

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

SHARIF J. DAVIS
Claimant

Precedent Benefit
Decision No. P-B-500

TIME WARNER NY CABLE LLC
Employer/Appellant

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

ROBERT DRESSER

ALBERTO TORRICO

KATHLEEN HOWARD

ROY ASHBURN, Dissenting

Pursuant to section 409 of the California Unemployment Insurance Code, AO-260877 is hereby designated as Precedent Decision No. P-B-500.

Adopted as Precedent: October 9, 2012

Case No.: AO-260877
Claimant: SHARIF J DAVIS

The employer appealed from the decision of the administrative law judge that held the claimant not disqualified for unemployment insurance benefits under section 1256 of the Unemployment Insurance Code and ruled the employer's reserve account was not relieved of benefit charges. The administrative law judge's decision also impliedly held the claimant not disqualified for benefits under code section 1256.4.¹

ISSUE STATEMENT

The issues presented in this case are:

1. Whether the claimant was discharged from his most recent employment due to behavior that constituted misconduct connected with such work;
2. whether the claimant was discharged from his most recent employment due to behavior that was attributable to an irresistible compulsion to consume intoxicants, and,
3. whether the employer's reserve account is subject to charges for benefits paid or payable to the claimant.

FINDINGS OF FACT

Prior to filing his claim for benefits, the claimant was most recently employed by the employer as a customer service escalation specialist earning \$15.06 per hour. The employer is a cable company. The claimant worked at a help desk responding to telephone inquiries from customers concerning their cable service. The claimant had been employed by the employer for approximately three years when he was discharged under the following circumstances.

¹ Unless otherwise noted, all code references are to the Unemployment Insurance Code. Code section 1256.4 disqualifies for benefits any claimant who is discharged from his or her most recent work for chronic absenteeism due to intoxication, reporting for work while intoxicated, using intoxicants on the job, or gross neglect of duty while intoxicated, when such behavior is caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages.

At the time of hire, the claimant was made aware of the employer's written "Drug Free Workplace" and "Post Accident Substance Testing" policies. The employer's "Drug Free Workplace Policy" provides, in pertinent part, as follows:

[The employer] is committed to protecting the safety, health, and well being (sic) of all employees and other individuals in our workplace. It is the policy of [the employer] to prohibit the unlawful manufacture, distribution, possession or use of a controlled substance during company time, on [the employer's] premises or other work sites where employees may be assigned. The [employer] further prohibits the use, sale, possession, distribution, manufacture or the transfer of controlled substances during nonworking time to the extent such use impairs an employee's ability to perform his/her job or where such use, sale, possession, distribution, manufacture, or transfer affects [the employer's] reputation with the general public.

The employer's "Post Accident Substance Testing Policy" provides, in pertinent part, as follows:

[The employer] expects employees to report to work in the physical and mental condition to perform their duties safely and efficiently. Consequently, [the employer] is committed to providing a working environment free of problems associated with the use and abuse of legal and illegal controlled substances and alcohol. Work related vehicular accidents and workers' compensation injuries will require a post accident substance test....Employees who tests (sic) non-negative for either drug or alcohol will be terminated immediately.

The claimant was experiencing stress and anxiety due to a variety of reasons, including some that were work-related. On January 25, 2011, the claimant met with the employer's human resources manager for the purpose of learning what options existed for the claimant obtaining time off from work in order to better cope with his condition. As a result of that discussion, the claimant decided to open a workers' compensation claim based on his stress-related problems and proceeded to the nearby clinic that handled such matters for the employer.

Upon arriving at the clinic, the claimant was required by clinic personnel to submit to a drug screen urinalysis test. He was required to do so on the ground that it is the employer's policy that an employee opening a workers' compensation claim be required to participate in such testing regardless of whether the claim is based on injury or illness. The employer's stated reason for that policy is the employer's interest in a drug-free workplace. The claimant was initially unwilling to undergo such testing. He only submitted to the drug screen

test after he was advised that a failure to do so would result in the termination of his employment.

Since the result of that test was “non-negative,” the test specimen obtained on January 25, 2011 was sent to a separate facility for further analysis. On February 1, 2011, both the claimant and the employer were notified that such further analysis had resulted in a positive test result for marijuana use by the claimant. Due to the positive January 25, 2011, drug screen test result, the employer discharged the claimant effective February 8, 2011. The claimant thereafter opened his claim for unemployment insurance benefits with the Employment Development Department (EDD).

On February 23, 2011, a representative of EDD interviewed the claimant by telephone. The representative’s record of that interview reflects the claimant’s contentions that the claimant was discharged due to a positive drug screen test result and that the test result is incorrect because the claimant “doesn’t do drugs” and “has no drug problem at all.” The “summary of facts and reasons for decision” section of the interview record concluded that misconduct by the claimant had not been clearly established.

On March 2, 2011, EDD issued a notice of determination/ruling to the employer that held the claimant not disqualified for unemployment insurance benefits under code section 1256 and ruled the employer’s reserve account was not relieved of benefit charges. That notice of determination/ruling did not explicitly address the issue of the claimant’s qualification or disqualification for benefits under code section 1256.4.

The employer timely appealed from that notice of determination/ruling. The notice of hearing sent to the parties listed the claimant’s qualification or disqualification for benefits under code section 1256 and the chargeability of the employer’s reserve account under code sections 1030 and 1032 as issues to be covered at the hearing. Having reviewed the appeal and the file documents indicating that alleged drug use by the claimant was a factor in the employer’s decision to discharge the claimant, the office of appeals also listed on the notice of hearing the issue of the claimant’s qualification or disqualification for benefits under code section 1256.4.

At the beginning of the hearing, the administrative law judge announced that the issue of the claimant’s qualification or disqualification for benefits under code section 1256.4 was an issue in the case. The claimant testified that he does not use marijuana or other illicit drugs. The claimant ascribed the positive drug screen test result to the fact that he was sharing a household with a roommate who regularly used marijuana for medicinal reasons. The employer admitted that

the employer did not suspect that the claimant had ever worked while impaired by the use of any intoxicant prior to the employer receiving notification of the drug screen test result. The employer presented no evidence to indicate that the marijuana level reported in the claimant's drug screen test result warranted the reasonable inference that the claimant's job performance on January 25, 2011 was impaired by use of marijuana.

There is a conflict between the evidence presented by the employer and the evidence presented by the claimant on the question of whether the claimant at some point in time used marijuana. It is not necessary to resolve that conflict. It was not established that (1) any such use took place on the employer's premises or during work time; (2) any off-duty marijuana use by the claimant either impaired the claimant's ability to perform his job or affected the employer's reputation with the general public; (3) the claimant's job was safety-sensitive, involved a substantial public profile on the employer's behalf, or entailed a high level of trust or responsibility; or (4) the claimant suffers from an irresistible compulsion to consume marijuana or any other intoxicant.

REASONS FOR DECISION

This case presents questions concerning this agency's procedures for adjudicating the issues involved and the extent to which an employer's rules may justifiably govern an employee's off-duty behavior in terms of assessing whether misconduct connected with the work has occurred for purposes of code section 1256. We will deal with each of these questions in turn. Since the claimant was discharged due to the result of the drug screen test and not due to any objection on his part to the requirement of the test, it is not necessary for us to address the separate question as to the reasonableness of the employer's requirement that the claimant submit to the test.²

PART I. What is the appropriate policy for the procedural adjudication of cases wherein issues under both code sections 1256 and 1256.4 may be involved?

The policy articulated herein supersedes the policy set forth in Precedent Decision P-B-483 for the procedural resolution of such cases. A brief review of

² The employer's requirement that the claimant submit to the drug screen test raises an issue concerning the claimant's right to privacy under the California Constitution. The administrative law judge concluded that the employer's requirement of the test was unreasonable. However, a resolution of that question is not necessary to our decision on this case. We therefore defer consideration of that issue to a more suitable opportunity on a later occasion.

the history of these provisions and the special difficulties they present is warranted in order that the need for the revised policy can be better understood.

Code section 1256 provides that a claimant is disqualified for benefits if he or she was discharged for misconduct connected with his or her most recent work. Misconduct was defined in Precedent Decision P-B-3, citing *Maywood Glass Co. v Stewart* (1959) 170 Cal. App. 2nd 719, as being “conduct evincing such willful or wanton disregard of an employer’s interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee.” It was specifically noted in those authorities that a “failure of good performance as a result of inability or incapacity” would not be deemed misconduct within the meaning of the statute.

Pursuant to code sections 1030 and 1032, an employer’s reserve account will be relieved of benefit charges if the claimant was discharged for misconduct connected with the work.

In *Jacobs v. California Unemployment Insurance Appeals Board* (1972) 25 Cal. App. 3rd 1035, the Court of Appeals held that if a claimant is discharged due to behavior that is the product of an irresistible compulsion to drink, the behavior is not sufficiently volitional to constitute misconduct. As a consequence of the *Jacobs* decision, the legislature in 1983 enacted code section 1256.5. That provision, in pertinent part, disqualifies for benefits any claimant who is discharged from his or her most recent work for chronic absenteeism due to intoxication, reporting for work while intoxicated, using intoxicants on the job, or gross neglect of duty while intoxicated, “when any of these incidents is caused by an irresistible compulsion to use or consume intoxicants, including alcoholic beverages.” In 1987, code sections 1030 and 1032 were amended to relieve the reserve account of the claimant’s most recent employer of benefit charges if the claimant’s separation from that employment was due to the claimant’s irresistible compulsion to consume intoxicants. In 2005, code section 1256.5 was renumbered as 1256.4.

The fact that the provisions of code section 1256.4 were codified in a statute other than code section 1256 created some inherent procedural difficulties for the adjudication of unemployment insurance appeals. The first difficulty stems from the fact that there is no requirement that a claimant’s qualification or disqualification for benefits be concurrently decided under both such code sections if the claimant was discharged due to behavior that appears to be associated with the use of intoxicants. This circumstance ignores the reality that the same factual circumstances will often result in diametrically different results if analyzed under one provision rather than the other. Since there was no means for ensuring that these issues would be decided together, too often conflicting

adjudications concerning the same individual and the same set of facts were issued under different code sections at different times by different authorities.

A second difficulty derives from the uncertainties that often plague the task of determining whether a case apparently arising under code section 1256 should include or be governed by code section 1256.4. Claimants are often reluctant to concede to EDD that they suffer from a substance abuse condition and frequently the initial information supplied by an employer to EDD attributing the separation from employment to a possible substance abuse condition is also quite ambiguous or incomplete.

A further difficulty stems from the fact that the factual record in cases involving these issues frequently changes in often dramatic ways during the appellate process. A case involving a claimant's alleged use of intoxicants initially presented to EDD as primarily involving a question of misconduct under code section 1256 due to a lack of evidence that the claimant suffers from an irresistible compulsion can take on a very different appearance by the time it is heard before an administrative law judge. Substantial additional evidence indicating that the claimant does indeed suffer from such an irresistible compulsion is often presented at the hearing with the result that a quite different ascertainment of the facts and application of the law is necessary.

In the absence of a policy for linking these issues throughout the appellate process, it became evident that these issues would too often be decided separately in ways that were inconsistent with the facts and contrary to the intent of the law. The appeals board's dissatisfaction with this situation led to the establishment in Precedent Decision P-B-483 of the general precept requiring that issues under code sections 1256 and 1256.4 be conjoined throughout the appellate process for the purpose of providing consistent and concurrent adjudications of those issues. That precept remains viable notwithstanding the fact that the policy described in P-B-483 has in other respects become outmoded.

The specificity required of the determination became the primary limitation of the policy delineated in P-B-483. P-B-483 instructed that an administrative law judge could only hear and decide the related issue if the related issue was specifically addressed in the appealed determination with the primary issue and the related issue also was either listed on the notice of hearing or all parties, including EDD, waived notice of the related issue. That instruction was predicated upon an understanding that the determination process was being revised in order to issue notices of determination that would specifically and concurrently address both code section 1256 and code section 1256.4 issues in a case wherein both of

those issues were involved. That revision was ultimately not implemented and the determination process has never been modified to consistently provide claimants with notices of determination that specifically address questions under both code sections 1256 and 1256.4. This reality has limited the viability of P-B-483. It thus became necessary for our agency to adopt a more pragmatic definition of what effectively constitutes a determination of a related code section 1256 or 1256.4 issue in a case wherein the notice of determination specifically addresses only one issue under either of those provisions. Indeed, that necessity represents the primary reason for the revised policy based upon the following principles.

First, if the case file supports the reasonable inference that a related issue under code section 1256 or code section 1256.4 was considered and at least impliedly determined by EDD, the notice of determination should be considered to include the related issue for purposes of the California Unemployment Insurance Appeals Board (CUIAB) exercising jurisdiction over the related issue.

With regard to the type of file information that might support such a reasonable inference, a rather wide spectrum of possibilities exists. On the relatively clear side of that spectrum are the cases wherein EDD has utilized a form dedicated to an analysis of issues under code section 1256.4 to memorialize the substance of at least a portion of its claim status interview even though the notice of determination thereafter issued only lists an issue under code section 1256. The existence of that form, currently described as form "2403 tox," clearly indicates that the related issue under code section 1256.4 was considered and at least impliedly determined by EDD despite the fact that the notice of determination does not explicitly make reference to it.

The instant case represents the other, clouded end of the spectrum in which the "silent" or "implied" determination must be divined from less explicit and often more cryptic references in file documents that are primarily dedicated to the analysis of the listed issue. While it might well be argued that the mere notation in EDD's file record that the claimant "has no drug problem" represents a less than optimal foundation for the inference that an implied determination has been made by EDD with regard to a claimant's qualification for benefits under code section 1256.4, such notation is typical of the often sparse information upon which CUIAB staff must rely in attempting to detect such implied determinations. Cursory notations such as "tox eligible" or "no i.c." [i.e. "no irresistible compulsion"] are not at all uncommon in reflecting an analysis by EDD of a claimant's qualification for benefits under code section 1256.4. Such comments are thus routinely and properly deemed by CUIAB staff to represent an implied determination by EDD of that issue notwithstanding the fact that the only issue listed on the notice of determination is under code section 1256.

Inasmuch as the claimant in this case was discharged due to a positive drug screen test result and the claimant denied suffering from a “drug problem” when questioned by EDD, we believe the record in this case was sufficient to support the reasonable inference that EDD at least impliedly determined the claimant to be qualified for benefits under code section 1256.4 when EDD determined the claimant to be disqualified for benefits under code section 1256. We therefore find that the office of appeals acted correctly under the revised policy by including the issue of the claimant’s qualification or disqualification for benefits under code section 1256.4 on the notice of hearing as an issue to be covered at the hearing and decided by the administrative law judge.

This policy should not be regarded as an exception to the general rule which prohibits an appeal from a determination that is not adverse to the appellant. The related issue that has been impliedly determined in a manner favorable to the appellant must be considered as representing essentially the converse of the listed issue and therefore an issue that is inextricably linked with the listed issue that is adverse to the appellant. As such, once one of these conjoined issues is determined or decided in a manner adverse to the appellant, an appeal from the listed adverse issue necessarily carries with it the related issue and the related issue therefore should not be regarded as moot.

In the event that an administrative law judge in a case involving issues under both code sections 1256 and 1256.4 decides both that (1) there is an insufficient basis to conclude that EDD impliedly determined the related issue when EDD explicitly determined the listed issue, and (2) there is, in the administrative law judge’s opinion, ample evidence³ to warrant the conclusion that the related issue should be determined by EDD, the administrative law judge is obligated to set aside the determination on the listed issue, together with any associated ruling, and refer both the listed and related issues, together with any associated ruling, to EDD for further investigation and such action as EDD deems appropriate.⁴

Since the issue under code section 1256.4 was impliedly determined by EDD in this case and properly listed by the office of appeals on the notice of hearing as an issue to be covered at the hearing in this case, it was incumbent upon the administrative law judge to address that issue at the hearing and specifically decide that issue. This is so because the main precept set forth in P-B-483 remains viable; once conjoined, the issues under code sections 1256 and 1256.4

³ In terms of describing what quantum of information would warrant the conclusion that a related issue should be determined by EDD, the current policy adopts the “ample evidence” standard originally prescribed in P-B-483.

⁴ Pursuant to code sections 1256 and 1256.4, EDD is entitled to make the first determination of benefit qualification or disqualification under these provisions.

must be decided or otherwise processed in tandem as an inseparable unit. Whether those issues are decided, continued, remanded or referred for further proceedings, those issues must remain together throughout the appellate process even though the decision on one issue will often be favorable to the appellant at any given stage in the proceedings.

The administrative law judge correctly announced at the start of the hearing that the claimant's qualification or disqualification for benefits under code section 1256.4 was a matter to be heard and decided. The administrative law judge therefore should have specifically decided that issue in the administrative law judge's decision. Given the circumstances of this case, however, the administrative law judge's failure to specifically include that issue in the decision is considered to represent an oversight that is attributable to the fact that there was little evidence provided to warrant the conclusion that the claimant suffers from an irresistible compulsion to consume marijuana. Accordingly, we believe that the particular circumstances of this case warrant the conclusion that the administrative law judge's decision at least impliedly decided that the claimant is not subject to benefit disqualification under code section 1256.4. Inasmuch as the record supports that implied decision and we discern that no purpose would be served by remanding this case for further proceedings, we will affirm the administrative law judge's implied decision on this issue.⁵

Inasmuch as we have taken the opportunity presented by this case to confirm the primary revision to the policy set forth in Precedent Decision P-B-483, we think it only appropriate at this juncture to describe the other notable way in which the policy announced in P-B-483 has been supplanted by the current policy. In P-B-483, the Appeals Board directed that the related issue in such combined issue cases involving code sections 1256 and 1256.4 could be heard and decided if it was determined by EDD and either listed on the notice of hearing or "all parties, including EDD, waive notice of that issue." In Precedent Decisions P-B-494 and P-B-496, however, an entirely new policy was announced concerning the need to obtain waivers from parties who do not attend the hearing in person or electronically, e.g. by phone.

P-B-494 provided an extensive overview of the "subject matter jurisdiction" and "notice jurisdiction" requirements in proceedings before CUIAB and announced that the due process notice rights of parties would henceforth be identified and resolved in accordance with a more flexible balancing of the respective interests of the parties involved rather than through adherence to the rigid concept of

⁵ We note that had the record raised significant questions as to whether the claimant suffers from an irresistible compulsion to consume marijuana or other intoxicants, we likely would have remanded this case for at least an explicit decision by the administrative law judge on this issue and very possibly a further hearing.

notice reflected in P-B-483. Recognizing the special rights and needs of a claimant to receive fair, correct and timely adjudications that ensure that the claimant promptly receive benefits “when due,” P-B-494 confirmed that a claimant is always entitled to a continuance when inadequate notice has been provided to the claimant and irrespective of whether the claimant has not appeared at the hearing or only appeared by a written statement.

P-B-494 also clarified, however, that the notice rights of employers and EDD are distinguishable from those of a claimant. P-B-494 confirmed that while a claimant is always entitled to adequate notice of the issues involved, neither EDD nor an employer would be entitled to a continuance of the hearing due to inadequate notice unless they appear at the hearing either in person or electronically. While much of the analysis contained in P-B-494 was directed to the question of adequate notice of the factual issues involved in a case, the decision subsequently issued in Precedent Decision P-B-496 verified that the limited rights to continuance or waiver announced in P-B-494 were applicable to a lack of legal notice as well as factual notice. In P-B-496 it was noted that the administrative law judge at the hearing “could have corrected the lack of legal notice by obtaining waivers from the claimant and any other party at the hearing as to both the legal issue and the ten day notice requirement.” It was further explained in P-B-496 that the right to request a further hearing by making an application to vacate the administrative law judge’s decision was sufficient to safeguard the rights of EDD or an employer if those parties did not appear at the hearing. Thus, as a consequence of the principles announced in P-B-494 and P-B-496, it is no longer necessary to obtain a waiver from EDD or any involved employer unless EDD or such employer appears at the hearing in person or electronically.

In summary, we confirm the following, revised policy for the appellate adjudication of cases wherein issues under both code sections 1256 and 1256.4 are included or should be included. First, if a case before an administrative law judge involves a listed issue under either code section 1256 or code section 1256.4 that has been specifically determined by EDD and there is either (1) a basis to support the reasonable inference that a related issue under one of those two provisions was also at least impliedly determined by EDD, or (2) ample evidence to support the reasonable conclusion that a related issue under one of those two provisions should be determined by EDD, then both such issues, together with any associated ruling, must thereafter be treated and processed as conjoined issues. Irrespective of whether those issues are decided, continued, remanded or referred, the issues shall remain linked together for concurrent treatment.

Second, an administrative law judge shall decide both the listed and related issues if the related issue was specifically or impliedly determined by EDD and both such issues were either (1) listed on the notice of hearing or (2) the claimant and each party that appears at the hearing in person or electronically waives notice of the related issue after being advised of the right to a continuance. If the related issue was not listed on the notice of hearing and all such waivers of notice are not obtained, the administrative law judge is obligated to continue the case for a new hearing with proper notice of both issues. It is acknowledged that in cases wherein the determination lists an issue under code section 1256.4, there will likely be a reasonable basis for inferring that a related issue under code section 1256 was at least impliedly determined by EDD.

Third, if the related issue was not specifically or impliedly determined by EDD, but ample evidence exists to warrant the administrative law judge's reasonable conclusion that the related issue should be determined, the administrative law judge assigned to the case is obligated to set aside the existing determination on the listed issue and refer both the listed and related issues, together with any associated ruling, to EDD for further investigation and such action as EDD deems appropriate.

Fourth, in the event that a related issue is mistakenly listed on the notice of hearing despite having not been specifically or impliedly determined by EDD and the administrative law judge finds ample evidence to warrant the reasonable conclusion that the related issue should be determined, the administrative law judge is obligated to set aside the existing determination on the listed issue and refer both the listed and related issues, together with any associated ruling, to EDD for further investigation. In the absence of ample evidence to support the reasonable conclusion that the related issue should be determined, the administrative law judge shall decide the listed issue and explain in the decision why the related issue listed in the notice of hearing does not warrant a decision.

Fifth, in the event that a related issue was not specifically or impliedly determined by EDD and the related issue was also not listed on the notice of hearing, but ample evidence is presented at the hearing before the administrative law judge to support the reasonable conclusion that the related issue should be determined by EDD, the administrative law judge is obligated to set aside the existing determination on the listed issue and refer both the listed and related issues, together with any associated ruling, to EDD for further investigation and such action as EDD deems appropriate.

The above-described policy also applies to the procedural adjudication of cases involving voluntary departures from employment wherein issues under code

sections 1256 and 1256.4 may be involved.⁶ We further note that although the above-described policy primarily refers to the processing of cases at the first appellate level wherein appeals from determinations by EDD are heard and decided by administrative law judges, the principles of the policy also generally apply to the processing of cases at the second appellate level wherein appeals from decisions by administrative law judges are decided by the appeals board.

Part II. Does a claimant's violation of an employer rule prohibiting the claimant's off-duty use of a controlled substance constitute misconduct connected with the work under code section 1256 if it is not established that the claimant was impaired at work due to such off-duty behavior and there is otherwise no sufficient nexus between that off-duty behavior and the job to justify enforcement of the rule?

For the reasons hereinafter explained, the answer to the foregoing question is no. We will therefore affirm the administrative law judge's decision holding the claimant not disqualified for benefits under code section 1256. In doing so, it is not necessary for us to decide whether the claimant actually used marijuana in his off-duty hours. Even if it were assumed that the claimant used marijuana while off-duty, the facts of this case provide no basis for characterizing such behavior as misconduct connected with the work.

For purposes of code section 1256, misconduct connected with the work has been defined as a substantial breach by the employee of an important duty or obligation owed the employer, willful or wanton in character, and tending to injure the employer. (Precedent Decision P-B-3, citing *Maywood Glass co. v. Stewart* (1959) 170 Ca. App. 2nd 719). An employee is generally required to substantially comply with all the directions of his or her employer concerning the service on which he or she is engaged, except where such obedience is impossible or unlawful, or would impose new and unreasonable burdens upon the employee. (Labor Code, section 2856). An employee's deliberate disobedience of a lawful and reasonable instruction of the employer, related to the employer's business, is misconduct. (Precedent Decision P-B-190). The employer has the burden of proving misconduct. (*Prescod v California Unemployment Insurance Appeals Board* (1978) 57 Cal. App. 3d 29).

The employer's policy reasonably prohibits an employee's use of a controlled substance during work time, on the employer's premises, or if such use impairs the employee's ability to perform the employee's job. The employer was unable

⁶ Code section 1256 provides that a claimant is disqualified for benefits if he or she voluntarily left his or her most recent work without good cause and code section 1256.4 provides that a claimant is disqualified for benefits if he or she left his or her most recent work for reasons caused by an irresistible compulsion to consume intoxicants, including alcoholic beverages.

to prove that the claimant was impaired in the performance of his job duties by any off-duty marijuana use or that any such use occurred during work time or on work premises. Misconduct by the claimant therefore cannot be based on that aspect of the employer's policy.

The employer's policy also prohibits an employee's use of a controlled substance if such use "affects the employer's reputation with the general public." That aspect of the policy calls into question the extent to which an employee's off-duty behavior can be considered "connected with the work" merely because of its possible reflection upon the employer. This issue was addressed in Precedent Decision P-B-217.

In P-B-217 the appeals board acknowledged the general rule holding that an act that occurs while the worker is off-duty and that is not related to the worker's employment is not misconduct. P-B-217 cited prior precedent decisions wherein misconduct was not found with regard to a leadman at a manufacturing plant who was discharged for gambling activity away from work (P-B-189) and a janitor who was discharged due to a conviction of drunk driving while off-duty (P-B-191). Misconduct was found, however, in another referenced prior decision wherein a bank bookkeeper's off-duty practice of drawing checks on a bank account with insufficient funds was deemed to be so logically linked to her occupation as to adversely reflect upon and substantially injure the interests of the employer. Accordingly, P-B-217 held that the claimant, a pharmacist who illegally possessed narcotics while off-duty, committed misconduct connected with the work because that offense was so closely related to his occupation. Since the claimant served the public on behalf of the employer in a position of trust wherein the health and, at times, even the lives of the employer's customers were under the claimant's control, it was concluded that the claimant's actions were so closely connected to his job as to negatively affect the employer's interests and effectively destroy the claimant's suitability for continued employment as a pharmacist.

Applying the principles confirmed in P-B-217 to the case at hand, we discern no basis for a contention that any off-duty marijuana use by the claimant adversely affected the employer's reputation with the general public. The claimant was a rank and file employee who handled telephone inquiries from customers concerning their cable service. It was not established that the claimant's job was hazardous or safety-sensitive, involved a substantial public profile on the employer's behalf, or entailed a high level of trust or responsibility. Accordingly, it cannot reasonably be claimed that any off-duty marijuana use by the claimant would in any substantial way affect the employer's image or standing in the community. The employer has therefore failed to establish a sufficient nexus between the alleged prohibited conduct by the claimant and the employer's

interests. Accordingly, charges of misconduct cannot be sustained on the contention that off-duty marijuana use by the claimant adversely affected the employer's reputation with the general public.

We certainly understand that employers have a significant interest in maintaining a drug-free workplace. To the extent that an employer's rule prohibits an employee from reporting for work while impaired by drug use, such a reasonable rule properly governs the employee's off-duty conduct because of the clear nexus between the employee's off-duty behavior and the employer's workplace.

In the absence of such impairment, however, an employer rule that prohibits an employee's off-duty use of a controlled substance will only be deemed reasonable for purposes of the unemployment insurance program if it can be justified by some legitimate interest that is sufficiently important to establish the requisite nexus between the workplace and the off-duty behavior of the employee in question. No such justification was established in this case. Given the nature of the claimant's job, the employer's interest in maintaining a drug-free workplace, standing alone, was not sufficient to supply that justification.

For all the reasons set forth above, we conclude that the claimant was discharged for reasons that do not disqualify the claimant for benefits under either code section 1256.4 or code section 1256. Accordingly, there is no basis for relieving the employer's reserve account of benefit charges.

DECISION

The decision of the administrative law judge is affirmed. The claimant is not disqualified for benefits under code section 1256.4. The claimant is not disqualified for benefits under code section 1256. The employer's reserve account is not relieved of benefit charges. Benefits are payable to the claimant provided the claimant is otherwise eligible.

DISSENTING OPINION

I respectfully dissent from the decision reached by my colleagues on the issue of whether the claimant's off-duty use of marijuana constituted misconduct connected with the work for purposes of Code section 1256.

This board has long held that an employee's deliberate disobedience of a lawful and reasonable employer directive that is related to the employer's business represents misconduct connected with the work. (Precedent Decision P-B-190.) An employer has the right to shield its workplace from the pernicious effects of illegal drug use by prohibiting its employees from engaging in such behavior. An employer's rules that reasonably proscribe such activities should be respected under our unemployment insurance law. This employer's "drug-free workplace" rules specifically prohibit off-duty use of a controlled substance if such use impairs the employee's ability to perform his job or affect the employer's reputation with the general public. Impairment is reasonably inferred when an employee is revealed to have a detectable amount of a controlled substance in his system. The positive drug screen test result produced by the employer was thus sufficient to establish that the claimant's ability to perform his job duties had been to some extent impaired by his use of marijuana. By purposefully engaging in behavior that caused a detectable amount of marijuana to be present in his system, the claimant willfully violated his employer's "drug-free workplace" rules and committed misconduct. I would therefore reverse the decision of the administrative law judge, hold the claimant disqualified for benefits, and relieve the employer's reserve account of benefit charges.

ROY ASHBURN