0002 4851 05 (Feb. 26, 2015) – *De Novo* order was a ruling of law that derives from the Board's authority under G.L. c. 151A, § 41, and it did not violate the claimant's due process rights. All unrepresented parties are entitled to assistance from the review examiner. *[Note: the District Court affirmed the Board of Review.]*

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Issue ID: 0002 4851 05

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant was discharged from his position with the employer on August 23, 2012. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 16, 2012. The claimant appealed the determination to the DUA hearings department. Following a hearing before a different review examiner ("initial hearing"), the agency's initial determination was reversed and the claimant was awarded benefits. The employer appealed to this Board, which ordered the case to be remanded for a hearing *de novo* before a new review examiner on the ground that the proceedings at the initial hearing had failed to afford the employer a fair hearing. A lengthy hearing before Review Examiner Etienne ensued, with both parties represented by counsel. In a decision rendered on September 19, 2014, the review examiner affirmed the original determination to disqualify the claimant from receipt of unemployment benefits. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was disqualified, under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record from the hearing *de novo*, including 15 hours of recorded testimony, documentary and video exhibits, the review examiner's decision, and the claimant's appeal

The issues before us are (1) whether the Board's remand order for a hearing *de novo* violated the claimant's due process rights or was otherwise improper; and (2) whether the review examiner's conclusion that the claimant deliberately falsified timecards to show that he and his subordinates worked an extra hour of overtime every day is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as a foreman/supervisor for the employer from November 2, 2001 until August 23, 2012 when the employer discharged the claimant.

2. The claimant's work hours were 7am to 3:30pm, Monday through Friday. The claimant worked overtime for the employer when overtime work was available.

3. The claimant's immediate supervisors were the employer's owner and salesman.

4. The claimant as foreman was the supervisor to several employees of the employer.

5. As Supervisor, the claimant recorded the time that he and his subordinates worked on timesheets. The claimant submitted the timesheets to the owner's son for payment of wages due.

6. The claimant indicated on the timesheets that he and his subordinates report to work at 6am when the subordinates did not report to work at 6am.

7. The claimant's subordinates were aware that their paychecks were more than they should be given the work hours. The claimant's subordinates were intimidated or admonished by the claimant to not say anything to the owner.

8. The employer expected the claimant to accurately report the time that he and his subordinates [sic] on the timesheets.

9. The employer maintained this expectation because the wages for each employee is [sic] computed from the timesheet.

10. The claimant is aware of that expectation given his position as foreman/supervisor.

11. The employer has multiple properties spread over a campus. The employer has camera surveillance of its shop area.

12. The employer does not have video surveillance of its bandstand.

13. The employer's video surveillance was not set up to back up every day.

14. Approximately two weeks prior to the claimant's discharge, the employer's Office Manager received a call from a former employee that the claimant and the owner of an adjacent business had been stealing the employer's materials and sharing the money from the sales.

15. The employer began an investigation that entailed reviewing the video surveillance of its main office.

16. The employer reviewed the video surveillance of its shop area for about 33 days from May 25, 2012 through August 24, 2012.

17. The video surveillance indicates that the claimant reported to the employer's shop area between 6:30am and 6:42am. The claimant and his subordinates did not report to work at 6am as stated on the timesheets.

18. The claimant was aware that his subordinates did not report to work at 6am as the claimant stated on the timesheets.

19. The owner confronted the claimant about the theft of steel and time from the employer. At first the claimant denied that he engaged in the theft of steel and time. Later in the meeting, the claimant admitted to the employer that he did misstate the time on the timesheets.

20. The employer's salesman did not assign the claimant to work at 6am.

21. The claimant had the authority to authorize overtime work for his subordinates.

22. The employer discharged the claimant for falsification of timesheets.

23. The employer reported the theft of steel and time to the police. As of the date of the hearing, no charges have been filed against the claimant.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. For the reasons set forth below, we find no merit to the claimant's challenges to the Board's remand order, and we affirm the review examiner's legal conclusion that the claimant is disqualified, under G.L. c. 151A, § 25(e)(2).

The Board's de novo order.

In his appeal, the claimant requests that the review examiner's decision be vacated because the order for a rehearing[1] was improper and violated his due process rights. Specifically, the claimant argues the following: the Board failed to provide the claimant with an opportunity to be heard *before* issuing its remand order; the Board's order constituted factual findings without citation to the record or conducting its own hearing and, therefore, was in excess of its authority; and the original review examiner had no obligation to assist an unrepresented *employer*. We disagree.

The Board's statutory review authority stems from G.L. c. 151A, § 41, which provides in relevant part, as follows:

> (a) Unless such application for review is withdrawn, the board of review shall make a preliminary examination of the record of the hearing afforded by the commissioner, along with the findings of fact and the decision, and shall, in its discretion, grant or deny the application for review. . . .
>
> (b) If a review is granted, the board shall inquire whether the commissioner's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights. Before rendering its decision, the board may remand the case to the commissioner for taking of such additional evidence as the board deems necessary or may itself take evidence at a hearing. . . .

In response to the employer's application for review of the initial hearing, the Board reviewed the hearing record and determined that it was not free from error of law and that the error affected substantial rights. The Board concluded that the review examiner did not afford the employer a fair hearing, which is required by G.L. c. 151A, § 39(b) ("Section 39(b)"). Hearings held under Section 39(b), are conducted pursuant to the Informal/Fair Hearing Rules set forth at 801 CMR 1.02 *et seq.*[2] The Informal/Fair Hearing Rules impose specific duties upon the Presiding Officer of a hearing.[3] These duties are set forth in 801 CMR 1.02(10)(f), which provides as follows:

> The Presiding Officer shall have the duty to conduct a fair hearing to ensure that the rights of all parties are protected; to define issues; to receive and consider all relevant and reliable evidence, including examining witnesses and authorizing the

[1] The Board's *de novo* order (Exhibit 21) provides: "This action is necessary because during the hearing, the review examiner permitted counsel to interfere with the orderly conduct of the hearing, ask unduly repetitive questions, and assist his client's testimony. In doing so, the review examiner also failed to assist an unrepresented party in the framing of questions and presentation of evidence. This interfered with the employer's right to a fair, independent, and impartial decision from a review examiner who has a duty to assist unrepresented parties in presenting all relevant and reliable evidence; exclude irrelevant and/or unduly repetitious evidence; and maintain an orderly presentation of the evidence."

[2] *See* 801 CMR 1.02(2)(a).

[3] 801 CMR 1.02(2)(b) defines Presiding Officer as "the individual(s) authorized by law or designated by the Agency or DALA to conduct an Adjudicatory Proceeding." In the instant matter this would be both the review examiner who conducted the initial hearing as well as the review examiner who conducted the *de novo* hearing.

> Agency to pay for an independent medical examination; to exclude irrelevant or unduly repetitious evidence; to ensure an orderly presentation of the evidence and issues; to ensure a record is made of the proceedings; to reach a fair, independent and impartial decision based upon the issues and evidence presented at the hearing and in accordance with the law; and to reconvene the hearing with notice to the parties at any time prior to the decision being issued.

The Board's review of the initial hearing record, conducted pursuant to G.L. c. 151A, § 41, established that the review examiner failed to carry out several of the duties imposed by 801 CMR 1.02(10)(f). The review examiner's failure in this regard denied the employer a fair hearing. Consequently, the Board issued its *de novo* order and remanded the matter back to the DUA for a new hearing.[4]

We reject the claimant's assertion that the issuance of our *de novo* Order violated his due process rights. The fundamental requirements of due process are the opportunity to be heard at a meaningful time and in a meaningful manner. Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (citations omitted). The due process clause "guarantees no particular form of procedure; it protects substantial rights." National Labor Relations Board v. Mackay Radio & Telegraph Co., 304 U.S. 333, 351 (1938). Determining 'what process is due' requires the defining and weighing of competing interests stemming from the facts in each case." Lotto v. Commonwealth, 369 Mass. 775, 780 (1976), *quoting* Morrisey v. Brewer, 408 U.S. 471, 481 (1972). Substantial weight is to be given to the good faith judgment of the officials charged with administering social welfare programs that the procedures chosen assure fair consideration of the individuals' claims, particularly where the individual is assured a right to an evidentiary hearing, as well as subsequent judicial review, before denial of such claim becomes final. Matthews v. Eldridge, 424 U.S. 319, 349 (1976) (citations omitted). In the case before us, the Board's remand to the commissioner was not a final decision on the central question presented at the hearing below *i.e.*, whether the claimant was entitled to unemployment benefits. The claimant has had ample opportunity to be heard on his objections to the Board's order during the hearing before Review Examiner Etienne (which she considered and rejected), in this appeal to the Board, and if he chooses, on further appeal to the District Court, under G.L. c. 151A, § 42.

Second, nothing about the Board's order constituted findings of fact; it was a ruling of law. "Application of law to fact has long been entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463-464 (1979).

The Board's order for a new hearing fell within its discretionary authority to remand the case to the DUA for "taking of such additional evidence as the board deems necessary." G.L. c. 151A, § 41(b). The original review examiner's failure to control the evidence and ensure a fair hearing rendered it impossible for the Board to assess which of her findings and conclusions were arbitrary and, therefore, impossible to reach a decision on the central legal issue of the case. Under these circumstances, remanding the case for a *de novo* hearing was an appropriate remedy. *See* Town of Oxford v. Civil Service Commission, Massachusetts Superior Court, No. 051740B, 2007 WL 869237 (Jan. 2, 2007) (where redacting the findings and conclusions with no support

[4] We note that each of the grounds cited in the Board's *de novo* order is enumerated in 801 CMR 1.02(10)(f).

in the record left the fundamental legal question unanswered, the proper course of action was a *de novo* hearing).

Third, we find no merit to the claimant's assertion that Hunt v. Director of Division of Employment Security, 397 Mass. 46, 48 (1986), stands for the proposition that only unrepresented claimants are entitled to reasonable assistance from the review examiner. The review examiner, as the commissioner's authorized representative, must afford *all interested parties* a reasonably opportunity for a fair hearing. G.L. c. 151A, § 39(b). As discussed above, the Informal Fair Hearing Rules, promulgated pursuant to G.L. c. 30A, provide that the presiding officer at a hearing has a duty to ensure that the rights of *all parties* are protected. 801 CMR 1.02(10)(f)[5]. Since the employer was an unrepresented interested party at the original hearing, he was entitled to no less assistance than an unrepresented claimant. *See, e.g.,* Downey v. Unemployment Compensation Board of Review, 2014 WL 3888283 at 3 (Pa. Commw. Ct. 2014) (when conducting hearings, referee must offer reasonable assistance to a *pro se* litigant); Howard v. Select Senior Living, 2014 WL 2688319 at 4 (Minn. Ct. App. 2014) (significant procedural defect in unemployment law judge's failure to assist unrepresented party in securing a subpoena); Cooper v. Ohio Department of Job & Family Services, 2007 WL 110595 at 4 (Ohio Ct. App. 2002) (duty of hearing officer to assist all unrepresented parties).

Deliberate misconduct under G.L. c. 151A, § 25(e)(2).

G.L. c. 151A, § 25(e)(2), provides in pertinent part, as follows:

> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter . . . (e) For the 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 . . . .

The employer bears the burden to prove both that the misconduct occurred and that it was done deliberately and in wilful disregard of the employer's interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985); Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). At the heart of this case is whether or not the claimant deliberately falsified timecards such that he and several subordinates were paid an extra hour of overtime that they did not work. As for his own time, the claimant insisted that there was no misconduct — that he was working during this extra hour. With respect to the claimant's subordinates' timecards, the claimant insisted that he did not intend to make false entries; he believed them when they told him that they started at 6:00 a.m.

The examiner considered and weighed the parties' conflicting evidence, ultimately finding that neither the claimant nor the subordinates started work at 6:00 a.m., that the claimant knew it, and that the claimant admitted to the employer that he had misstated time during his discharge meeting. In doing so, she rejected testimony from the claimant and his supporting witnesses. Such assessments are within the scope of the fact finder's role; and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School

[5] As previously noted, unemployment hearings must adhere to the Informal Fair Hearing Rules. 801 CMR 1.02(2)(a).

Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by "substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627-628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

Based upon the record before us, we conclude that the examiner's findings are reasonable and supported by substantial evidence. The examiner heard consistent testimony from the employer's owner, salesman, truck driver, and three of the claimant's coworkers, who testified that the regular work day began at 7:00 a.m., and that no one regularly started work before that[6]. Corroborating this was videotape evidence (Exhibits 29 and 30), showing the claimant and his subordinates trickling into the shop entrance between 6:00 and 7:00 a.m. and not performing any work[7].

Finding of fact # 18 addresses the claimant's state of mind with respect to his subordinates' time. It provides that the claimant was aware that his subordinates did not report to work at 6:00 a.m., as he stated in the timecards. In making this finding, the examiner rejected the claimant's assertion that he simply recorded the hours that his subordinates told him. Her finding is supported by the claimant's admission to the employer that he misstated time (Finding of Fact # 19) and testimony from one of the claimant's subordinates, Mr. [A], that he never gave the claimant his hours or saw his timesheets, that the claimant got angry when the subordinate asked to see them, and that, although the subordinate knew he was being overpaid, he was told by the claimant not to communicate directly with the owner (Finding of Fact # 7). The latter point was corroborated by another witness.

In sum, the employer has sustained its burden to prove with substantial and credible evidence that the claimant deliberately falsified time records for himself and his subordinates in wilful disregard of the employer's interest. We, therefore, conclude as a matter of law that the claimant is disqualified, under G.L. c. 151A, § 25(e)(2).

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[6] Even if the credibility of one of the employer's witnesses, Mr. [B], is questionable because he changed his testimony from the initial hearing, there is plenty of other evidence in the record from which the examiner could have reached her findings.

[7] Exhibit 29 and 30 show one employee moving equipment around before 7:00 a.m., but his time is not in dispute. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending September 1, 2012, and for subsequent weeks, until such time as he has had eight weeks of work and in each of those weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 26, 2015

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

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