The claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest, where, after remand for subsidiary findings, the review examiner accepted the claimant's version of events, finding that the claimant did not yell or threaten or become insubordinate after his supervisor questioned his lesson plan in front of the client.

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Issue ID: 0015 6423 83

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Richard Conway, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. Benefits were granted on the ground that the claimant did not engage in a knowing policy violation or deliberate misconduct in wilful disregard of the employer's interests, pursuant to G.L. c. 151A, § 25(e)(2). After reviewing the entire record, we affirm the review examiner's decision.

The claimant had filed a claim for unemployment benefits, which was approved in a determination issued by the agency on March 31, 2015. The employer appealed to the DUA Hearings Department. Following a hearing on the merits, at which only the employer appeared, a review examiner reversed the agency's initial determination in a decision rendered on May 5, 2015. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On October 20, 2015, the District Court ordered the Board to remand the case to the review examiner to allow the claimant an opportunity to testify. Because the initial review examiner was longer employed by the agency, the Board remanded the case on November 19, 2015 for a *de novo* hearing before a new review examiner. On June 4, 2016, the review examiner issued his decision, awarding the claimant benefits. The employer filed a timely appeal with the Board. On November 8, 2016, after reviewing the entire record, the Board remanded the case to the review examiner seeking specific subsidiary findings based upon the existing record. On January 17, 2017, the review examiner, in response to the Board's remand order, conveyed his consolidated findings of fact to the Board.

The issue before the Board is whether the review examiner's conclusion that the claimant did not engage in a knowing violation of any rule or policy or commit deliberate misconduct in wilful disregard of the employer's interests is supported by substantial and credible evidence and is free from error of law, where the review examiner reasonably credited the claimant's testimony about the nature of his conduct during the events in question, which was not insubordinate or disrespectful.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments, which were issued following the *de novo* hearing and the Board's remand for subsidiary findings, are set forth below in their entirety:

1. The claimant began working full-time as a non-union Instructor for this employer's school for mentally challenged adults on 11/18/13.

2. English is a second language for the claimant. His primary language is a [c]reole, an amalgamation of English and an African dialect.

3. On 1/7/15, while the claimant was monitoring clients in his care, the program director asked the claimant to leave his clients and speak with her about the proper way to collect data on the clients. The claimant did not want to leave and upset his clients and explained this to her.

4. On 1/7/15, the claimant believed he behaved properly in putting his client's welfare first and not leaving the client to meet with the program director.

5. On 1/7/15, the program director issued the claimant a written warning for not creating daily data reports correctly and for refusing to meet with her when asked.

6. The claimant believed he was collecting data properly and explained this to the program director during the meeting at which the warning was issued. The claimant did not understand what the employer wanted him to do differently. The claimant repeatedly told the manager he did not understand what she was talking about.

7. The claimant asked for a translator to help him understand the employer's concerns. The manager informed him there was no translator.

8. The claimant did not sign the 1/7/15 warning and explained he would not sign a warning he did not understand.

9. A portion of the 1/7/15 written warning refers to a "standard of behavior" and notes it would be unacceptable to refuse a job assignment or a reasonable request of a supervisor; and that unprofessional, discourteous conduct is not allowed.

10. On 1/22/15, the claimant was in the classroom with a blind, autistic client. The supervisor visited the classroom. After briefly observing, the supervisor told the claimant he was not following the approved lesson plan for the client.

11. The claimant told the supervisor he was following the lesson plan. The supervisor raised his voice at the claimant.

12. The client became agitated due to the tense conversation and raised voice.

13. The claimant decided to go to the office to complain to upper management about the supervisor's raised tone in front of the client. Holding the client's hand, the claimant took the client with him to the office so as not to leave the client unattended. The supervisor followed the claimant's lead and chose to bring his concerns to the office also.

14. The claimant's and the supervisor's voices could be heard as they walked toward the office. Once in the foyer, the senior program director asked the claimant to lower his voice.

15. The senior program director saw the client was agitated and led him into another room.

16. The program director told the supervisor and the claimant they should take a few minutes' break and then meet with her in the conference room. The break temporarily ended the disagreement between the claimant and the supervisor.

17. In the conference room, the supervisor accused the claimant of not following the lesson plan and of not listening to the supervisor's corrections.

18. During the meeting, the claimant felt the program director was not listening to his concerns. At one point, the supervisor shook his head at something the claimant said and the claimant believed the supervisor was laughing at him. The claimant, feeling disrespected, chastised the supervisor for allegedly laughing.

19. The meeting was heated. Both the claimant and the supervisor were frustrated.

20. The claimant believed he behaved appropriately during this meeting. The claimant believed it was appropriate to make a complaint about the supervisor's behavior. The claimant was frustrated and repeatedly tried to make the program director listen to and understand his viewpoint. The claimant did not intend his actions or statements to be insubordinate or rude and did not believe they were.

21. The claimant did not threaten the supervisor during the meeting.

22. After the meeting, the program director told the senior program director about the meeting and alleged the claimant acted aggressively and insubordinately. The senior program director contacted human resources and was told to have the claimant report to the human resources office.

23. The senior program director offered the claimant a ride to the human resources office, which was in another building. The claimant accepted.

24. On 1/23/15, the employer suspended the claimant pending investigation.

25. On February 10, 2015, the senior human resources representative discharged the claimant for allegedly being insubordinate and threatening on 1/22/15, both in the classroom with the supervisor and later while in the hallway, foyer and conference room.

CREDIBILITY ACCESSMENT

The testimony of the claimant and the employer witnesses differed in many respects. For example, the program director testified the claimant rolled up his sleeves and in a threatening manner told the supervisor "If this were the streets, you wouldn't be talking to me like that." The employer discharged the claimant, in part, because he allegedly threatened the supervisor. However, in response to a threat which allegedly made the supervisor fear for his life (per the testimony of the program director); the employer did not call the police. Instead, the senior program director offered the claimant a ride and voluntarily got into a car alone with the claimant. These are not the actions one would expect of managers who believed the claimant was a threat. It is more likely that, in chastising the supervisor for allegedly laughing at him, the claimant objected to what he perceived as disrespectful and demeaning behavior. Since English is a second language for him, the phrasing the claimant used may have sounded odd to the managers. But by not calling the police and having another manager drive the claimant to the office alone, it shows the managers did not consider the claimant's words to be a real threat. This suggests the testimony of the employer witnesses was exaggerated or inaccurate.

There was another example of exaggerated testimony by the program director. The program director testified the claimant became "enraged" whenever a manager tried to supervise him. She initially suggested the claimant regularly became enraged at work. This testimony was not persuasive since the claimant's first warning for being loud or argumentative was on 1/7/15 - after he had been employed for 14 months. If the claimant regularly became enraged while working with a very vulnerable population, it would not make sense for the employer to ignore this and potentially place clients at risk. Even if the program director were only referring to the 1/7 and 1/22 incidents, enraged is a very strong word meaning to make extremely angry. The 1/7 written warning states the claimant's tone became "loud", but does not reference the claimant being infuriated.

The program director also spoke of the claimant being difficult to supervise and that he interpreted feedback personally. Events suggest there was, indeed, a communication problem between the claimant and his managers. The program director testified the claimant repeatedly said he did not understand, but she never considered this might be due to language difficulties. When the program director initially raised an issue with the claimant while he was with a client on 1/7, the result was not positive. Yet, on 1/22, the supervisor again chose to discuss the claimant's performance in front of a client rather than speaking privately to the claimant so that his attention and focus would not be divided.

Since the testimony of the employer witnesses that the claimant threatened the supervisor was not credible; and the testimony of the employer witnesses tended to be exaggerated; and the managers had difficulty communicating with the claimant, which difficulty was most likely due to English not being the claimant's first language; certain allegations by the employer are not credible:

- The claimant questioned why the supervisor criticized his activities with the client since the lesson plan had been agreed to by managers. He may have also said the supervisor was not listening to him. It is not clear the claimant stated at least once, in an angry manner, that the supervisor was not his boss and he (the claimant) did not have to listen to the supervisor.

- During the 1/7 incident, the claimant agreed he told the program director he could not leave his client to speak to her privately. But it is not clear his exact words were ""I refuse to leave and take a break, if you want to do something, do something!"

- The claimant testified the supervisor raised his voice in the classroom, not the claimant. This is accepted as credible because the claimant exhibited a mindfulness and awareness of his responsibility towards his clients. For example, on 1/7, he did not feel comfortable leaving his client. On 1/22, he took the client's hand and had the client accompany him as he left the room. The client on 1/22 was sensitive to anger and loud voices. It is reasonable it would have been ingrained within the claimant to not raise his voice in the classroom. For this same reason, the claimant's testimony that he decided to leave and the supervisor followed him out of the room is accepted.

  As the two walked down the hall, their voices may well have become raised above the normal speaking level that would be maintained in a classroom. The claimant was defending his actions and objecting to the supervisor's actions, but it has not been shown the claimant was "yelling" at the supervisor.

- The senior program director removed the client from the scene on 1/22 because the client was agitated. It is fair to surmise the client was affected by the disagreement between the claimant and the supervisor. But two individuals were involved in that disagreement and it is not clear the client was agitated due just to the claimant's actions. Nor has it been shown the claimant stated in a loud voice "If you want to do something, do it" to his supervisor at this point.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated 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 consolidated findings of fact

and deems them to be supported by substantial and credible evidence. As discussed more fully below, the consolidated findings of fact, which have been considerably expanded in response to the Board's remand order, now support the review examiner's initial conclusion that the claimant is eligible for benefits.

Because the claimant was discharged from his employment, his qualification for benefits is governed by G. L. c. 151A, § 25(e)(2), which provides in pertinent part:

> [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, 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 . . . .

In deciding whether the claimant's conduct is disqualifying under the above provision, it is the employer's burden to establish that the claimant actually engaged in the alleged conduct, that such conduct violated a reasonable expectation or uniformly enforced rule or policy, and that the conduct was done deliberately in wilful disregard of the employing unit's interest. A "critical issue in determining whether disqualification is warranted is the claimant's state of mind in performing the acts that cause his discharge." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979). To determine the employee's state of mind, we "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Id.

In this case, the record indicates that the employer maintained a written "standard of behavior" that prohibits "refus[ing] to perform a job assignment or reasonable request of a supervisor, or unprofessional discourteous conduct." The record is not clear, and the findings do not reflect, that the rule is "uniformly enforced," within the meaning of the statute. Further, given the inherently vague and therefore subjective nature of the term "unprofessional discourteous conduct," and the lack of clarifying examples that would clearly apply to the claimant's alleged behavior, we conclude that the knowing policy violation portion of statutory criteria does not apply.

The question, therefore, is whether the claimant engaged in deliberate misconduct in wilful disregard of the employer's interests. The first inquiry in this regard is whether the claimant actually engaged in the misconduct alleged by the employer. In this case, the employer's termination letter referred to two incidents as the basis for the claimant's termination: (1) his interaction with his supervisor in the classroom, and (2) his interaction with his supervisor and other managers after he left the classroom and while engaged in a meeting shortly thereafter to discuss the classroom incident. The review examiner's initial decision addressed only the first of these allegations. He accepted the claimant's version of what had occurred inside the classroom, *i.e.*, that it was the supervisor who had behaved unprofessionally in front of the client, rather than the claimant, because he found the claimant's testimony to have been "credible," whereas the supervisor (the only person other than the claimant and the client who were present in the

classroom) did not attend the hearing and the employer therefore offered only hearsay about what occurred. [1] We remanded for the review examiner to render findings about the employer's other allegations about the claimant's conduct, which occurred after the claimant, the supervisor, and the client had exited the classroom and became engaged with managerial personnel. As to these additional allegations, the employer had presented witnesses with first-hand testimony.

As the review examiner's response to the Board's remand order reflects, the claimant's version of all events diverged considerably from that of the employer's witnesses. The employer maintained that the claimant became loud and angry in the classroom, after his supervisor questioned whether he was following a lesson plan, and that the claimant left the classroom with the client in tow and was loudly complaining to the supervisor and to other managers they encountered about what he perceived as the supervisor's improper questioning of him in the classroom. The employer further alleged that the claimant refused to comply with several directives to lower his voice while in the hallways in the presence of other parties, including the client and other managers. According to the employer, one manager observed that the client was upset and removed him from the scene, while the other manager and the supervisor, after a break, met with the claimant in a conference room. In the conference room, according to the employer, the claimant remained agitated, angry, and loud, repeatedly telling the supervisor he was not the claimant's boss, and that claimant did not have to listen to him, and, at one point, rolling up his sleeves while telling the supervisor that "If this were the streets, you wouldn't be talking to me like that." The claimant testified, on the other hand, that, in the classroom, the supervisor had yelled at the claimant in front of the disabled adult client, upsetting the client, and that he removed the client from the classroom in order to calm the situation down. He denied yelling in the hallway or in the subsequent meeting, denied refusing to acknowledge the supervisor's authority or directives, and contended he was just trying to get the supervisor and managers to listen to his explanation of what had been occurring in the classroom.

In response to the Board's remand order, the review examiner rendered findings accepting the claimant's version of events. In sum, the review examiner did not find that the claimant engaged in the misconduct of which he was accused. In his credibility assessment, the review explained in detail, with references to the underlying record, why he viewed the employer's testimony to have been exaggerated and less believable than the claimant's. 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 Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). In this case, the review examiner's assessment is reasonably related to the underlying evidence, and we see no reason to disturb it.

Since the findings of fact indicate that the claimant did not engage in the alleged wrongdoing (insubordinate and unprofessional conduct), the employer has not met its burden to establish misconduct, let alone deliberate misconduct in wilful disregard of the employer's interests. We note that the review examiner appears to acknowledge that the discussion between the supervisor and the claimant in the classroom, as well as the subsequent discussion among the claimant, the

[1] The record reflects that the supervisor, who had testified in the original hearing in this matter, was no longer employed at the time of the *de novo* hearing.

supervisor and another manager, became heated, that both parties were frustrated, and that the claimant became agitated. To the extent these characterizations suggest that the claimant may have exceeded the standards of professional decorum, the findings also indicate such behavior on the part of the claimant was mitigated by his frustration in trying to explain himself in English, not his native language, to superiors who were themselves frustrated and heated at times. The findings reflect, however, based upon the claimant's testimony, that any such lack of decorum did not reach the level of being "threatening" or amount to overt insubordination.

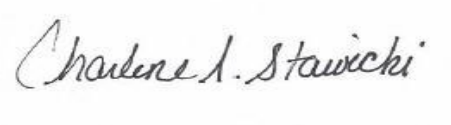
We, therefore, conclude as a matter of law that that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer's interests, or for a knowing violation of a uniformly enforced rule or policy, within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending January 17, 2015, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 31, 2017

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member



Charlene A. Stawicki, Esq.
Member

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.

JN/rh