STATE OF MICHIGAN
UNEMPLOYMENT INSURANCE APPEALS COMMISSION

IN THE MATTER OF:

INVOLVED CLAIMANT: [redacted]
SSN: [redacted]

APPEAL DOCKET NO. [redacted]260172

UIA CASE NUMBER: [redacted]

ALJ: [redacted]

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MICHIGAN UNEMPLOYMENT INSURANCE AGENCY'S WRITTEN ARGUMENT

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INTRODUCTION

This case, along with two other cases pending before UIAC, presents a question of statutory interpretation concerning the interplay between Michigan's Regulation and Taxation of Marihuana Act (MRTMA), which legalizes recreational marijuana use and possession for those over age 21, and Sections 29(1)(b) and 29(1)(m) of the Michigan Employment Security (MES) Act, which disqualify unemployment claimants from benefits for misconduct and controlled substance use.

The MRTMA contains no provision specifically addressing the eligibility for unemployment benefits of those individuals legally using marijuana in compliance with the statute; nor does the MES Act specifically disqualify users of marijuana from unemployment benefits. The voter-enacted MRTMA, which built on Michigan's existing Medical Marijuana Act (MMMA), preserves and adopts the very same immunities from penalty and prosecution that have been previously recognized under the MMMA, and the Michigan Court of Appeals has interpreted the similar MMMA language to preclude automatic disqualification from unemployment benefits arising from the lawful use of marijuana. Thus, recreational marijuana use, or a positive drug test related to legal use, would not categorically disqualify an individual from unemployment benefits. However, because the MRTMA still restricts marijuana use in certain contexts and locations and because some employers have specific employee rules that circumscribe marijuana use, certain marijuana uses may still disqualify an individual from

unemployment benefits. Disqualification under §§ 29(1)(b) and 29(1)(m) for marijuana use must, therefore, be judged case-by-case depending on the facts at issue.

FACTS AND PROCEDURAL HISTORY

I. Factual Background

[redacted] worked as an HVAC meter installer. He was involved in a vehicle accident while working and was subsequently given a drug test. He tested negative for controlled substances in a urine test, but positive for THC metabolite in a test conducted on his hair. Following the positive hair test, he was terminated for violation of his employer's drug policy and for the accident.

The Agency determined [redacted] was not disqualified under § 29(1)(m). After an employer appeal and hearing, the ALJ determined [redacted] was not disqualified under either § 29(1)(b) or § 29(1)(m), reasoning that the car accident did not constitute misconduct and was merely negligent. He also held that THC metabolite is not a controlled substance under Schedule I citing to *People v Freezel*, 486 Mich 184 (2010).

II. This Commission designates this case as a matter of first impression

This Commission has designated this case as a matter of first impression to assess the impact of the MRTMA on the misconduct and controlled substance provisions of the MES Act, §§ 29(1)(b) and (m) respectively. On July 14, 2021, this Commission issued an order determining that oral and written argument from the

parties would assist in its deliberation of the impact of the MRTMA on §§ 29(1)(b) and 29(1)(m) of the MES Act.

The Agency submits this brief to address its position on the legal question raised in the Commission's July 14, 2021 order, but it is not taking a position regarding the claimant's specific appeal.

ANALYSIS

I. Michigan voters chose to legalize marijuana over the last decade, and courts have supported that legal marijuana use should not penalize users or restrict government benefits

A. Michigan opens the door to legal marijuana use in the Michigan Medical Marijuana Act (MMA)

The MRTMA is not Michigan's first voter-enacted legislation relating to marijuana usage. In 2008, Michigan voters legalized medical marijuana by enacting the Michigan Medical Marijuana Act (MMMA) to authorize marijuana's use, possession, cultivation, and transportation in certain enumerated medical treatment circumstances, subject to restrictions. MCL 333.26421 *et seq*.

Section 4(a) of the MMMA provides immunity for medical marijuana use and permits a registered patient to possess 2.5 ounces of usable marijuana, or marijuana equivalents, without being subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including, but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, where the patient's use of medical marijuana is in accordance with the MMMA. MCL 333.26424(a). Authorized medical use of marijuana acts as a

total defense to any prosecution, professional disciplinary proceedings, and property forfeitures. MCL 333.26428. All statutes inconsistent with the MMMA "do not apply to the medical use of marijuana as provided for by" the MMMA. MCL 333.26427(e).

This said, § 7 of the MMMA lists circumstances in which registered patients are *not* protected under the MMMA, including individuals who undertake any task under the influence of marijuana when doing so constitutes negligence or professional malpractice. MCL 333.26427. The immunity granted by the MMMA also does not extend to individuals who operate, navigate, or physically control any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat while under the influence of marijuana. *Id.*

B. Courts have found the MMMA supersedes language limiting government benefits or penalizing marijuana use

The Court of Appeals has held that legal use of marijuana under the MMMA cannot be used to disqualify individuals from government benefits or otherwise penalize them, as conflicting statutory provisions are superseded by the MMMA's immunity language. Most applicable here, in *Braska v Challenge Mfg Co*, 307 Mich App 340, 360 (2014), the Court of Appeals determined that a person could not be denied unemployment benefits for their lawful use of medical marijuana because MMMA's immunity clause superseded conflicting provisions of the MES Act. *Id.* at 360.

Braska involved the consolidated appeal of three separate claimants for unemployment benefits, all of whom possessed medical marijuana cards, but who were each discharged after testing positive for marijuana or its metabolites. *Id.* at 342-43. The circumstances underlying these claimants' terminations were distinct from one another. One claimant was discharged after injuring his ankle while operating a hi-lo, and he subsequently tested positive in violation of the company's drug-free-workplace policy. *Id.* at 343-44. A second claimant worked as a hospital CT technician, and he was referred for testing after a patient complained about his job performance. *Id.* at 346-347. The technician was terminated after testing positive for marijuana metabolites and THC. *Id.* at 347. The third claimant, who repaired furniture as an in-home technician and drove a company car, was terminated by the employer after testing positive for "metabolized marijuana" during a random drug test. *Id.* at 349. Because none of the parties contended that claimants used medical marijuana in a manner that violated the MMMA, the *Braska* court affirmed the circuit courts' ruling that the claimants were not disqualified on the grounds that denial of unemployment benefits under § 29(1)(m) constitutes an impermissible penalty under the MMMA. *Id.* at 358.

Other courts have similarly held that the MMMA's immunity supersedes statutes that would otherwise penalize or restrict marijuana use. For example, in *People v Koon*, 494 Mich 1, 8 (2013) the Supreme Court held that the vehicle code's prohibition on driving with any measurable amount of a Schedule I controlled substance, a list that includes marijuana, was superseded by the MMMA's

allowance of marijuana in a registered patient's body even while driving so long as the registered patient is not driving under the influence, i.e., impaired by its effects. More recently, in *Ter Beek v City of Wyoming*, 495 Mich 1, 19–24 (2014), the Supreme Court held that a city's zoning ordinance enacted under the Michigan Zoning Enabling Act was superseded by the MMMA to the extent it prohibited legally sanctioned marijuana growth, possession, and use.

C. Michigan expanded legal marijuana use in the Michigan Regulation and Taxation of Marihuana Act (MRTMA)

In 2018, voters opted to expand legal marijuana use in adopting the MRTMA. The MRTMA expanded legal use of marijuana to personal recreational use for adults 21 years of age and older. MCL 333.27951 *et seq*. The Act calls for broad construction to accomplish this intent. MCL 333.27967. The MRTMA contains the same language of the MMMA in many respects, including a similar immunity section prohibiting prosecution and penalty for legally sanctioned marijuana possession, use, purchase, and transport, and a section providing it supersedes inconsistent laws. See MCL 333.27955; MCL 333.27954(5). Both statutes also define marijuana in near-identical fashion, and that definition includes all parts of the plant, such as seeds, resin, derived compounds and mixtures, concentrates, and marijuana-infused products. Compare MCL 333.27953(e) with MCL 333.26423(e) (incorporating MCL 333.7106(4)).

The MRTMA states it was enacted to prevent "the arrest *and penalty*" for personal possession and cultivation of marijuana by adults 21 years of age or older.

MCL 333.27952 (emphasis added). Relevant permitted acts under the MRTMA include possessing, using, or consuming, internally possessing, purchasing, transporting, or processing 2.5 ounces or less of marijuana, except that not more than 15 grams of marijuana may be in the form of marijuana concentrate. MCL 333.27955(a). A person 21 years of age or older who engages in a permissible act under § 5.1 of the MRTMA is not committing an unlawful act or offense and is not subject to the seizing or forfeiture of their property, arrest, prosecution, or penalty in any manner, nor do the permitted acts provide grounds for search or inspection or denial of any other right or privilege. MCL 333.27955.

While the MRTMA greatly expanded the legal use, cultivation, and possession of recreational marijuana, some marijuana activities remain illegal. Activities unauthorized by the MRTMA include, among other things:

- Operating, navigating, or being in physical control of any motor vehicle, aircraft, snowmobile, off-road recreational vehicle, or motorboat while under the influence;
- Use and transfer of marijuana and marijuana accessories to anyone under 21 years of age;
- Consuming or smoking marijuana in a public place or where prohibited by the person who owns, occupies, or manages the property;
- Possessing marijuana accessories or possessing or consuming marijuana on school buses or the grounds of a public or private school where children attend classes;
- Possessing or consuming marijuana on the grounds of any correctional facility; and
- Possessing amounts in excess of the statutory limits allowed.

MCL 333.27954(1)(a)–(i).

By its own terms, the MRTMA expressly states that all other laws inconsistent with the Act do not apply to conduct that is permitted by the Act. MCL 333.27954(5).

II. The MRTMA's legalization of marijuana supersedes Sections 29(1)(b) and 29(1)(m) of the MES Act to the extent they would otherwise categorically disqualify claimants for marijuana use

In its order granting written argument, this Commission asked the parties to address the impact of the MRTMA on the application of §§ 29(1)(b) and 29(1)(m) of the MES Act. These are issues that turn on interpreting the language of these statutes. For the reasons detailed below, the Agency believes that interpreting the applicable statutory language would mean claimants should not be categorically disqualified under either § 29(1)(b) or § 29(1)(m) for legal marijuana use consistent with the MRTMA, but that certain factual circumstances may still fall within these disqualification sections.

A. Principles of statutory construction

It is a well-established rule of statutory interpretation that where statutory language is clear and unambiguous, courts "must apply the language as written." *DeVormer v DeVormer*, 240 Mich App 601, 605 (2000). Unless statutorily defined, "every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Spectrum Health Hospitals v Farm Bureau Mutual Ins Co*, 492 Mich 503, 515 (2012) (quoting

Krohn v Home-Owners Ins Co, 490 Mich 145, 156–157 (2011)). Courts should "presume that every word has some meaning and should avoid any construction that would render the statute, or any part of it, surplusage or nugatory." *Karpinski v St. John Hospital-Macomb Center* Corp, 238 Mich App 539, 543 (1999). These same principles apply to voter-initiated statutes like the MRTMA—"the intent of the electors" governs its interpretation, and the "statute's plain language is considered the most reliable evidence of the electors' intent." *Braska v Challenge Mfg Co*, 307 Mich App 340, 352 (2014).

B. Impact of the MRTMA's legalization of marijuana on the application of Section 29(1)(b)

Section 29(1)(b) of the MES Act disqualifies an individual from receiving benefits where the person was suspended or discharged for misconduct connected with the individual's work or for intoxication while at work. MCL 421.29(1)(b). Under *Braska*, an individual's lawful use of recreational marijuana, i.e., use that is compliant with the MRTMA, does not automatically disqualify that person from receiving unemployment benefits under § 21(1)(b). *Braska* was clear that a per se disqualification from unemployment benefits for legal marijuana use would be a penalty for permissible use contrary to the immunity language in § 4 of the MMMA statute. *Braska*, 307 Mich App at 364–365. Because the MMTRA contains virtually the same immunity language as the MMMA for lawful marijuana use as defined in the statute (see MCL 333.27955), and because the MMTRA contains the same language as the MMMA that it supersedes conflicting statutes to the extent they

penalize marijuana use (see MCL 333.27954(5)), the MMTRA should be interpreted the same way as the MMMA statute in *Braska*, meaning claimants would not be *per se* disqualified for misconduct for legal marijuana use.

However, an inquiry under § 29(1)(b) does not end here. The plain language of this provision refers to two separate instances in which an individual can be disqualified from benefits. In the first instance, disqualification can arise from misconduct connected with the individual's work. MCL 421.29(1)(b). Case law has limited the term misconduct to conduct evincing "willful or wanton disregard of an employer's interests," such as "deliberate violations or disregard of standards of behavior which the employer has the right to expect," "carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design," or "an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer." *Carter v Michigan Employment Sec Commission*, 364 Mich 538, 541 (1961). Where an employer has a workplace policy that prohibits its employees from using marijuana, a finding of misconduct will depend on the facts of each case and entail assessing evidence regarding the policy itself, how it was communicated to claimant, the particular circumstances of the marijuana use, and the potential consequences to the employer to determine whether there was an intentional disregard for the employer's interests. Misconduct disqualifications such as this are directly within the scope of the MRTMA, as the statute preserves an employer's ability to discipline an employee for a violation of a workplace drug policy. MCL 333.27954(3).

The second incidence of misconduct that can lead to disqualification is intoxication at work. MCL 421.29(1)(b). This basis is also consistent with the MRTMA, which permits an employer to discipline an employee for working while under the influence of marijuana. MCL 333.27954(3). In *Koon*, 494 Mich at 3, the court resolved an analogous conflict between the MMMA and the Michigan Vehicle Code as to whether a registered medical marijuana user is allowed to drive when they have indications of marijuana in their system but are not otherwise impaired. That case held that the immunity provisions of the MMMA prohibited the prosecution of registered medical marijuana users who internally possessed marijuana, superseding the Vehicle Code's "zero tolerance" provision for Schedule I controlled substances in this regard, but it did *not* supersede the Vehicle Code to protect medical marijuana users who operated a vehicle while under its influence because the MMMA prohibited driving while under the influence of marijuana. *Id.* at 6. The court had an opportunity to address what it means to be "under the influence" of marijuana in a criminal proceeding, and, although it stopped short of defining the term, indicated that it "contemplates something more than having any amount of marijuana in one's system and requires some effect on the person." *Id.* This is consistent with how "intoxication" has been defined in unemployment matters involving marijuana. See *Korzowski v Pollack Industries*, 213 Mich 223, 229 (1995) (holding that evidence of red, glassy eyes, coupled with witness testimony that claimant was observed smoking marijuana, was insufficient to prove

intoxication because there was no evidence to show the claimant's physical or mental faculties were disturbed by his alleged use of marijuana).

In summary, a claimant may not be *per se* disqualified under § 29(1)(b) for legal use of marijuana consistent with the MRTMA, but there may still be circumstances where claimants are disqualified for misconduct arising from marijuana use, such as where they consume it at work in violation of workplace policy or where it results in intoxication at the workplace.

C. Impact of the MRTMA's legalization of marijuana on the application of Section 29(1)(m)

Section 29(1)(m) of the Michigan Employment Security Act disqualifies an individual from receiving benefits where the person was discharged for "illegally ingesting, injecting, inhaling, or possessing a controlled substance on the premises of the employer," or for refusing or testing positive on a drug test administered in a nondiscriminatory manner. MCL 421.29(1)(m).

Marijuana remains a Schedule I controlled substance under state law. MCL 333.7212.

However, § 29(1)(m) only disqualifies a person for *illegal* use or possession of a controlled substance. Marijuana use consistent with MRTMA, or a positive drug test for marijuana or metabolic byproducts after legal use, would not disqualify a person for unemployment benefits. This is consistent with the holding in *Braska* concerning the near identical language in the MMMA – so long as the employee's use is compliant with the MRTMA – a positive test result will not automatically

disqualify that person from unemployment benefits under Section 29(1)(m). See *Braska*, 307 Mich App at 358–365. But the remainder of § 29(1)(m) remains in effect. Namely, *illegal* use of a Schedule I controlled substance as contemplated in § 29(1)(m), e.g., use that falls outside the scope of the MRTMA (like possessing more than 2.5 ounces of marijuana or sharing marijuana with individuals under the age of 21, etc.), is still grounds for disqualification. An employee's refusal to submit to a drug test if administered in a nondiscriminatory manner also still justifies disqualification under § 29(1)(m) as such an interpretation is not inconsistent with the immunity and legal use provisions of the MRTMA, and thus not superseded by it.

It is notable that the MRTMA does not require an employer to permit or accommodate conduct otherwise allowed by the Act, and does not prohibit an employer from disciplining, discharging, or taking an adverse employment action against a person for violation of a workplace drug policy or because that person was working under the influence of marijuana. MCL 333.27954(3). Moreover, the MRTMA allows people and legal entities to prohibit or otherwise regulate the consumption, cultivation, distribution, processing, sale, or display of marijuana and marijuana accessories on property the person owns, occupies, or manages. MCL 333.27954(3), (4). The plain statutory language of the MRTMA makes it evident that employers are still able to regulate a wide range of employee behavior with respect to marijuana through the implementation of workplace drug policies. But employees terminated by these actions may still be eligible for unemployment

benefits under some circumstances, and those circumstances must be evaluated on a case-by-case basis.

CONCLUSION

When addressing the impact of the MRTMA on §§ 29(1)(b) and 29(1)(m) of the MES Act, this Commission should adopt the holding in *Braska* by declining to automatically disqualify a claimant solely on the basis of testing positive for marijuana. This said, while the MRTMA allows individuals to avail themselves of marijuana in various manners, it also enumerates a number of restrictions that continue to make certain uses (like using while driving) and possessions (like by those underage) unlawful. Thus, the circumstances of each case will be important, and the Agency respectfully asks the Commission to take the position that facts of each claimant's case must be reviewed for conformity with the MRTMA in order to establish their qualification for benefits.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned certifies that on August 2, 2021, a copy of the above document was served via U.S. Postal Service with postage fully prepaid on [redacted]

Dated: August 2, 2021

/s/ Paula A. Price
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