

0018 9387 49 (Dec. 29, 2016) – The claimant was in total unemployment while suspended without pay pending a disciplinary hearing, as work was not available with the employer. There is no indication that the claimant's two requests to continue the hearing were meant to delay the employer's decision regarding his employment status; rather, it appears the claimant was merely trying to properly prepare for his disciplinary hearing.

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Issue ID: 0018 9387 49

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 reverse.

The claimant was suspended from his position with the employer on April 8, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 10, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on September 10, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in total unemployment and, thus, was disqualified, under G.L. c. 151A, §§ 29(a) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record.

The issue on appeal is whether the review examiner's conclusion that the claimant was not in total unemployment under G.L. c. 151A, §§ 29(a) and 1(r), while out on suspension pending a hearing to determine his employment status, 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 works as a sergeant for the employer, a sheriff's department. The claimant began work for the employer in 1992.
2. On January 2, 2015, the claimant entered into a last chance agreement with the employer. The agreement states in part: "The Employee and the Union also agree that any future violation of Policy S-220 (Code of Conduct) within three (3) years (beginning February 15, 2015) involving either admission to sufficient facts or conviction of domestic abuse, violation of a restraining order, or any failure to comply with the terms of his supervised probation, will constitute just cause for his immediate termination."
3. On April 8, 2016, the claimant was arrested and charged with assault and battery of a minor.
4. The employer suspended the claimant with pay pending an investigation.
5. On May 27, 2016, the employer suspended the claimant without pay pending a hearing scheduled for June 6, 2016.
6. On June 6, 2016, the claimant and his union requested the hearing be continued to allow them additional time to prepare. The claimant's [sic] and his union also believed that there would soon be a disposition with regard to the assault and battery charge and that this may be beneficial to the claimant. Upon agreement from both sides, the hearing was continued to August 31, 2016.
7. Also on June 6, 2016, the claimant applied for unemployment benefits. He was determined to have a benefit year beginning June 5, 2016.
8. On August 10, 2016, the DUA sent the claimant a Notice of Disqualification within Section 29(a) and 1(r) of the Law. The claimant's appeal is from this Notice.
9. On August 30, 2016, the claimant requested that his hearing be continued further because there were new criminal charges against him. The employer agreed. There has not yet been a new date scheduled.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the findings of fact are supported by substantial and credible evidence; and (2) whether the original conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner's findings of fact. In adopting these findings, we deem them to be supported by substantial and credible evidence. However, we conclude that the findings support an award of benefits to the claimant.

In analyzing the claimant's eligibility for benefits, we look to G.L. c. 151A, § 29(a), which authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant 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.

The review examiner found that the claimant was suspended with pay on April 8, 2016, after he was arrested and charged with assault and battery of a minor. On May 27, 2016, the employer suspended the claimant without pay pending a disciplinary hearing scheduled for June 6, 2016, where the claimant's ongoing employment status would be determined. The employer granted the claimant's request for a continuance of the June 6th hearing, and the hearing was rescheduled for August 31, 2016. On August 30th, the employer agreed to a second continuance at the claimant's request. G.L. c. 151A, § 29(a), explicitly provides that, in order to be considered in total unemployment and be eligible for benefits, an individual must be “available for work.” During the hearing held on September 7, 2016, the employer argued that the claimant was voluntarily out of work, as his requests to continue the hearing had prevented the employer from making a decision regarding the claimant's continued employment. We disagree.

There is no indication in the record that the claimant's requests to continue his disciplinary hearing were a tactic to delay the employer's decision regarding his employment status going forward. Furthermore, absent contrary evidence, we infer that the employer's acquiescence to the claimant's postponement requests resulted from a belief on its part that the claimant's requests were reasonable under the circumstances. Since there is no indication in the record that the employer had work available for the claimant during the period at issue, or that the claimant requested continuances of the disciplinary hearing for reasons other than to properly prepare his defense, we cannot conclude that the claimant was voluntarily out of work. We, therefore, conclude that, during the time the claimant was suspended without pay, he was in total unemployment, under G.L. c. 151A, §§ 29(a) and 1(r), as he was available for work, but the employer did not have work for him.¹

¹ We note that the effect of the claimant's requests for continuances was that the employer's decision regarding his ongoing employment status was substantially delayed. If the record indicated that the claimant was engaging in conduct meant for the purpose of delaying or preventing the employer from making a decision — as opposed to trying to properly prepare for the disciplinary hearing — such conduct could be disqualifying under the unemployment statute.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 11, 2016, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 29, 2016



Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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.

SVL/rh