DIVISION OF EMPLOYMENT SECURITY
NC DEPARTMENT OF COMMERCE

PRECEDENT DECISION NO. 34

IN RE TEACHEY
(Adopted May 10, 1999)

Pursuant to N.C.G.S. §96-15(e), this cause has come on before the Commission to consider the EMPLOYER'S APPEAL from a decision by Appeals Referee Milford K. Kirby under Appeals Docket No. VIII-A-09591. The employer requested oral arguments to be held. A notice of oral arguments, scheduled to be held on February 25, 1999, was mailed to all interested parties on February 8, 1999. When the matter came on to be heard, appearing and presenting oral arguments were: Harley H. Jones, attorney for the employer.

The record evidence has been reviewed in its entirety. All written and oral arguments have been considered.

G.S. §96-15(i) requires that findings of fact found by the Commission to be supported by competent evidence. ESC Regulation No. 14.25(C) makes this same requirement applicable to findings of fact made by the Appeals Referee. Pursuant to G.S. §96-15(f), the Commission has promulgated procedures by which such competent evidence may be presented at hearings.

In cases involving "a drug related separation from work", the Commission permits controlled substance examination results to be deemed proved by affidavit or testimony from the testing laboratory. The affidavit or testimony must show that the controlled substance examination from which the results were derived met all statutory procedural requirements. The affidavit or testimony also must explain what the results mean.

What are the procedural requirements of a controlled substance examination (test)? Under G.S. §95-232, the required procedures are:

1. Collection of samples for examination or screening under reasonable and sanitary conditions and in a manner reasonably

calculated to prevent substitution of samples and interference with the collection, examination, or screening of samples;

2. Use of approved laboratories for screening and/or confirmation of samples;

3. Confirmation of any sample that produces a positive result by a second examination of the sample utilizing gas chromatography with mass spectrometry or an equivalent scientifically accepted method;

4. Retention by the screening and/or confirmation laboratory of a portion of every sample that produces a confirmed positive examination for a period of 90 days from the time the results of the confirmed positive examination are mailed or otherwise delivered to the examiner;

5. Establishment by the examiner or its agent of a chain of custody for sample collection and examination to ensure proper record keeping, handling, labeling, and identification of examination samples; and

6. Making confirmed positive samples available to the affected examinee or his/her agent, within the retention period, if the examinee elects to have the samples retested at his/her own cost.

To make it convenient to present testimony as to the results of the controlled substance examination, the Commission allows the personnel of the testing laboratory to participate and testify in the hearing by way of teleconference means, although the original hearing may be scheduled to be conducted in-person. ESC Regulation No. 14.18, in pertinent part, provides:

> (O) When a party desires to introduce documents, affidavits or statements at a hearing, that party must provide an authenticated copy plus one copy of each exhibit for the use of the Appeals Referee and a copy for each party to the proceeding.

The notice of hearing in a case involving a "drug related separation from work' informs the parties of the type of proof that would be necessary, and the availability

of the teleconference means if a party desired to present this proof through testimony from witnesses. The notice further states:

> At the hearing you will need to bring documentary evidence and/or witnesses to prove or disprove any test and its results that had a part in the separation from work, along with any applicable work rules.
>
> . . .
>
> If you have documents which you wish to be considered, you must bring them to the hearing. Please bring the original document and two copies.

In the present case, the claimant was discharged from employment because the employer had reason to believe that the claimant tested positive for a controlled substance. The Appeals Referee found as a fact that the "claimant's drug test was positive for cannabinoids." At no time has the claimant denied that the controlled substance examination results were positive. His argument, as presented at the hearing before the Appeals Referee, centered around how the controlled substance came to be present in his body; i.e., "second-hand" inhalation of the drug rather than use of the drug.

The employer argues that the employer did not know of the proof requirement in cases involving drug related separation from work, and therefore is entitled to a remand to present such proof at another hearing. In the alternative, the employer argues that "too high a burden" is placed on the employer "by requiring an affidavit or testimony from the testing laboratory in order to prove misconduct connected with work relating to a positive drug test." The employer also argues that since the claimant did not deny that the results were positive, an affidavit or testimony from the testing laboratory was unnecessary and the positive results should have been deemed to have been proved.

Commission Exhibit 8, the Notice of Hearing mailed to all interested parties on December 18, 1998, clearly shows that the employer knew or should have known of the type of proof required in a case involving a drug related discharge from work and how such proof could be presented. Furthermore, the Appeals Referee, during the January 7, 1999 hearing, offered the employer an opportunity to have the hearing continued in order that the employer could arrange to obtain the necessary proof. The employer declined this opportunity. Accordingly, the Commission finds the employer's argument on this ground to be unpersuasive and without merit.

In view of the statutory and regulatory requirement that findings of fact be supported by competent evidence, the Commission is of the opinion that the methods by which drug test results are to be deemed proved at hearings before the Appeals Referee are not burdensome. They are the most convenient and least intrusive methods of proof.

The employer further argues that Employer Exhibit 2 at page 3 (drug test results report) shows that a confirmation of the positive sample was conducted by a second examination of the sample utilizing gas chromatography with mass spectrometry. The Appeals Referee found as a fact that "there is no evidence that the positive test result was confirmed by a second test utilizing gas chromatography with mass spectrometry." This finding was apparently based on the testimony of the employer witness that she had evidence only as to one test in response to the Appeals Referee's question: "Was a positive result confirmed by a second test using gas chromatography with mass spectrometry?" The employer argues that its witness misunderstood the question and thought the Appeals Referee was referring to a test that the claimant could have had done at his own cost. This failure of the employer witness to understand the question and testify accordingly showed the necessity of having an affidavit or testimony from the testing laboratory. Because the record is absent any showing of him having expertise in this field, the Appeals Referee properly refrained from attempting to interpret the meaning of the terms and abbreviations appearing on the drug test results report. Accordingly, the Commission concludes that the Appeals Referee did not commit error in finding that no confirmation examination had been conducted.

The employer's Substance Abuse Policy, Employer Exhibit 1, is premised on the "use" of abused substances by employees and job applicants. The claimant, who did not deny that his drug test was positive for cannabinoids, did deny using drugs. He blamed the presence of the drug in his system on his "second-hand" inhalation of marijuana smoke that was present at a social gathering that he attended. This reason is uncontroverted since the employer presented, by testimony or affidavit, no expert evidence explaining what the positive results meant. That is, it is unknown from the drug test results report whether the levels found in the claimant's system established the "use" of the drug rather than "second-hand" inhalation as asserted by the claimant. This failure of the employer witness to make this distinction showed the necessity of having an affidavit or testimony from the testing laboratory explaining what the positive results meant.

Is the employer entitled to another hearing in order that it may present additional evidence? When a party has had a hearing with the opportunity to present

and refute any evidence and chooses not to call certain witnesses, the party is not entitled to a rehearing because the party has been accorded procedural due process. Douglas v. J. C. Penney Company, 67 N.C. App. 344, 313 S.E.2d 176 (1984). Where there is evidence in the record that supports a conclusion on a material issue, the Commission may not grant an employer more than one opportunity to produce other evidence to prove that a claimant is disqualified from receiving unemployment insurance benefits. To do otherwise, would allow employers repeated opportunities to meet their burden of proving that an employee should be disqualified. Dunlap v. Clarke Checks, Inc., 92 N.C. App. 581, 375 S.E.2d 171 (1989).

The Commission concludes that the employer was afforded procedural due process and had a reasonable opportunity to present all relevant and material evidence to prove its case. Also, the Commission concludes that the record contains sufficient evidence to support conclusions as to all material issues. Accordingly, the employer is not entitled to another hearing to present additional evidence in this matter.

Pursuant to the statutory authority of the Commission to "affirm, modify, or set aside any decision of an appeals referee on the basis of the evidence previously submitted, or direct the taking of additional evidence," IT IS NOW THEREFORE, ORDERED, ADJUDGED, AND DECREED that the employer's request for a rehearing be, and the same, is **DENIED**, and the attached decision by the Appeals Referee is **AFFIRMED** and **ADOPTED** as the decision of the Commission.