

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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SALVADOR QUEZADA, *Appellant*,

*v.*

ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an agency,

*and*

DOLE BAKERSFIELD, INC., *Appellees*.

Nos. 1 CA-UB 17-0001, 1 CA-UB 17-0362 (Consolidated)  
FILED 1-16-2018

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Appeal from the A.D.E.S. Appeals Board  
Nos. U-1469482-001-BR, U-1463043-001-BR

**REVERSED AND REMANDED**

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COUNSEL

Desert Schools Federal Credit Union, Phoenix  
By Sara K. Regan  
*Co-Counsel for Appellant*

Squire Patton Boggs (US) LLP  
By Gregory Schneider  
*Co-Counsel for Appellant*

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QUEZADA v. ADES  
Decision of the Court

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**MEMORANDUM DECISION**

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Jennifer B. Campbell and Judge Maria Elena Cruz joined.

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**T H U M M A**, Chief Judge:

¶1 Salvador Quezada timely challenges an April 30, 2015 Appeals Board decision denying his application for unemployment benefits. The Arizona Department of Economic Security (ADES) has confessed error and agrees that the decision should be reversed, which it agrees would moot any resulting overpayment issue. Because Quezada's arguments are well-taken, the stay previously issued is vacated, the April 30, 2015 Appeals Board decision is reversed and this matter is remanded for any resulting administrative proceedings deemed necessary.

**FACTS AND PROCEDURAL HISTORY**

¶2 Quezada worked as a laborer and transfer driver for produce company Dole Bakersfield, Inc. Quezada worked for Dole for about 35 years before his discharge. On February 14, 2014, Quezada was driving a transfer bus and hit and damaged a garbage bin and ladder. Dole asked Quezada to submit to a post-accident drug and alcohol test, pursuant to a claimed testing policy. Quezada denied any wrongdoing and refused to submit to testing. Dole terminated Quezada's employment on February 20, 2014.

¶3 In August 2014, ADES accepted Quezada's timely application for unemployment benefits, finding Dole did not show the discharge was for "disqualifying reasons." Dole timely appealed and, after a hearing, the Appeal Tribunal found Quezada was terminated for willful or negligent misconduct, meaning he was not entitled to benefits. Quezada timely appealed and the Appeals Board affirmed initially and upon review in an April 30, 2015 decision. In May 2015, Quezada timely filed with ADES an

QUEZADA v. ADES  
Decision of the Court

application for review by this court. ADES, however, did not transmit the application for appeal to this court until December 30, 2016.<sup>1</sup>

¶4 In February 2017, this court granted Quezada’s application for appeal, placed this matter in the Arizona Court of Appeals Pro Bono Representation Program and stayed the appeal. After pro bono counsel for Quezada was appointed and appeared of record, and after various procedural matters were resolved, counsel of record filed the opening brief in September 2017. After other procedural matters were resolved, ADES filed a confession of error, requesting reversal of the April 30, 2015 decision.<sup>2</sup>

**DISCUSSION**

¶5 As set forth in Quezada’s brief on appeal, this court reviews the evidence in a light most favorable to affirming the decision and will affirm if any reasonable interpretation of the record supports it. *Baca v. Ariz. Dep’t of Econ. Sec.*, 191 Ariz. 43, 46 (App. 1997). The court, however, will overturn a decision that is arbitrary, capricious or an abuse of discretion, or not supported by the record. *Avila v. Ariz. Dep’t of Econ. Sec.*, 160 Ariz. 246, 248 (App. 1989). Issues of law are reviewed de novo, *see Bowman v. Ariz. Dep’t of Econ. Sec.*, 182 Ariz. 543, 545 (App. 1995), and “legal conclusions of the appeals board are not binding on this court. [The court is] free to draw [its] own legal conclusions in determining if the appeals board properly interpreted the law,” *Avila*, 160 Ariz. at 248.

¶6 As applicable here, for a refusal to take an employer-directed drug or alcohol test to constitute disqualifying misconduct for unemployment benefits, Arizona Administrative Code (A.A.C.) R6-3-5105(A)(1); R6-3-51485(A), such testing “shall be carried out within the

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<sup>1</sup> “On the filing of an application for appeal, the clerk of the [ADES] appeals board *shall* transmit to the court of appeals the application for appeal.” Arizona Revised Statutes (A.R.S.) § 41-1993(B) (emphasis added). The reason for ADES delaying by more than 18 months in transmitting Quezada’s application to this court is not apparent from the record. The ruling in this memorandum decision is without prejudice to this court’s Administrative Order 2017-001 and any related consequences.

<sup>2</sup> Cases selected for participation in the Pro Bono Program usually will be set for oral argument. *See* Administrative Order 2014-04 at 2. Given ADES’ confession of error, however, the court is resolving this case without oral argument.

QUEZADA v. ADES  
Decision of the Court

terms of a written policy that has been distributed to every employee subject to testing,” A.R.S. § 23-493.04(A). Dole had the burden of proof to show discharge for disqualifying reasons. A.A.C. R6-3-51190(B)(2)(b).

¶7 As applied, and as ably discussed in Quezada’s opening brief and acknowledged by ADES in its confession of error, the record contains no written policy authorizing drug or alcohol testing; Quezada made no admissions to the contrary and no conduct by Quezada would constitute disqualifying misconduct. A.A.C. R6-3-51255(A)(2). Accordingly, Dole did not meet its burden of proving that Quezada was discharged for disqualifying reasons. As Quezada’s opening brief further demonstrates, without contradiction, the April 30, 2015 decision should be reversed, thereby mooting any argument that the decision resulted in an overpayment.

**CONCLUSION**

¶8 The stay previously issued is vacated, the April 30, 2015 Appeals Board decision is reversed and this matter is remanded for any resulting administrative proceedings deemed necessary.



AMY M. WOOD • Clerk of the Court  
FILED: AA