Board of Review
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Issue ID: 0002 2514 44
Claimant ID: 1843191

BOARD OF REVIEW DECISION

REVISED

0002 2514 44 (Sept. 11, 2014) – A claimant who was placed on a disciplinary suspension could not be disqualified under G.L. c. 151A, § 25(f), because the suspension was indefinite. Since the claimant remained on suspension at the time he filed an unemployment claim, his separation was properly analyzed under G.L. c. 151A, § 29, regardless of the fact that he was subsequently discharged.

Introduction and Procedural History of this Appeal

The claimant was placed on an indefinite suspension by the employer on June 13, 2011, and filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA) on June 22, 2011. His claim was denied in a determination issued on August 10, 2011. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, a review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on September 20, 2012. We accepted the employer's application for review.

The review examiner considered whether the claimant was disqualified, under G.L. c. 151A, § 25(f), and awarded benefits after determining that the employer did not establish that the claimant was suspended for a violation of the employer's drug and alcohol policy. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties and the DUA legal department responded. Thereafter, we remanded the case to the review examiner to take additional evidence and notified the parties that additional provisions of the law may be considered in our analysis. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment.

On December 17, 2013, we rendered a final decision reversing the review examiner's decision and disqualifying the claimant from receiving benefits, under G.L. c. 151A, § 25(e)(2). On June 3, 2014, we issued an Order to Rescind Final Decision in order to reconsider whether we had decided the case under the appropriate section of law. Upon further review of the entire record, and pursuant to our authority under G.L. c. 151A, § 41, we now affirm the review examiner's decision allowing benefits.

The issue before the Board is whether the review examiner's conclusion that the claimant was entitled to benefits during his period of indefinite disciplinary suspension is supported by substantial and credible evidence and free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant started working as a fulltime electrician for the employer, a municipality, on June 1, 1992. The claimant continues to work for the employer. The claimant is scheduled to work Monday through Friday from 7:30AM until 3:30PM. The claimant is paid $24.00 per hour.

2. The employer maintains a Drug/Alcohol Policy (Exhibit 12).

3. In the employer's Drug/Alcohol Policy, the employer writes: "The unlawful use, possession, distribution, dispensation, cultivation or manufacture of a Controlled Substance [drugs and/or alcohol], while on the job, at City Sponsored events, premises is prohibited. Any violation of this policy is cause of disciplinary action up to and including discharge (Exhibit 12 Page 1)."

4. The claimant was aware of the employer's Drug/Alcohol Policy.

5. The claimant did not know what would happen to his employment if he was found to have purchased or possessed illegal or controlled drugs while on the job.

6. The employer expected employees not to purchase or possess illegal or controlled drugs while on the job (Exhibit 12).

7. On June 9, 2011, the claimant was arrested while on duty for the employer.

8. The police department drafted an arrest report (Exhibit 10).

9. At the time of the arrest, the claimant had in his possession controlled drugs (Exhibit 10).

10. At the time of the arrest, the claimant had 58 pills of Oxycontin 30mg in his possession (Exhibit 10).

11. At the time of the arrest, the claimant had 1 pill of Oxycontin 80mg in his possession (Exhibit 10).

12. The controlled drugs were not prescribed to the claimant but to the 1st individual (Exhibit 10).

13. The 1st individual is the 2nd individual's wife.

14. The 2nd individual sold the controlled pills to the claimant (Exhibit 10).

15. The claimant was in one of the employer's vehicles at the time of his arrest (Exhibit 10).

16. The claimant did possess and purchase controlled drugs while on duty for the employer (Exhibit 10).

17. On June 9, 2011, the employer drafted a letter to the claimant (Exhibit 8). In the letter, the employer wrote:

    "You are hereby notified that effective today, Thursday June 9, 2011 you have been placed on paid administrative leave from your position as an Electrician in the Department of Public Works pending the conclusion of further investigation and documentation of consistently unacceptable performance of duties (Exhibit 8)."

18. On or about June 13, 2011, the claimant was subsequently arraigned on 5 charges in the [Name of], Massachusetts District Court.

19. The claimant was arraigned on the following 5 charges in the [Name of], Massachusetts District Court (Exhibit 13):

    - 94C/32A/G Drug, Possess to Distribute Class B
    - 94C/32J Drug Violation Near School/Park
    - 94C/32A/G Drug, Possess to Distribute Class B
    - 94C/32J Drug Violation Near School/Park
    - 94C/40 Conspiracy to Violate Drug Law

20. The claimant was never indicted by a grand jury in the Superior Court. The charges against the claimant always remained in the District Court.

21. On June 13, 2011, the employer drafted a letter to the claimant (Exhibit 9).

22. In the June 13, 2011 letter, the employer wrote:

    "The [employer] has been notified that on June 13, 2011, you were charged with and arraigned on the following felonies…"

"These charges arise as a result of alleged conduct performed while on duty for the [employer]. Such alleged conduct constitutes misconduct in your public employment and violates the public trust. Accordingly, this is to advise you that you are hereby suspended without pay, effective June 13, 2011, from your position as an Electrician in the Department of Public Works pursuant to Massachusetts General Laws, Chapter 268A, section 25."

"This suspension is in effect until the Commonwealth of Massachusetts proceedings against you have been terminated (Exhibit 9)."

23. The claimant's suspension was indefinite.

24. On June 22, 2011, the claimants filed his 1st claim for unemployment insurance benefits.

25. On or about January 3, 2012, the following charges against the claimant were dismissed (Exhibit 13):

- 94C/32J Drug Violation Near School/Park
- 94C/32J Drug Violation Near School/Park
- 94C/40 Conspiracy to Violate Drug Law

26. On January 3, 2012, the claimant entered a plea of continued without a finding/admission to sufficient facts for 2 years with regard to the following charges:

- 94C/32A/G Drug, Possess to Distribute Class B
- 94C/32A/G Drug, Possess to Distribute Class B

27. On March 5, 2012, the claimant entered into an Employment Agreement with the employer (Exhibit 15).

28. In the Employment Agreement, the employer agreed to reinstate the claimant's employment.

29. In the Employment Agreement, the claimant agreed to be placed on a probationary period for 2 years, to participate in treatment programs, and to be subject to random drug screenings (Exhibit 15). In the Employment Agreement, the claimant agreed to waive any back pay from the employer for the time that the claimant was out of work.

30. On or about March 6, 2012, the claimant did start working for the employer again.

Credibility Assessment: Since the claimant elected not to respond to questions regarding his arrest during the remand hearing, the police report that was

> introduced during the initial hearing is deemed credible and acceptable. The claimant's attorney argued that the police report was hearsay and should not be considered. However, the police report is deemed reliable hearsay and is deemed credible and acceptable.

Ruling of the Board

In accordance with our statutory obligation, the Board reviews the decision of the review examiner to determine: (1) whether the consolidated findings and credibility assessment are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion that the claimant is entitled to benefits is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment, except as follows. Consolidated Finding # 5 (that the claimant did not know what would happen to his employment if he purchased or possessed illegal drugs on the job) is set aside, as it is inconsistent with Findings # 3 and # 4. Findings # 3 and # 4, which are supported by substantial evidence, establish in their totality that the claimant was aware of the Employer's Drug/Alcohol Policy, which clearly provided that any violations of the policy would result in disciplinary action up to and including termination. We further note that Finding # 5 is inconsistent with the claimant's statement to the adjudicator, in which the claimant acknowledged it was "common sense" and he "thought it might cause a problem" to be arrested during working hours. *Compare* Hearings Exhibit # 2, page 2. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we also agree with the examiner that the claimant is eligible for benefits, but our decision rests upon on a different ground.

We first address the employer's contention that, because the claimant was suspended due to an indictment for misconduct committed while in office, he was ineligible for unemployment benefits pursuant to G.L. c. 268A, § 25. This statute provides, in pertinent part, as follows:

> An … employee of a … city … may, during any period such … employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him, be suspended by the appointing authority…. Any person so suspended shall not receive any compensation or salary during the period of suspension, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits…. If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed….

The review examiner concluded that this provision does not apply to the claimant and we agree. The Supreme Judicial Court has deemed unemployment benefits to be "compensation," subject to the restrictions of G.L. c. 268A, § 25. *See* City of Springfield v. Dir. of Division of Employment Security, 398 Mass. 786, 789 (1986). However, as the review examiner correctly concluded, the felony charges filed against the claimant in district court do not constitute an

"indictment" for the purposes of G.L. c. 268A, § 25. *See* Brittle v. City of Boston, 439 Mass. 580 (2003); Boike v. McGovern, 30 Mass. L. Rptr. 120 (Suffolk Super. Ct. No. SUCV-11-02354) (May 21, 2012) (slip op. at 2). Since the claimant was never under "indictment," his unemployment benefits are not subject to the restriction of G.L. c. 268A, § 25.[1]

We turn next to the question of whether the claimant was "in total unemployment" during the period of his suspension, within the meaning of G. L. c. 151A, §§ 29(a) and 1(r)(2). G.L. c. 151A, § 29(a), provides, in pertinent part, as follows:

> Any individual in total unemployment and otherwise eligible for benefits … shall be paid for each week of unemployment …

G.L. c. 151A, § 1(r)(2), provides, in pertinent part, as follows:

> "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

Here, the claimant's employment was not completely severed or terminated, but rather, as a suspended employee, he retained a relationship with his employer. Nonetheless, we conclude that he meets the "practical" meaning of being in "total unemployment" in light of the overall purpose of the law, as described by the Supreme Judicial Court in Dir. of Division of Employment Security v. Fitzgerald: "an employee who is unwillingly out of work and without current earnings and unable to find work appropriate to his employment capacity." 382 Mass. 159, 164 (1980). In Fitzgerald, the Court interpreted G.L. c. 151A, § 29(a), to allow benefits to a claimant during her period of maternity leave; because, although she was physically unable to perform her regular welding duties for the employer, she was able, available, and seeking to perform other work. Id. at 163.

Similarly, in the present case, the claimant performed no wage-earning services for the employer, received no remuneration, and, as far as this record reflects, remained able and available to work during his indefinite suspension, but the employer would not let him do so. Pursuant to Fitzgerald, therefore, the claimant was in total unemployment within the meaning of §§ 29(a) and (1)(r) and entitled to benefits, if otherwise eligible.

The question next becomes whether the claimant, who was in total unemployment, was disqualified under one of the subsections of G. L. c. 151A, § 25, which governs "Disqualification for benefits." Since the claimant was suspended from employment, the review examiner considered his eligibility for benefits under G.L. c. 151A, § 25(f), which states, in pertinent part, as follows:

[1] The review examiner also correctly concluded that the claimant's entry of a plea of "continued without a finding" on two of the charges against him is not the equivalent to pleading guilty and cannot be construed as a conviction under G.L. c. 151A, § 25(e)(3). That plea is also not sufficient in and of itself to demonstrate deliberate misconduct under G.L. c. 151A, § 25(e)(2). *See* Wardell v. Dir. of Division of Employment Security, 397 Mass. 433 (1986).

> No waiting period shall be allowed and no benefits shall be paid to an individual pursuant to this chapter . . . (f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

G.L. c. 151A, § 25(f), is further interpreted in DUA regulations at 430 CMR 4.04(4), which provides, in pertinent part, as follows:

> A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he or she has been suspended, but in no case more than ten weeks, provided it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit, *that such suspension was for a fixed period of time* as provided in such rules or regulations, and that a claimant has a right to return to his employment with the employing unit if work is available at the end of the period of suspension. (Emphasis added.)

Thus, the foregoing regulation interprets G.L. c. 151A, § 25(f), to disqualify a claimant only if the suspension was for a "fixed" period of time and the claimant has a right to return to his employment at the end of that fixed period. Since the claimant in the instant case had been placed upon an *indefinite*, albeit disciplinary, suspension, he cannot be disqualified under G.L. c. 151A, § 25(f), and 430 CMR 4.04(4).

We next consider whether the claimant can be disqualified under any other provision of G.L. c. 151A, § 25. In our prior decision in this case, we decided that the claimant's indefinite suspension, which carried an uncertain outcome, was tantamount to a discharge. Given that the eventual outcome of claimant's situation was reinstatement without back pay, we concluded that the claimant had effectively been discharged and then "re-hired." Accordingly, we analyzed whether he should be disqualified under G. L. c. 151A, § 25(e)(2), which addresses discharge from employment and provides, in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for ... [T]he period of unemployment next ensuing ... after the individual has left work ... (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence ....

We now reject that analysis, because it depended upon information (the ultimate resolution of the claimant's employment situation) which did not exist at the time the claimant applied for benefits. It is clear, particularly in the claims processing provisions of G.L. c. 151A, §§ 38–42,

and the limitations periods set forth in G.L. c. 151A, § 71, that the unemployment system is designed to function expeditiously in order to ensure that eligible claimants receive their benefits timely, thus serving the statutory purpose of "lighten[ing] the burden which now falls on the unemployed worker and his family." G.L. c. 151A, § 74. Consonant with this purpose and processes, the nature of a claimant's separation must be adjudicated based upon the situation that exists at or near the date the claim is filed, as best that can be determined. The qualifying or disqualifying nature of a separation cannot be contingent upon facts that may occur many months later.[2] Here, at the time the claimant filed his claim, he had not been discharged, nor had the employer decided it had cause to discharge him. Accordingly, the employer was not in a position to meet its burden under G.L. c. 151A, § 25(e)(2), to establish that the claimant had been "discharged" for either a knowing policy violation or deliberate misconduct in wilful disregard of the employer's interests. Since our earlier decision (that the claimant had been discharged and then reinstated) had been premised upon information available only many months after the claim was filed, its analysis does not comport with the expeditious and remedial purposes of the statute.[3]

In short, at the time claimant filed his claim, he had not been discharged. Therefore, notwithstanding the police report that led to claimant's indefinite suspension, or any subsequent facts or admission to sufficient facts relating to the claimant's drug-related activity or reinstatement without back pay, the claimant cannot be disqualified under G.L. c. 151A, § 25(e)(2).

Thus, while we are satisfied that the claimant was separated from employment within the meaning of the Fitzgerald decision, during his period of indefinite disciplinary suspension, we find no provision in G.L. c. 151A, § 25, that would apply to disqualify him from benefits in that status.

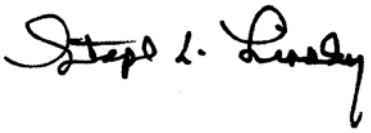
[2] This assertion does not mean that *evidence* about the fact and cause of a particular separation can be considered only if it is produced or ascertained during the initial investigation of a claim. For various reasons, such evidence may not come to light until a later date, and the law governing redeterminations of agency decisions takes this possibility into account. *See* G.L. c. 151A, § 71.

[3] In a prior Board decision, BR-110769 (Jan. 11, 2011), we applied G.L. c. 151A, § 25(e)(2), to an investigatory suspension followed several months later by a discharge. To the extent that prior decision suggests that G.L. c. 151A, § 25(e)(2), applies in situations where a claimant has not been discharged, we decline to follow it in this case and in future cases. (BR-110769 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted).

The review examiner's decision is affirmed. The claimant is entitled to benefits for the week ending June 18, 2011, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 11, 2014

Paul T. Fitzgerald, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Judith M. Neumann, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh