

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

In the Matter of)	
)	
NICHOLAS LONG)	OAH No. 21-2333-LUI
_____)	Agency No. 21 1275 10

APPEAL DECISION

Docket Number: 21 1275 10

Hearing Date: January 5, 2022

CLAIMANT APPEARANCES:

DETS APPEARANCES:

Nicholas Long

None

CASE HISTORY

The claimant, Nicholas Long, timely appealed a June 10, 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 January 5, 2022. Mr. Long appeared by telephone as did Ruth Dinardi, office manager and human resources representative for the Fairbanks Rescue Mission, his employer.

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

Nicholas Long established a claim for UI benefits effective March 13, 2021. The Division determined that the claimant was not eligible for UI benefits because he voluntarily left employment under circumstances that did not equal good cause as defined by law.

Nicholas Long is a life-long Alaskan. He grew up in interior Alaska. Mr. Long was a volunteer at the Fairbanks Rescue Mission (Mission). The Mission is a 200-bed emergency shelter for men and women experiencing hardships or homelessness in Interior Alaska. In addition to the shelter, the Mission runs a work apprentice program at the local recycling center.

After volunteering, Mr. Long felt the desire to work at the Mission full time. He took a job as the overnight manager to get his foot in the door. After a few months, he requested to be moved to a day shift. The Mission agreed and created a new position

called the Assistant Day Manager. His hours were Tuesday through Saturday. He was not expected to work alternating days and nights: this was a full-time day position. Later, his shift was moved to Monday through Friday so he could participate in ministry events on Saturday.

As described by Mr. Long and Ms. Dinardi, the Assistant Day Manager acted essentially as a “rover.” That is, the Day Manager could request the assistant pick up slack in any area of the Mission. Mr. Long testified he thus worked a day in the kitchen when it was short-staffed, he drove clients to the recycling center, he operated a forklift at the recycling center, and was expected to fill-in at any position.

One of the duties as assigned to which Mr. Long objected was transporting sealed COVID-19 kits to the University for testing. The Mission had trained testers on site. Once the tests were complete, they were placed in an insulated container (a glorified cooler). The cooler was sealed. Then it was driven across town to the University where the samples were tested. Mr. Long was not expected to take samples. He was not supposed to open the cooler. He was merely expected to put the cooler in the car, drive it, and hand it off to medical providers. After Mr. Long told his supervisor he was not comfortable with the assignment, he was excused from transport.

Mr. Long also reported that he believed one of the cars for his use was unsafe. The Mission has a small fleet of cars for use by employees since employees are expected to transport clients. The cars are inspected twice a year. The Mission also has mechanic service available. After Mr. Long reported the unsafe car, the car was taken to the mechanic shop.

In addition, Mr. Long testified that he had problems with one of the supervisors, “Lisa.” He was called to meet with her in a small room. She was not wearing a mask. He testified that when he told her that he was uncomfortable due to COVID-19, she belittled him and mocked him by trying to close the door so they would be locked in together. According to Mr. Long, he had to “rip open the door” and immediately report the incident to Pete Kelly—who appears to have been the Director of Operations, but the testimony was not completely clear on that point. On another occasion he and Lisa had a dispute and she called him names. In a separate meeting he was “cursed” at.

Mr. Long testified he resigned on February 23, 2021. He did so because the constant changes in his hours and responsibilities meant his job lacked stability. He did not feel he was adequately trained or appreciated.

In response to the request to describe in detail the situation that caused you to quit on his unemployment claim, Mr. Long wrote: “There were a number of reasons why I wanted to quit but the very last incident before I turned in my resignation was that my employer changed my work schedule again.”

Ms. Dinardi testified that Mr. Long was moved between positions. However, she testified he went from nights to days at his request. He went from Tuesday through Saturday to Monday through Friday at his request. The Mission created the Assistant Day Manager job just for him because he wanted flexibility to do his “ministry.”

Ms. Dinardi expressed her belief that the Mission attempted to accommodate Mr. Long as much as possible. He did not have to regularly drive after he expressed discomfort with it. When he told the Mission, he did not want to transport the medical cooler, they stopped asking him to do so. However, his written job description specifically included driving. The written job description required him to perform case manager duties which include helping clients at the recycle center as well as at the Mission. The written description also included “other jobs as assigned” and all Mission employees were expected to be flexible because it is staffed by both volunteers as well as paid employees. Mr. Long’s job was not only to minister to the spiritual needs of the Mission clients, but that was Mr. Long’s primary interest.

Ms. Dinardi was a new Mission employee, so she was not personally familiar with Mr. Dinardi and Lisa’s history. However, her records indicated that Lisa received oral counseling over the incident where she did not wear a mask and provoked Mr. Long. However, she noted that the Mission had received complaints about Mr. Long’s temperament as well.

Ms. Dinardi noted that Mr. Long did not refer to any of the problems identified at the hearing in his resignation letter. In addition, she noted that Mr. Long had exaggerated his claims to the Department of Labor. For example, the statement on his original claim that “When I was asked to handle COVID samples, I explained to my employer that I was never trained in handling biohazardous samples” made it sound like he was asked to perform nasal or throat swabbing for tests or perform medical duties, but he was not. Similarly, the statement on his appeal that Mr. Long “left my job because I was not trained for the position I was expected to perform (transporting COVID-19 samples)” was misleading because all he was expected to do was carry the cooler that had already been sealed to and from a car.

Ms. Dinardi agreed that there had been several administrative changes while Mr. Long was employed, however, and the Mission had been short-staffed so jobs were more demanding.

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

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

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 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

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).

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;
- (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

⁵ 8 AAC 85.0895(d)(1).

⁶ 8 AAC 85.095(c).

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

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

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.

¹² *Id.*

¹³ *Id.*

(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.

APPLICATION

Mr. Long did not establish legal good cause for his voluntary resignation: he did not demonstrate a legal compelling reason for leaving work.

Mr. Long voluntarily resigned from the Mission. 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 entitling Mr. Long to immediate unemployment benefits must, therefore, be analyzed under 8 AAC 85.095(c)(8), the catchall provision.

Mr. Long 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. Long did not meet that standard. Mr. Long experienced three shift changes in the six months he worked at the Mission: he moved from night to day, then from Tuesday to Saturday to Monday through Friday. Mr. Long requested each of those shift changes. His employer cannot be faulted for accommodating those requests.

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

¹⁵ *Calvert*, *supra*.

¹⁶ *Id.*

Mr. Long's written job duty specifically included driving clients. The fact that he was requested to do so at erratic intervals does not establish a compelling reason to quit. His complaint about safety of one of the cars was investigated.

Mr. Long's written job description included "other duties as assigned." He was assigned to transport coolers of sealed COVID-19 tests for analysis. Reasonable people could disagree about whether they were comfortable performing such an assignment. The assignment would bother some people and not others. It did bother Mr. Long. However, when he asked not to do so anymore, that request was respected.

Overall, it appears Mr. Long was uncomfortable with the fact the job was more chaotic than he anticipated. There was turn-over and change in administration. A global pandemic impacted the clients and the employees. The position likely was not what Mr. Long expected it to be. He could legitimately conclude the position was not a good fit for him and make a valid personal decision to quit.

However, valid personal decisions do not automatically establish legal good cause. Immediate unemployment benefits are not available to assist a person who has decided to quit due to straightforward job dissatisfaction unless other factors not presented in this case exist.

Mr. Long did not establish that the Division erred in its determination.

DECISION

The Division's June 10, 2021 denial decision is **Affirmed**.

DATED January 14, 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.

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

CERTIFICATE OF SERVICE

I certify that on January 14, 2022, this document was sent to: Nicholas Long (by mail and email); Fairbanks Rescue Mission (by mail). A courtesy copy has been emailed to the DETS UI Appeals Team and DETS UI Technical Team.

 _____
Office of Administrative Hearings