Where a claimant knew that her employment with a state-funded public housing complex was conditioned upon her residence at the complex, her decision to move to a federally-funded housing facility and subsequent separation from employment is deemed to be initiated by the claimant, rather than the employer. Under G.L. c. 151A, § 25(e)(1), since the review examiner did not believe that the claimant's ongoing issues with anxiety and depression or her prior history of domestic violence were the real reasons for her decision to move, the separation is deemed to be voluntary and disqualifying.

Board of Review
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Issue ID: 0016 3623 20

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Elizabeth Cloutier, a review examiner of the Department of Unemployment Assistance (DUA), to deny benefits following the claimant's separation from employment on May 29, 2015. Benefits were denied on the ground that the claimant did not leave her job with good cause attributable to the employer, within the meaning of G.L. c. 151A, § 25(e)(1), nor did she separate involuntarily for urgent, compelling, and necessitous reasons, within the meaning of G.L. c. 151A, § 25(e), para. 3.

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on September 22, 2015. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on December 7, 2015. The claimant sought review by the Board, which denied the appeal on January 22, 2016, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On May 24, 2016, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the reasons for the claimant's separation from the employer, including whether the residency requirement (that the claimant must live at the employer's housing authority in order to stay in her job) was mandated by law. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and returned the case to the Board on October 24, 2016. The Board then reviewed the record of the remand hearing, as well as the documentation presented, and remanded the case again on November 2, 2016, this time for the review examiner to make subsidiary findings of fact from the record, which were necessary for the Board to address the concerns noted in the District Court's order. After rendering another set of consolidated findings of fact, the review examiner returned the case to the Board on January 18, 2017.

The issue before the Board is whether the review examiner's conclusion that the claimant's separation is disqualifying, pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant testified and argued that the separation was based on her need to address the effects of domestic violence and her health, but where the review examiner ultimately concluded that this was not the real reason for the claimant's decision to move out of the employer's housing complex.

After reviewing the entire record, including the review examiner's decision, the documentary evidence, the testimony from the hearings, the District Court's Order, and the consolidated findings of fact, we affirm the review examiner's decision to deny benefits.

Findings of Fact

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

1. The claimant was employed full time in an apprentice training program as a step up apartment prep person for the employer, a public housing facility, from 8-5-13 until she became separated from the employer on 5-29-15.

2. The claimant's position was conditional upon her residency in the public housing facility. This requirement was commonly known by all employees, including the claimant. All employees were residents at the facility. Each participant in the apprentice program was assigned a case manager to assist with any issues related to housing or employment. The purpose of the Step-Up Program was to help residents become self-sufficient.

3. No state or federal statute, regulation or other external directive imposed a condition requiring all employer employees to be residents.

4. The claimant's rent was deducted from her paycheck. The claimant paid a higher monthly rent than some of her coworkers, based upon the unit to which she was assigned.

5. The claimant resided in her unit with her daughter. The claimant had a restraining order against her daughter's father prohibiting his presence in the housing facility beginning in January of 2014, with modifications in February of 2014, July of 2014, and January of 2015.

6. On 7-29-14 the claimant wrote requesting a transfer in her housing unit location, stating "I am requesting you thoughtful consideration for me and my daughter request of transfer to the housing apartments in the back [Name A]. I currenly feel if given the opportunity to move with this transfer it can be a new beginning for me and my daughter. I need a diffest environment from these apartments in which they all look and feel the same that I don't even visit any friends. I want to prospest here. Coming from P.R. where, all my family lives. I have no one here to help me. My daughter is in the camp on

freedom way, her busstop is up there as well. We both feel happies over there is a happier environment than my current living situation. The depression I have at this moment has made me loose 40 lbs. My co-workers and friends have been trying to help me, but I need a new beginning. Pleases consider my daughter depression at loosing her father and having less contact with him…."

7. The claimant suffered from anxiety and depression. She provided documentation for ongoing treatment for these conditions since 2009 to the public housing facility in support of her request for a housing transfer. A January 2014 provider document identifies the major depressive disorder, and cites an escalating verbally abusive relationship with the claimant's child's father, warranting a restraining order. Provider documentation from May and July 2014 cites the claimant's anxiety and depression disorders with no reference to domestic violence.

8. The claimant was offered two different units in the State subsidized units which the claimant refused. One offered unit was approximately one block from her assigned unit. She refused this unit. The claimant was offered a unit at a different address which would have required her to have a car. The claimant refused this unit. The claimant wanted to move from her unit in "the front" to a unit in "the back". The claimant wanted to move to a Federally subsidized unit where there were different rules, including calculation of rent.

9. There was no substantial difference in safety between the front and back units. The claimant did not make complaint to the employer housing facility or to the police about any conditions at the housing facility.

10. In the Spring of 2015 the claimant had the restraining order against her child's father dropped. She asked the Court to terminate the abuse prevention order because her daughter did not want to be picked up at the police station and the claimant was no longer concerned about her daughter's father. The claimant's request was approved after judicial review on 4-27-15 and the Abuse Prevention Order was terminated.

11. The claimant applied for subsidized housing in 2011 at an [sic] HUD subsidized address at a different location where she would need to have a car. After being on the wait list for several years, a unit became available to her as of 6-1-15. The claimant accepted this housing.

12. On 5-19-15 the claimant notified the employer that she would be moving out of the public housing facility on 5-31-15. She acknowledged that her participation in the apprentice employment with the employer would end on her move. She requested that the employer allow her to complete the program employment despite her lack of residence in the facility because she only had 3 months remaining in the program and she had transportation from her new housing to the program. Her letter did not reference any domestic violence issues or other reason for leaving.

13. On 5-20-15 the employer denied the claimant's request to continue in her employment after her move. In its written response the employer clarified, "You are voluntarily giving up your apartment knowing that it will result in loss in your employment as an apprentice. Therefore, your employment will end following termination of your lease."

14. The claimant was aware that when she moved out of the public housing facility she would be separated from the employer.

15. The claimant moved out of the public housing facility resulting in her separation from this employer on 5-29-15.

16. The claimant did not keep her new location a secret from her child's father.

Credibility Assessment:

The residency requirement was known by the claimant:

The employer asserted that the residency requirement for the claimant's position was common knowledge amongst all those employed by the employer. The claimant responded to agency questionnaires with the assertion that she learned of the residency requirement after she had given her notice of leaving (Ex 2, 5). However, her notice letter dated 5-19-15 and date stamped 5-20-15 (Ex 21) references her understanding of the residency requirement and asks that the requirement be waived to enable her to complete the program after her move. This document refutes her testimony that her giving the employer notice that she would be moving prompted them to inform her for the first time of the residency notice, as she requests waiver of the requirement in her notice prior to the employer's response.

The claimant's testimony that she was not aware of the residency requirement was found to be less credible than that of the employer based upon the circumstances. The work was offered to the claimant as a resident at the complex. The work took place at the employer housing complex. The coworkers of the claimant were all residents of the housing complex. The claimant's rent for her housing in the complex was deducted from her paycheck from the housing employer. Based upon the employer's assertion that the Apprentice employment was only offered to residents, the claimant would have responded to a position posting directed to residents of the program employer's facility. Documentation submitted by the employer identifies the claimant's position as part of a Step-Up Program to help "residents become self-sufficient". According to the submitted documentation (Remand Exhibit 19), the program tied pay increase eligibility to other Self-Sufficiency requirements of the Step-Up Program for residents. An assigned case manager helped participants understand the Program. It is extremely unlikely that the claimant was ignorant of the residency requirement given the

strong and evident connection of the position to the resident community. Lastly, the claimant's notice to the employer of her impending move supports her knowledge that her change of residence would have an effect on her employment.

The claimant dropped the restraining order because her daughter did not want to be picked up at the police station and the claimant was no longer concerned about her daughter's father.

On 4-27-15 the claimant moved that the Court terminate the abuse prevention order issued pursuant to G.L. c. 209A. In support of this request the claimant stated, under penalty of perjury, "I would like to remove the restraining order off of (the child's father) because he would like to pick up my daughter and see her and me and him are in good terms. And I am having a problem where I live because of the order." The claimant's request was approved after judicial review on 4-27-15 and the Abuse Prevention Order was terminated.

Testimony of the claimant did not describe "a problem where she lived" caused by the order. The claimant testified that she had the Order removed because her daughter did not want to be picked up at the police station as required by the terminated Order. The claimant's testimony regarding her daughter's expressed concern is not challenged. The agreement of a parent to remove a Protective Order based upon the complaint of a child if there still was a concern warranting the Order is the salient consideration here. The claimant was savvy enough to seek the protective assistance of the Court for the original Order and subsequent modifications. It is not credible that the claimant would have the Protective Order terminated merely to appease a child if a safety concern still existed. The claimant's agreement to her child's request, considered with her attested statement that "me and him are in good terms" supports that the circumstances of the domestic abuse situation were not a current concern.

Additionally, in her response to the agency on 9-21-15 (Exhibit 5), the claimant references the Protective Order, saying, "I had a restriction order against my ex-boyfriend which was lifted because he was not harassing me anymore. Both my daughter and his (sic) father had a good relationship and my daughter demanded to see his father. In the process he started coming to my apartment to see and pick up his daughter. When his girlfriend found out that this was going on, she started complaining to the Housing authorities that he was living with me which was not true. He was coming to my apartment to visit his daughter and pick her up but he was not staying with me. Her complains let them to believe her and they were investigating and trying to evict me because of her false accusations." It is not known if this is the "problem where she lived" caused by the Order, which was not clarified, but the response clearly illustrates that the conditions warranting the Protective Order were no longer a concern.

The claimant wanted to move to a federally subsidized unit where there were different rules, including calculation of rent.

The claimant specifically requested a transfer to the housing apartments *in the back* [of] [Name A]. The claimant was offered two different units in the State subsidized units which the claimant refused. The claimant wanted to move from her unit in "the front" to a unit in "the back".

Testimony at the Remand Hearing established that the "front" section of the housing complex was the state section ([Name B]) and the back was the federal section ([Name C]), to which the claimant wanted to move. The Step up office was located in between the state and federal sections. The claimant testified that she would have accepted a unit location in the back because she would have felt more secure. Asked about the difference in safety measures in place in the front versus the back, the claimant testified that safety measures were the same in both the front and back. The claimant testified that she "did not make complaint to the housing facility or to the police about any conditions at the housing facility." (Fact 9)

Remand Hearing testimony of the employer's general counsel describes that the main difference between the "front" and the "back" is their funding. The "front" is state funded by DHCD (Department of Housing and Community Development). The "back" is federally funded by HUD (Housing and Urban Development). The rules differed based on the funding source, including the rent calculation.

The housing authority offered the claimant alternate housing about a block away from her unit. This offered unit was in the "front" section. The claimant refused this unit. Under cross examination, the claimant agreed that the only transfer site she desired was in "[Name C]" (the federal section). The housing authority offered the claimant alternate housing at "[Name D]," a different location, also part of the housing authority. The claimant declined this because she did not have a vehicle and her daughter was in after school care at the [Name C]/[Name B] location. The claimant refused these offers of alternate housing in state subsidized locations during the period of time the Protective Order was in effect. After the Order was terminated and the claimant no longer had concerns about the child's father, the claimant's name came up for subsidized housing at another location. The claimant ultimately accepted HUD subsidized housing at "[Name E]" for which she had been on a wait list since 2011. This housing was 15 minutes from her housing authority location. She was able to obtain a vehicle to enable her to move there.

The claimant did not keep her new location a secret from her child's father. She was aware that the daughter informed her father of their new location. It is concluded that at the time the claimant accepted the housing, it was not for reasons of domestic violence.

> The claimant's request for waiver made no assertion of domestic violence or any necessitous reason for her moving.
>
> At the time the claimant accepted the HUD unit and left the state unit, causing her separation, the Protective Order had been terminated at her request, and she and the child's father were on good terms, to the degree that he was at her unit to the extent that an investigation was prompted to determine if he was living there. The timing of the claimant's move was consistent with the offer of HUD subsidized housing, at a time that no situation of domestic violence is evidenced.

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 findings lead to a conclusion that the claimant is disqualified.

At the outset, we note the Board's role and standard of review at this stage of the administrative process. The "inquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited . . . to determining whether the review examiner's findings are supported by substantial evidence." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979). To satisfy the substantial evidence requirement, the review examiner's findings, conclusion, and decision "need not be based upon the 'clear weight' of the evidence or even a preponderance of the evidence, but rather only upon reasonable evidence, that is, 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" Gupta v. Deputy Dir. of Department of Employment and Training, 62 Mass. App. Ct. 579, 582 (2004). Since the Board did not hold a hearing in this matter, we cannot make findings of fact. We also cannot set aside the review examiner's credibility determination, unless it is unreasonable or unsupported by the totality of the evidence before her. In unemployment proceedings, "[t]he responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985). In other words, even if the Board could have viewed the circumstances surrounding the claimant's separation differently from the review examiner, and even if the Board would have made findings of fact which were different from the review examiner's findings, we cannot substitute our judgment for the review examiner's view of the evidence, if her view is reasonable.

With these principles in mind, we turn now to the review examiner's decision, the evidence, and the consolidated findings of fact. The underlying circumstances of the separation are relatively straightforward. The claimant lived and worked at the employer's state-sponsored public housing facility. In the spring of 2015, she was informed that a unit became available for her at a federally-funded housing facility. She decided to move to the federally-funded housing facility. When she moved, her position with the employer ended. At that time, the employer considered the claimant to have quit, because, per its policy, residency at the housing facility was a pre-

condition to working for the housing facility. Without living at the facility, she could no longer work there. The claimant argued that she had been unaware of that requirement but, in any event, separated either involuntarily due to her health or due to the effects of domestic violence. The review examiner concluded that the claimant's separation is governed by G.L. c. 151A, § 25(e)(1), which applies to voluntary separations or quits.

Following the second remand for additional findings of fact, the review examiner has now found that the claimant was aware that her employment was conditioned on her residency at the employer's housing facility. Consolidated Finding of Fact # 2. Despite the claimant's denials during the hearing, and the evidence and testimony that such a requirement was not explicitly written in any document the claimant received, the review examiner considered all of the circumstances surrounding the claimant's living situation and employment to conclude that she knew about the residency requirement. We conclude that her credibility assessment and findings about this issue are supported. The review examiner's findings regarding the claimant's knowledge of the residency requirement is logical and understandable, in light of the duties of the job itself, the deduction of the rent from her paycheck, and the fact that the only employees in the claimant's position were residents. In her credibility assessment, the review examiner concluded that "[i]t is extremely unlikely that the claimant was ignorant of the residency requirement given the strong and evident connection of the position to the resident community." Such a conclusion is supported by the record.

Since the claimant's continued employment was conditioned upon her residency in the program, we conclude, as did the review examiner, that the claimant's eligibility for benefits is properly determined according to the "quit" provisions of G.L. c. 151A, § 25(e). In the claimant's appeal to the Board and in the DUA-drafted Assented-to Motion to Remand, there was some suggestion that the claimant may have been discharged when the employer learned that she was moving out of its housing complex. This argument is based on the idea that the employer could have waived its residency requirement: since the residency policy was employer-imposed, and since the employer decided not to waive it, the separation could be viewed as initiated by the employer.[1] We disagree. An individual who sets in motion the circumstances which eventually lead to her unemployment, with full knowledge that her actions will do so, is not "discharged" simply because the employer could have but did not allow her to remain at or return to work. *See* Abramowitz v. Dir. of Division of Employment Security, 390 Mass. 168 (1983) (after claimant voluntarily resigned and employer accepted, subsequent letters to employer to clarify that claimant did not intend to resign did not render resignation ineffective); LeBeau v. Comm'r of Department of Employment and Training, 422 Mass. 533 (1996) (noting majority rule that once a resignation is proffered, change of heart does not render resignation ineffective).

Generally, the purpose of the unemployment law is to provide compensation for those who are separated from their employment through no fault of their own. "[T]he inquiry is not whether the employee would have preferred to work rather than become unemployed, but whether the employee brought his unemployment on himself." Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002, 1003 (1985). Here, the claimant clearly wanted to remain employed,

[1] No state or federal law required the employer to condition employment upon residence. Consolidated Finding of Fact # 3.

even after she moved to the federally-funded housing facility.[2] However, she knew the residency requirement. She knew that, if she left the employer's housing facility, her job would end. She did so anyway, thus bringing her unemployment on herself. The fact that the employer might have been able to waive the rules but chose not to do so does not make the employer responsible for initiating the separation.

Because we concur with the review examiner that the claimant quit her position, we also analyze her eligibility for benefits under G.L. c. 151A, § 25(e)(1), which 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . .

Since the claimant has asserted that her reasons for moving from the employer's housing facility were due to health reasons and/or the effects of domestic violence, G.L. c. 151A, § 25(e), paras. 2 and 3 are also relevant. They provide as follows:

> No disqualification shall be imposed if the individual establishes to the satisfaction of the commissioner that the reason for the individual's discharge was due to circumstances resulting from domestic violence, including the individual's need to address the physical, psychological and legal effects of domestic violence.
>
> An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling, and necessitous nature as to make his separation involuntary.

Under all three portions of the law cited above, the claimant has the burden to show that she is eligible to receive unemployment benefits. The review examiner concluded that the claimant had not carried her burden. As noted above, this case was remanded to the review examiner several times for a full consideration of the circumstances surrounding the claimant's separation.

The claimant has argued that her separation should be deemed to be involuntary due to her personal circumstances. Specifically, she was suffering from anxiety and depression. Moreover, she needed to move to address the effects of domestic violence. As to her health conditions, the review examiner made findings regarding her history of depression and anxiety. The documentation regarding her health includes letters written in January, May, and July of 2014, requesting a housing transfer for the claimant. *See* Exhibits ## 15, 17, and 19. The review examiner, however, did not find or conclude that the claimant needed to leave the employer's housing complex due to her health issues. We concur. The record before us establishes that, in

[2] *See* Consolidated Finding of Fact # 15 (referencing e-mail written by claimant requesting that she be allowed to continue in the "program employment").

response to the medical letters requesting a housing transfer for the claimant, the employer twice offered to transfer her to two different units. The claimant refused both offers. The claimant's reasons for refusing these transfers were her lack of a car and a desire to obtain a federally subsidized unit within the employer's facility. Thus, the claimant appears to have put her transportation issues and desire to obtain a federally subsidized unit ahead of her health concerns. We also note in this regard that, although the 2014 medical documentation provided by the claimant indicates that she had some health issues, she did not move until May of 2015, when a federally-funded housing option became available. It does not appear from the record, therefore, that the health issues were the reason for the move, given that she had been dealing with and coping with her medical situation for over a year. We also observe that, although the claimant had ongoing treatment for her medical issues, there are no findings suggesting that she had an immediate health crisis or breakdown in the spring of 2015 that forced her to leave the employer's housing complex at that time. Simply because the health problems existed does not necessarily mean that the claimant's separation is attributable to them or that the decision to move when she did was involuntary.[3]

The issue of the domestic violence is more compelling. The claimant offered into the record several legal documents showing that she had a restraining order against the father of her child. The restraining order was in effect until April of 2015, shortly before the claimant moved out of the employer's housing complex. The question then remains: did the claimant decide to move when she did in order to deal with the effects of domestic violence or the ongoing threat of domestic violence? The review examiner clearly concluded that the domestic violence was no longer a concern in May of 2015, when the claimant notified the employer that she was going to move out of its housing complex. The credibility assessment gives understandable reasons for questioning whether the claimant actually decided to move because of the domestic violence. The review examiner cites to the claimant's testimony, her responses to the DUA, and the final request to vacate the protective order (Remand Exhibit # 14) to conclude that, on the whole, the situation with the father of her child was not a problem in May of 2015. The father continued to go to the claimant's home (Exhibit # 5), the father knew where the new housing was (Consolidated Finding of Fact # 16), and the claimant decided not have the courts and/or police involved in the visitation with the father (Consolidated Finding of Fact # 10). This evidence does not support a conclusion that the claimant was still dealing with the potentially harmful effects of the domestic violence.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits is supported by the record and free from error of law, because the claimant did not carry her burden to show that she separated from her job voluntarily for good cause attributable to the employer or involuntarily for urgent, compelling, and necessitous reasons.[4]

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[3] Although the claimant did mention her health issues in her request for a transfer in July of 2014, she also indicated that she wanted to move to get "a new beginning" for herself and her daughter. She suggested she wanted a different environment "from these apartments in which they all look and feel the same." This dissatisfaction with the look of the public housing would not constitute an urgent, compelling, and necessitous reason for moving when she did.

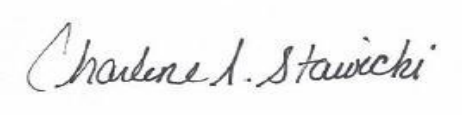
[4] We note here that, even if the Board were to conclude that G.L. c. 151A, § 25(e)(2), was applicable in this matter, the findings suggest that the claimant knowingly violated a policy of the employer and could be subject to disqualification. The claimant knew that she needed to live at the housing authority to work there, and she knew that her job would end as a result of her move. *See* Consolidated Findings of Fact ## 2 and 14. The policy appears

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning May 24, 2015, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 10, 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.

SF/rh

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to have been reasonable, since the program the claimant worked in, the Step-Up program, was specifically tied to work at the housing complex and in furtherance of the goal of making the program participants more self-sufficient. None of the findings suggest that the residency requirement was not uniformly enforced or that it applied only to the claimant. Moreover, since the review examiner has not found that the separation was due to domestic violence or the claimant's health issues, it does not appear that the claimant's state of mind in May of 2015, was anything other than "knowing" or intentional.