

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON
REFERRAL FROM THE DEPARTMENT OF LABOR AND WORKFORCE
DEVELOPMENT**

In the Matter of)	
)	
GAREN BLANDOV)	OAH No. 21-2222-LUI
_____)	Agency No. 21 0915 10

APPEAL DECISION

Docket Number: 21 0915 10

Hearing Date: December 2, 2021

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Garen Blandov

None

CASE HISTORY

The claimant, Garen Blandov, timely appealed a May 5, 2021 determination which denied Unemployment Insurance (UI) benefits under AS 23.20.379. The Department of Labor referred the appeal to the Office of Administrative Hearings. Under the agreed terms of referral, an administrative law judge (ALJ) hears and decides the appeal under procedures specific to UI appeals. AS 44.64.060 procedures do not apply.

The matter was heard in a recorded hearing December 2, 2012. Mr. Blandov appeared by telephone as did Floyd Russell, Director of Plant Operations for Metlakatla Power and Light Company (MLP) his employer, and Stefanie Hodihn, an outsource human resource assistant for MLP.

The issue before the ALJ is the nature of the claimant's separation from work and whether the claimant is disqualified from full employment benefits as a result.

FINDINGS OF FACT

Metlakatla is a village located on Annette Island in southeast Alaska. It is the only Indian Reserve in the State of Alaska. As such actions by its local governing body, the Metlakatla Indian Community Council (MIC), have the effect of federal law. The Reserve is 20 miles south of Ketchikan, Alaska and typically reached by seaplane, boat, or ferry. The economy of Metlakatla is principally tied to fishing, seafood processing, services, tourism, and forest products. The current population is approximately 1,500 people.

Metlakatla Power & Light, Purple Lake Hydro, is a tribally owned utilities company that provides power to Annette Island using power generated from a nearby watershed. The utility has recently been re-organized with the assistance of a tribal economic capacity grant funded by the Department of Energy and Mineral Development (DEMD). It is currently looking to invest in wind and solar energy

generation in addition to an intertie cable project that will connect MIC to the southeast Alaska power grid. Those initiative directly tie to the MIC mission to provide energy in a sustainable fashion that address changing climate and conserves natural resources.

Garen Blandov was hired as an operator/dispatch MLP in May 2017. He worked a weekly schedule of five eight-hour shifts monitoring power production at the plant and raising and lower power in response to demand. He is supervised by two foreman, one of whom must be on-call 24hours a day.

Carl Gaube is one of those foreman. Mr. Gaube has worked approximately two decades at Metlakatla. He started as an operator and moved to foreman in approximately 2009.

Mr. Blandov testified that he has had issues with Mr. Gaube's supervision since he started at Metlakatla. Mr. Gaube is moody and angry and difficult. He can be belittling and curt. On many occasions, his conduct crossed appropriate professional boundaries.

In addition, Mr. Gaube does not comply with the MLP rules and procedures governing the on-call supervisor. He turns his telephone off and cannot be reached for days at a time. He sometimes leaves the community. He sometimes consumes alcohol. On repeated occasions Mr. Blandov has tried to reach him for something critical at the plant and been unable to do so.

Mr. Gaube is also responsible for approving leave for operators and adjusting the schedule. Mr. Blandov, and others, have also regularly been unable to reach him to schedule leave or required to wait long periods of time for a response to requests.

When those problems happen, Mr. Blandov must find some higher in the chain of command. That is often Floyd Russell, the director of plant operations for MLP, because he is so responsive. MLP does not have a human resources department and there is no established mechanism for filing complaints or requesting assistance.

Mr. Blandov gave several specific examples of times he needed assistance from Mr. Gaube who should have been available but was not. For example, one weekend there was a problem balancing baseload power with intermittent demands. This can be a serious problem. Mr. Blandov repeatedly attempted to contact Mr. Gaube who was the assigned foreman but got no response. Ultimately, Mr. Blandov had to search the community for the other foreman who was not on-duty. When that foreman confronted Mr. Gaube about not being available, Mr. Gaube denied that Mr. Blandov ever tried to contact him. However, Mr. Blandov had extensive telephone, text and other records demonstrating the attempts.

On another occasion, there was a security issue at the plant and Mr. Gaube could not be found. Mr. Gaube again tried to excuse himself by saying no one had tried to reach him, but again, Mr. Blandov had a record of the attempts.

These were not exhaustive examples. Mr. Blandov gave other examples involving him personally and described similar problems experienced by other operators.

Mr. Blandov testified that Mr. Gaube regularly failed to respond to requests for time off until the last minute, making it difficult to plan and causing a burden on the other operators who would need to provide coverage because they were often given short notice that they had to come to work or cover a shift. Mr. Blandov was personally impacted when he requested leave and when he received last minute callouts for work.

Mr. Blandov testified that he spoke with Mr. Gaube about the communication problems on several occasions, but Mr. Gaube did not seem to care, and no changes were made. Mr. Gaube gave off the attitude that he had been with MLP for so long that he could do what he wanted without repercussion.

On Friday, January 29, 2021 Mr. Blandov requested leave to attend the funeral and potlatch for a close family member who died of COVID-19 on February 2 or 3, 2021. MLP policy requires leave requests be made three to five days in advance, although attendance for potlatch and funerals is typically liberally granted regardless of the timing. This is especially true because weather and ground conditions in Metlakatla are not always appropriate to hold such ceremonies and they are often rescheduled and rescheduled at the last minute.

Mr. Gaube did not respond. Mr. Gaube was working and all call, but simply did not answer the telephone or respond to text messages. From January 29, 2021 through February 2, 2021, Mr. Gaube could not be reached.

Increasingly frantic because weather issues were impacting the funerary schedule, Mr. Blandov contacted Mr. Russell. Mr. Russell also could not reach Mr. Gaube. Finally, on February 2, 2021, Mr. Gaube responded to Mr. Russell, texting that he “didn’t have any messages from” Mr. Blandov.

Mr. Russell approved Mr. Blandov’s leave.

Mr. Blandov called and spoke with Mr. Russell. He also sent a text message stating that he felt his time with the company needed to come to an end. The death of his family member was devastating and Mr. Gaube’s callous disregard of the impact his actions had on his co-workers had made the situation worse. He told Mr. Russell that “I’d like to apologize to you and thank you for what you do. I usually don’t let my emotions get the best of me, but I just reached that breaking point. It’s tough to go to work not knowing what Carl’s mood is going to be that day.”

February 2, 2021 was Mr. Blandov’s last day with MLP.

Mr. Russell testified that he has worked for Metlakatla for 25 years. As the foreman, Mr. Gaube has two phones when he is on-call. He is supposed to always be reachable. Multiple employees over the past two decades have complained about Mr. Gaube as a co-worker due to his temperament. Since Mr. Gaube became a foreman, in addition to complaints about his temperament, Metlakatla has received numerous complaints from employees regarding his unresponsiveness to requests for leave and failure to respond when the on-call foreman.

Mr. Russell is aware that Mr. Gaube has been dishonest when he claims that his employees did not try to reach him as the reason for lack of response; Mr. Russell has seen the corroborating call logs and text message. Mr. Russell has repeatedly counseled Mr. Gaube about this conduct over the past few years, but Mr. Gaube had not changed his behavior and Mr. Russell does not know what else to do.

Mr. Blandov filed for unemployment benefits effective February 6, 2021. The Division denied his claim, concluding he voluntarily resigned from employment without legal good cause. Mr. Blandov appealed.

THE UNEMPLOYMENT INSURANCE BENEFITS ELIGIBILITY FRAMEWORK.

An individual is eligible for unemployment compensation under Alaska labor law if the individual's employment is covered by the Alaska Employment Security Act EASA, AS 23.20.005-535 as implemented in 8 AAC 85.010-842 and detailed in the Department's Benefit Policy Manual (BPM).¹ Under those rules the employment and training services division of the Department of Labor and Workforce Development conducts a two-part analysis of each claim filed by an unemployed worker. The first step in the analysis is the "non-monetary determination" of whether the claimant is eligible to for benefits.² If the claimant is eligible, the division conducts the second step and issues a "monetary determination" calculating the benefit amount payable to the claimant.³

Eligibility turns on the acts and circumstances surrounding the claimant's separation from employment. The separation may be due to "discharge" where the employer takes action which results in the separation and the worker does not have a choice in remaining in employment.⁴ A claimant who has been involuntarily discharged by their employer is eligible for full unemployment

¹ The BPM fulfills the mandate in 8 AAC 85.360 that the Department "maintain a policy manual interpreting the provisions of AS 23.20 and this chapter." The Alaska supreme court has referred to the BPM as the "Precedent Manual" and looks to the BPM to interpret labor issues. See, *Calvert, supra*; *Westcott v. State, Dep't of Labor*, 996 P.2d 723 (Alaska 2000). The BPM is divided into eight sections: Able and Available, Evidence, Labor Dispute, Miscellaneous Misconduct, Suitable Work, Total and Partial Unemployment, and Voluntary Leaving with individual subsections addressing specific issues and incorporating recent updates.

² 8 AAC 85.010(a)(14); 8 AAC 85.085.

³ 8 AAC 85.010(a)(12).

⁴ 8 AAC 85.010(a)(20).

benefits unless the discharge was for misconduct connected with work as defined in AS 23.20.379(a)(2) and 8 AAC 85.095(d).

“Misconduct connected with work” means discharge for:

- (1) a claimant's conduct on the job, if the conduct shows a willful and wanton disregard of the employer's interest, as a claimant might show, for example, through gross or repeated negligence, willful violation of reasonable work rules, or deliberate violation or disregard of standards of behavior that the employer has the right to expect of an employee; or
- (2) a claimant's conduct off the job, if the conduct shows a willful and wanton disregard of the employer's interest; and either (i) has a direct and adverse impact on the employer's interest; or(ii) makes the claimant unfit to perform an essential task of the job; or
- (3) discharge for an act that constitutes commission of a felony or theft under circumstances defined in 8 AAC 85.095(f).

If the claimant was discharged for misconduct connected with work, the claimant is not eligible for full employment benefits. Instead, the claimant is disqualified under AS 23. 20.379(a) and (b)-- meaning the claimant is disqualified from benefits the first and following five weeks of unemployment and the maximum potential benefit is reduced by three times the weekly benefit amount. However, “wanton disregard of the employer's interest does not arise solely from inefficiency, unsatisfactory performance as the result of inability or incapacity, inadvertence, ordinary negligence in isolated instances, or good faith errors in judgment or discretion.”⁵ Claimants discharged for those reasons remain eligible for full unemployment benefits.

The work separation may also be due to voluntary decisions or “job quits” by the employee. When the separation is due to a voluntary job quit by the employee, the employee will be disqualified per AS 23. 20.379(a) and (b) unless the employee can demonstrate that the job quit was for “good cause.”

To determine whether good cause existed for voluntarily leaving suitable work, the factors set out in 8 AAC 85.095(c) are considered:

- (1) leaving work due to a disability or illness of the claimant that makes it impossible for the claimant to perform the duties required by the work, if the claimant has no other reasonable alternative but to leave work;
- (2) leaving work to care for an immediate family member who has a disability or illness;

⁵ 8 AAC 85.0895(d)(1).

(3) leaving work due to safety or other working conditions or an employment agreement related directly to the work, if the claimant has no other reasonable alternative but to leave work;

(4) leaving work to accompany or join a spouse at a change of location, if commuting from the new location to the claimant's work is impractical; for purposes of this paragraph, the change of location must be as a result of the spouse's (A) discharge from military service; or (B) employment;

(5) leaving unskilled work to attend a vocational training or retraining course approved by the director under AS 23.20.382, only if the individual enters the course immediately upon separating from work;

(6) leaving work in order to protect the claimant or the claimant's immediate family members from harassment or violence;

(7) leaving work to accept a bona fide offer of work that offers better wages, benefits, hours, or other working conditions; if the new work does not materialize, the reason for the work not materializing must not be due to the fault of the worker; and

(8) other factors listed in AS 23.20.385(b).⁶

AS 23.20.385(b) establishes a catchall provision under which an employee can demonstrate good cause and retain unemployment eligibility by proving the employee had “a compelling reason for leaving work” and “exhausted all reasonable alternatives to quitting.”⁷ A compelling reason is “one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment.”⁸ Typically, to establish good cause under this standard, an employee must give the employer notice of the problem a chance to adjust or correct it before exhaustion of alternatives can be found.⁹ However, the employee is “not expected to do something futile or useless in order to establish good cause for leaving employment.”¹⁰ There is “no requirement that a worker’s reasons for leaving work be connected with the work. Either work connected or personal factors may present sufficiently compelling reasons.”¹¹

⁶ 8 AAC 85.095(c).

⁷ *Wescott*, 996 P.2d at 726-28 adopting the BPM criteria.

⁸ *Calvert v. State, Dept. of Labor & Workforce Development, Employment Sec. Div.*, 251 P.3d 990, 1001 (Alaska 2011)(adopting BPD criteria).

⁹ *Id.* at 1002-06.

¹⁰ *Id.* at 1004. (“An employer’s limited authority or expressed refusal to accommodate an employee can establish that requesting an adjustment to work conditions would be futile: ‘[i]f the employer has already made it known that the matter will not be adjusted to the worker’s satisfaction, or if the matter is beyond the power of the employer to adjust, then the worker is not expected to perform a futile act.’ ”)(internal citation omitted).

¹¹ *Id.* at 1002-06.

AS 23.20.385 provides that suitability of work depends on a wide range of factors, including whether wages, hours, or other conditions of work are substantially less favorable than prevailing conditions in the locality; the degree of risk to the claimant's health, safety, and morals; the claimant's physical fitness for the work; the distance of the work from the claimant's residence and any "other factor that would influence a reasonably prudent person in the claimant's circumstances." Although suitability of work may not be presumed it need not be examined in all cases.¹² Suitability of work must be examined if the worker objects to the appropriateness of wages or other "conditions of work, the worker specifically raises the issue of suitability of work; or facts appear during the investigation that put the Department on notice that wages or other conditions of work maybe substantially less favorable than prevailing conditions for similar work in the locality."¹³

EXCERPTS OF RELEVANT PROVISIONS OF LAW

AS 23.20.379. Voluntary quit, discharge for misconduct, and refusal of work.

a) An insured worker is disqualified for waiting-week credit or benefits for the first week in which the insured worker is unemployed and for the next five weeks of unemployment following that week if the insured worker

(2) was discharged for misconduct connected with the insured worker's last work.

(b) An insured worker is disqualified for waiting-week credit or benefits for a week and the next five weeks of unemployment following that week if, for that week, the insured worker fails without good cause

(2) to accept suitable work when offered to the insured worker.

¹² *Id.*

¹³ *Id.*

DECISION

Mr. Blandov did establish legal good cause for his voluntary resignation: he demonstrated a compelling reason for leaving work and that it would have been futile to request MLP re-address the on-going problems with his supervisor.

Mr. Blandov voluntarily resigned from MLP USA. He did not do so for any of the specific reasons listed in 8 AAC 85.095(c)(1)-(7). Whether legal good cause existed thus entitling Mr. Blandov to immediate unemployment benefits must, therefore, be analyzed under 8 AAC 85.095(c)(8), the catchall provision.

Mr. Blandov was required to prove that he had a compelling reason for leaving work and exhausted all reasonable alternatives to quitting.¹⁴ A compelling reason is “one that causes a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment.”¹⁵ Typically, to establish good cause under this standard, an employee must give the employer notice of the problem a chance to adjust or correct it before exhaustion of alternatives can be found. However, employees are not required to request accommodations from their employer when it appears such requests would be futile.¹⁶

The evidence presented by Mr. Blandov met that standard. Mr. Blandov resigned because he could no longer tolerate the unprofessional conduct and personal disrespect from his supervisor. The straw that broke the camel’s back was his supervisor’s intentional failure to respond to a request for bereavement leave during an international pandemic that had gone on for more than a year with increasing mental health and personal demands. The Metlakatla community is small; Mr. Blandov had no doubt that the supervisor was aware of the potlatch and its importance to him. The supervisor then lied to the director for MLP and attempted to shift blame to Mr. Blandov. The supervisor had a history of similar conduct. These circumstances are sufficient to cause a reasonable and prudent person of normal sensitivity, exercising ordinary common sense, to leave employment

Mr. Blandov is excused from giving his employer notice and a chance to correct the problem. He had attempted to personally resolve the issue and requested assistance in the past without success. Prior instances involving Mr. Blandov where complaints were made about Mr. Gaube not responding to requests for assistance, including during potential power plant emergencies, had not resulted in any change by the foreman. Mr. Blandov had witnessed numerous similar occasions involving his co-workers. There was no mechanism to request relief other than through Mr. Russell and Mr. Russell had not been able to change Mr. Gaube’s behavior despite repeated

¹⁴ *Wescott*, 996 P.2d at 726-28 adopting the BPM criteria.


¹⁵ *Calvert*, *supra*.

¹⁶ *Id.*

attempts to do so. It would have been futile for Mr. Blandov to request assistance from MLP again.

The Division's May 5, 2021 denial decision is **Reversed**.

DATED January 13, 2022.

¹⁷
Carmen E. Clark
Administrative Law Judge

APPEAL RIGHTS

This decision is final unless an appeal is filed in writing to the Commissioner of Labor and Workforce Development **within 30 days** after the decision is mailed to each party. The appeal period may be extended only if the appeal is delayed for circumstances beyond the party's control. A statement of rights and procedures is enclosed.

CERTIFICATE OF SERVICE

I certify that on January 13, 2022, this document was sent to: Garen Blandov (by mail); Metlakatla Power & Light (by email). A courtesy copy has been emailed to the DETS UI Appeals Team and DETS UI Technical Team.

_____
Office of Administrative Hearings

¹⁷ Signed electronically to accommodate remote work restrictions due to COVID-19.



*Alaska Department of Labor and Workforce Development
Appeals to the Commissioner _*

Please read carefully the enclosed Appeal Tribunal decision. Any interested party (claimant or the Division of Employment and Training Services [DETS]) may request that the Commissioner accept an *appeal* against the decision (AS 23.20.430-435 and 8 AAC 85.154-155).

A Commissioner appeal must be filed within 30 days after the Appeal Tribunal decision is mailed to a party's last address of record. The 30-day period may be extended for a reasonable time if the appealing party shows that the appeal was late due to circumstances beyond the party's control.

A Commissioner appeal must be in writing and must fully explain your reason for the appeal. You or your authorized representative must sign the appeal. All other parties will be sent a copy of your appeal. Send Commissioner appeals *to the Commissioner's Hearing Officer* at the address below.

A Commissioner appeal is a matter of right if the Appeal Tribunal decision reversed or modified a DETS determination. If the Appeal Tribunal decision did not modify the DETS determination, the Commissioner is not required to accept the appeal. If the appeal is accepted, the Commissioner may affirm, modify, or reverse the Appeal Tribunal decision. The Commissioner may also refer the matter back to the Appeal Tribunal for another hearing and/or a new decision. The Commissioner will issue a written decision to all interested parties. The Commissioner decision will include a statement about the right to appeal to Superior Court.

Any party may present *written argument* to the Commissioner stating why the Appeal Tribunal decision should or should not be changed. Any party may also request to make an *oral argument*. Written argument and/or a request for oral argument should be made when you file an appeal or immediately after you receive notice that another party filed an appeal. You must supply a written argument or a request for oral argument promptly, because neither will likely be considered after the Commissioner issues a decision.

**ALASKA DEPARTMENT OF LABOR
AND WORKFORCE DEVELOPMENT
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