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GEORGE N. COPADIS, INTERIM COMMISSIONER

APPEAL TRIBUNAL
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P. O. BOX 9505
MANCHESTER, NH 03108-9505
TELEPHONE (603) 656-6644
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DECISION OF APPEAL TRIBUNAL

Natasha [redacted]
XXX XX [redacted]
Frisbie Memorial Hospital
Unemployment Help Center, Ltd, [redacted]

Docket # 12-03015
Docket # 12-03016
Portsmouth

Benefits denied; claimant appealed.

APPEARANCES: Claimant in person, with her representative from Unemployment Help Center, Ltd. On the telephone; Employer by Compensation Manager.

ISSUE OF LAW: RSA 282-A:32 I (b); whether or not the claimant was discharged for misconduct connected with work. RSA 282-14 I (a) (b) and III (a); whether or not the claimant was partially unemployed during weeks claimed; whether or not the claimant had earnings in excess of 30% over her unemployment compensation rate for weeks claimed.

BACKGROUND: The claimant chose to withdraw her appeal to the Appeal Tribunal regarding Determination # 5846039-1, which disqualified her from benefits due to the receipt of separation pay. Upon review of the record and finding no error, the Chairman allows the withdrawal of the appeal. A confirmation of that withdrawal will be computer generated and mailed to the interested parties separately from this decision.

FINDINGS: The claimant was employed in a dual capacity of radiographer and CT scanner/technician. The Director of Imaging was her supervisor.

The employer prefers to use individual counseling as opposed to a progressive disciplinary process. The claimant had had counseling on February 1, 2012 for speaking inappropriately, in a loud tone, in front of patients, on two separate occasions within the prior week. The claimant was advised that any recurrence of this or similar unprofessional, discourteous, disrespectful, and/or uncooperative behavior would result in termination of her employment. It is noted that the claimant's signature on the counseling does not indicate agreement to the reason for counseling.

A performance review dated May 6, 2012 advised the claimant that her customer service needed improvement, particularly her tone and the way she speaks to co-workers in the presence of patients. The review form reiterates the prior counseling of February 1, 2012. It does not refer to any incident after that counseling.

The employer received a complaint dated June 7, 2012 from a patient who claimed to be yelled at and inappropriately processed at a CT scan appointment.

IF YOU WISH TO APPEAL THIS DECISION, SEE REVERSE FOR YOUR APPEAL RIGHTS.

THIS DECISION IS FINAL UNLESS AMENDED BY THE CHAIRMAN OR APPEALED IN WRITING.
AN APPEAL IS TIMELY IF IT IS RECEIVED IN THIS DEPARTMENT OR POSTMARKED NO LATER THAN:
10/03/2012.

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ADJUSTMENT OF OVERPAID BENEFIT ACCOUNT BY COMPROMISE

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PROTECTION OF RIGHTS AND BENEFITS

WAIVER OF RIGHTS VOID: Any agreement by an individual to waive, release, or commute his rights to benefits or any other rights under this chapter shall be void. *See RSA 282-A:157.*

LIMITATION OF FEES: No individual claiming benefits shall be charged fees of any kind in any proceeding under this chapter by the commissioner of the department of employment security, or by his representative or by any court or by any officer thereof. Any individual claiming benefits before the commissioner or his representative may be represented by counsel or other duly authorized agent; but no such counsel or agent shall either charge or receive for such services more than an amount approved by the commissioner. Any person who violates any provision of this section shall be guilty of a misdemeanor. *See RSA 282-A:158.*

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The employer investigated the complaint by speaking with the nurse supervisor and the patient. Based on the time of the alleged incident, they determined that the claimant was the person involved. On June 20, 2012, the claimant was discharged from her employment because a patient's experience was inappropriate. She allegedly was inappropriately physically handled and, in the capacity of CT technician, the claimant chose to change the parameters of the exam which was ordered by the doctor. The claimant's termination form states the reason for termination was "poor quality/quantity work". At her termination, the claimant was advised that the reason for her termination was not up for discussion. The claimant refused to sign a termination document. The reason for the delay between the date of the complaint and the date of discharge was because of the investigation and the fact that no termination is done with the situation being reviewed by Human Resources.

The employer's witness has no first-hand knowledge of the situation that led to the warning, the performance review notations or the separation from employment. She relied solely on the claimant's record and a transcript, done by the Director of Imaging, of a voice mail left by a nursing supervisor on June 8, 2012 for her testimony. The claimant was not given a copy of the transcript. The claimant argues that it was within her job description to change the method of testing.

Item # 6 of the Position Description for Radiographer states: "The Radiographer exercises judgment in modifying and adapting procedures according to the needs of the patient. The Radiographer has an in-depth knowledge of Human Anatomy and Physiology, and the disease process." Item #11 indicates, in part, that "The radiographer is cognizant to the environment in which she works, generating an appropriate and courteous attitude..."

The position description for CT Technologist also gives the latitude of modifying and adapting procedures according to the needs of the patient.

CONCLUSION OF LAW: After a review of all of the records and of all of the testimony, the Appeal Tribunal Chairman concludes that the claimant was discharged but not for misconduct connected with work. In reaching this conclusion, the Chairman considered that the claimant's first hand testimony of the account of the patient encounter on June 7, 2012 is consistent and credible. There is no other first-hand witness. Additionally, the job descriptions for the claimant's positions indicate that she exercises judgment in modifying and adapting procedures according to the needs of the patient. The job description does not set limits. Although it is reasonable to assume there are limits to her authority, the claimant's first hand testimony is that she had had to do the procedure without the contrast on prior occasions and was simply required to document the reason why and if the test is not readable, the test is done over, with no cost to the patient.

The employer failed the burden of proof that the claimant violated company policy designed to protect the legitimate business interests of the employer or that the claimant displayed a pattern of negligence or disregard for the employer's best interest.

According to Appeal of New Hampshire Sweepstakes Commission, 130 NH 659 (1988), "isolated or inadvertent instances of unsatisfactory conduct are not sufficient for a finding of 'misconduct'...negligence need not be of such degree or recurrence as to manifest wrongful intent or evil design or to show intentional and substantial disregard." A "single instance of misconduct may be sufficient for a finding of misconduct if it is a deliberate violation of company rule reasonably designed to protect the legitimate business interests of the employer...Deliberate is a synonym for willful."

DECISION: The decision of the Certifying Officer is reversed. Benefits are allowed from the week ending June 23, 2012, if otherwise eligible. Emp 502.08 Waiting Week. An individual shall have served the waiting

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period of one week required under RSA 282-A:31,I(h) once a week is treated by the department as meeting all of the requirements of that subparagraph.

Benefits paid as a result of this decision will be charged to the reimbursable account of Frisbie Memorial Hospital, # 98039.

Decision of the Appeal Tribunal Chairman, Denise Czaja

Held: September 10, 2012
Mailed: September 19, 2012

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