC 27605-1154

NOTE: If you are served with a Petition for Judicial Review by another party, you will not be a party to the judicial review proceedings unless you: (1) notify the superior court within ten (10) days after you receive the petition that you want to become a party to the proceedings, or (2) file a motion to intervene as provided in N.C. Gen. Stat. § 1A-1, Rule 24.

NOTICE TO ALL INTERESTED PARTIES

A legal representative as defined in 04 N.C. Admin. Code 24A .0105(32) (including individuals from a third-party company serving as an employer’s unemployment insurance administrator) must be a licensed attorney, or a person supervised by a licensed attorney in accordance with N.C. Gen. Stat. Ch. 84 and § 96-17(b). Notices and/or certification of attorney supervision must be in writing pursuant to 04 N.C. Admin. Code 24C .0504. **Legal representation in judicial proceedings must comply with N.C. Gen. Stat. Ch. 84.**

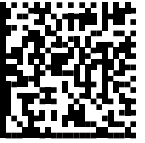
Pursuant to 04 N.C. Admin. Code 24C .0504, when a party has a legal representative, all documents or information required to be provided to the party will only be sent to the legal representative. Any information provided to a party’s legal representative will have the same force and effect as if it had been sent directly to the party.

For claims filed on or after June 30, 2013, claimants are subject to repayment of benefits received from any administrative or judicial decision that is later reversed on appeal. N.C. Gen. Stat. § 96-18(g)(2).

SPECIAL NOTICE TO CLAIMANTS: If you were receiving or have previously received unemployment insurance benefits in connection with the underlying claim and this Higher Authority Decision rules you ineligible or disqualified for all or part of such benefits, you may now have an overpayment of benefits pursuant to N.C. Gen. Stat. § 96-18(g)(2). If an overpayment is created by this Higher Authority Decision, you will be mailed a separate Notice of Overpayment or Determination of Overpayment from the Division’s Benefits Integrity/Benefit Payment Control Section. The Notice of Overpayment or Determination of Overpayment will specify, among other things, the amount of your overpayment and any penalties that apply. Please note that the only way you may contest the overpayment is to file a petition for judicial

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review of this Higher Authority Decision with the superior court as provided above, and in accordance with North Carolina law. In your petition, you must specify whether you are appealing (1) the issue of disqualification or eligibility and/or (2) the resulting determination that you received an overpayment of benefits.

Appeal Filed:

Decision Mailed: