

**Employer did not establish that the claimant police officer actually engaged in the alleged misconduct of slapping a person under arrest. Claimant's direct testimony was credible for reasons explained by the review examiner. Employer's evidence was entirely in the form of hearsay that was not substantially reliable for reasons explained by the review examiner.**

**Board of Review  
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**Issue ID: 0018 4899 50**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The employer appeals a decision by Meghan Orio-Dunne, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and [B]firm.

The claimant was discharged from his position with the employer on March 28, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 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 overturned the agency's initial determination and awarded benefits in a decision rendered on August 13, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, was not disqualified, under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to provide a legally adequate credibility assessment and to render subsidiary findings of fact as appropriate. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the employer failed to meet its burden of proving that the claimant had actually engaged in the alleged misconduct — striking a disabled student on the back of the head after he was subdued during an arrest — is supported by substantial and credible evidence and is free from error of law.

### **Findings of Fact**

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

1. The claimant worked for the employer, a municipality, as a full time police officer from December, 2005, until March 28, 2016.
2. The employer maintains a Use of Force policy for the purpose of ensuring that employees use only the force necessary to achieve their specific goal.
3. Violation of the Use of Force policy results in disciplinary action from written warning to termination depending on the circumstances of the violation.
4. The employer maintains a policy regarding Arrest Procedures Arrests in General for the purpose of allowing police officers to use their discretion and prevent unwarranted arrests.
5. Violation of the Arrest Procedures Arrests in General policy results in disciplinary action from verbal warning to termination depending on the circumstances of the violation.
6. The employer maintains a policy regarding Conduct Unbecoming an Officer for the purpose of assuring that police officers refrain from behavior which reflects negatively on the employer.
7. Violation of the Conduct Unbecoming an Officer policy results in disciplinary action from verbal warning to termination depending on the circumstances of the violation.
8. The employer maintains a policy regarding Neglect of Duty to ensure that officers are attentive to their job duties and adhere to the employer's procedures.
9. Violation of the Neglect of Duty policy results in disciplinary action from verbal warning to termination depending on the circumstances of the violation.
10. The employer maintains a policy regarding Courtesy for the purpose of ensuring that officers demonstrate patience in all circumstances.
11. Violation of the Courtesy policy results in disciplinary action from verbal warning to termination depending on the circumstances of the violation.
12. The employer maintains a Professional Image policy for the purpose of preventing officers from acting in any manner inconsistent with the image of a police officer.

13. Violation of the Professional Image policy results in disciplinary action from verbal warning to termination depending on the circumstances of the violation.
14. The employer maintains a policy regarding Policies & Procedures Compliance for the purpose of ensuring that officers comply with the employer's policy and procedure manual.
15. Violation of the Policies & Procedures Compliance policy results in disciplinary action from verbal warning to termination depending on the circumstances of the violation.
16. The claimant signed for receipt of the manual containing the employer's policies on October 2, 2009.
17. On August 27, 2015, the claimant responded to a report of an unruly student destroying furniture at a local school for students with various special needs.
18. The claimant arrived at the school at the same time as his partner, Officer [A].
19. Upon arriving at the school, the claimant encountered numerous staff members and clients outdoors and was directed by those individuals to the front door of the facility's main building.
20. The unlocked main door leads into a foyer approximately 6 feet long. At the far end of the foyer is a locked door leading into the facility. The locked door contains a Plexiglas-type window.
21. The claimant entered the main door with his partner and observed Student J in the alcove yelling and attempting to break through the locked door.
22. The student was physically larger than both the claimant and his partner, at approximately 6 feet tall and weighing 250 lbs.
23. The officers instructed the student to get to the ground; however, the individual did not comply.
24. Officer [A] activated her Taser and the individual slid to a seated position.
25. The officers instructed the student to lie on his stomach.
26. The individual was noncompliant with the officers' orders.
27. The claimant utilized a wristlock technique and a "distraction technique", striking the student in the ribs with his knee, to move the student onto his stomach.

28. Once the student was lying down, the claimant placed his knee on the individual's back.
29. Due to the student's large stature, the claimant was unable to maneuver both of the individual's arms behind his body.
30. While the claimant remained on the student's right side, Officer [A] moved to the student's left side and, together, they moved both of the student's arms behind his body and placed him in handcuffs.
31. Only the claimant, his partner, and the student were present in the foyer between the time the officers entered the building and the time they were prepared to lead the student outside.
32. At that time, school employee [B] opened the door to assist in the student's removal from the building.
33. An unknown number of school employees, including [C], were located on the opposite side of the locked interior door during that same period of time.
34. The claimant and his partner lifted the student, who was either unable or unwilling to stand, to an upright position by gripping his wrists and elbows.
35. The officers led the student outside, at which time the student tripped.
36. The claimant returned to the main building to obtain documentation while the student was evaluated by the school's nursing staff.
37. When the claimant returned from the building, the student was placed in Officer [A]'s vehicle.
38. The school utilizes surveillance cameras throughout its facility.
39. The claimant was aware that his interaction with the student was potentially within view of the facility's cameras.
40. Officer [A] was present for the entirety of the claimant's interaction with the student.
41. The claimant utilized the methods he felt were necessary to take the student into custody.
42. The claimant did not strike the student in the head during their interaction.
43. On approximately September 3, 2015, the employer was notified by the State Police that a complaint regarding the claimant's actions at the school on

August 27, 2015 had been filed with the Disabled Persons Protection Commission.

44. The complaint was filed by a school employee who alleged having seen the claimant “backhand” the student in the head while he was in handcuffs and lying on his stomach.
45. The school employee had been located on the opposite side of the locked interior door during the claimant’s interaction with the student in the alcove on August 27, 2015.
46. The claimant was allowed to continue work while the employer awaited a response to its request for information from the State Police.
47. On September 11, 2016, the claimant was placed on paid administrative leave pending an investigation by the employer.
48. The subject of the employer’s investigation was whether the claimant had violated its policies on August 27, 2015.
49. Between September 11, 2015, and March 28, 2016, the employer interviewed the claimant, Officer [A], and employees of the school.
50. On September 30, 2015, the claimant was interviewed by the State Police. He stated during the interview that he did not recall whether or not he had struck the student.
51. School employees [C], [D], [A], [B], [E], [F], and [G] were also interviewed by the State Police.
52. On March 28, 2016, the town’s Board of Selectman voted by majority to terminate the claimant’s employment.
53. The outcome of the State Police investigation had no bearing on the employer’s determination.
54. On March 28, 2016, the claimant was discharged for allegedly violating the employer’s policies regarding Use of Force, Arrest Procedures Arrests in General, Conduct Unbecoming an Officer, Neglect of Duty, Courtesy, Professional Image, and Policies & Procedures Compliance by striking an individual after placing him in handcuffs on August 27, 2015.

NOTE:

The claimant was the only individual present at the time of his August 27, 2015 interaction with student J who appeared at the hearing.

In his September 30, 2015, interview with State Police, the claimant stated that he did not recall one way or another whether he had struck J. During the hearing the claimant could not clearly explain why he responded as he did on September 30, 2015, but indicated that he was confident he had not hit J in the head as asserted. The claimant was aware that his activity on the date in question may have been subject to recording by the school's surveillance cameras, supporting the claimant's statement that he did not engage in the activity alleged. The claimant provided detailed information regarding his actions and the actions of his partner from the time of their arrival until the time J was removed from the school building, and his testimony was consistent throughout the hearing. The claimant's direct testimony is deemed credible.

Both parties presented hearsay evidence, which will be described and the credibility of which will be discussed below.

An affidavit signed by the claimant's partner, Officer [A], (Ex. 19) was presented at the hearing. The July 12, 2016, affidavit states that [A] was the joint arresting officer on August 27, 2016 and that she did not leave J's side at any time while the officers were at the facility. [A] stated that she did not see the claimant touch or hit J in any inappropriate manner, and that she did not see the claimant hit J on the back of the head as alleged.

Transcripts of [C]'s interviews with the town (Ex. 7) and State Police (Ex. 17) were also presented. In both interviews, [C] indicated that she was separated from the officers and J by a partially broken, windowed door while J was taken into custody, and that 3 other staff members were present.

In her interview with the town, [C] stated that shortly following the officers' arrival, Officer [A] "started to taze" J. [C] reported that the officers then grabbed J and got him "down on his knees" before he was ultimately moved to his stomach and handcuffed. She stated that, while J was lying face down in handcuffs, the claimant backhanded J in the back of his head. She described what she perceived as a non-aggressive "slap" which did not appear to be an attempt to hurt the student. When interviewed by the State Police on October 21, 2015 [C] reported that, when Officer [A] displayed her Taser, J "got down" and "he laid there". She stated that while J was handcuffed and on the ground, the claimant smacked him on the back of the head. She described the contact as a flick and stated that she did not believe the claimant intended to hurt J.

[C] identified the 3 additional staff members present at the time of the incident as [B], [F], and [G]. Documentation of each individual's interview by State Police was introduced in the form of CDs. In his interview (Ex. 27), [G] reported that the claimant hit J "pretty good". [G] was not present in the foyer during the officers' interaction with J. It is uncertain where he was located and whether he was able to view the interior of the foyer clearly enough to observe

the event described. In [F]'s interview (Ex. 25) he reported that no one struck J. It is unclear where [F] was located during the officers' interaction with Student J. [B] was the only individual to enter the foyer with the officers and student J, as he assisted with opening the door when J was removed from the building. It is unclear where he was located during the remainder of the claimant's interaction with J. In his interview with the State Police (Ex. 23), [B] stated that both officers were abrasive but he did not see either strike J.

CD documentation of State Police interviews with 3 additional staff members were entered as Exhibits 21, 22, and 24. It is unknown where these parties were located when Student J was taken into custody. None of the 3 individuals reported seeing either police officer strike J.

The interview transcripts and CD recordings of school staff are of limited value without the ability to question the individuals interviewed. Without questioning of the witnesses to the alleged incident, particularly regarding their direct observations and their locations at the time of the claimant's interaction with J, the credibility of this evidence cannot be established. The 3 accounts of individuals having observed the claimant strike student J (including 2 statements by the same employee) are inconsistent, calling the credibility of these hearsay statements further into question.

In weighing the totality of the testimony and evidence presented, it cannot be concluded by this examiner that the employer met its burden by substantial and credible evidence that the claimant engaged in the conduct alleged.

### 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, those findings support the review examiner's conclusion that the claimant is eligible for benefits.

Since 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, 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, 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 foregoing provision, it is the employer's burden to establish that the claimant was discharged for disqualifying behavior. Cantres v. Dir. of Employment Security, 396 Mass. 226, 231 (1985). The first thing the employer must prove is that the claimant actually engaged in the misconduct of which he has been accused.

In this case, the employer contends that, after subduing and arresting an agitated 20-year old student at a residential school for the disabled, the claimant police officer delivered a gratuitous back-handed slap to the back of the student's head, which the town believes violated the employer's rules and expectations about professional conduct. The review examiner rendered numerous and detailed findings about what occurred during the incident on August 27, 2015. To summarize, the claimant and his partner were called to a scene at the residential facility, where a large autistic student with a history of disruptive behavior had become agitated and violent toward school property while he tried to force entry into a school building through a locked door. The student was not immediately compliant, but the officers were able to subdue him when the claimant's partner activated her Taser (*i.e.*, turned it on and pointed it, but did not deploy) and the claimant engaged in distraction techniques to persuade the student to lie prone. The claimant and his partner then maneuvered the claimant's arms from under his body, with some difficulty because of his size, and handcuffed him behind his back.

School employee [C] and some other school employees were behind the door the student was attempting to enter. They were able to observe his behavior and the arrest at least partially through the door's plexiglass window, which the student had broken. Shortly after the incident, [C] reported that, just after the student was handcuffed, the claimant "smacked" or "flicked" the student on the back of his head with the back of the claimant's hand, although not in a manner designed to hurt the student. Over the course of the next several months, the employer investigated the report by interviewing the claimant and his partner, as well [C] and another employee of the school. The State Police also conducted an investigation.

To meet its burden of proof in this case, the employer called two witnesses, the Town Administrator and the Police Chief, neither of whom were present at the incident. The Administrator had not personally interviewed any witnesses, but he had been present at the claimant's termination hearing before the Board of Selectmen, where, he testified, [C] had described the incident as "a flick" to the back of head while the student was handcuffed and face down. The Police Chief testified about his interviews with four individuals, *i.e.*, the claimant, the claimant's partner, [C], and another staff member at the school, all of whom were present at the time of the incident. [C] told the Chief that the student had been on the ground handcuffed when the claimant backhanded him on the back of the head. The other school employee and the claimant's partner both told the Chief that the claimant had not struck the student. On advice of counsel, the claimant had declined to answer the Chief's questions. The employer provided transcripts of the Police Department's interview with [C] (Exhibit # 7) and the State Police interview with [C] (Exhibit # 17), as well as a CD of the State Police Interview with [C] (Exhibit # 26). The employer also submitted a CD of the State Police interview with another school employee who was present during the incident, SF, who stated that he saw one of the officers "hit [the student] on the back of the head with the back of the hand. . . . Smacked him pretty good." Finally, the employer offered testimony, which the claimant confirmed at the instant



hearing, that he had been inconsistent in his statements about the incident: he had initially told the State Police that he could not remember whether or not he struck the student, and, at the instant hearing, he testified that he was certain that he had not done so.

The claimant was the only witness to the incident itself who testified at the instant hearing. He acknowledged that he had at first told the State Police that he could not recall one way or the other whether he struck the student. At the instant hearing, he testified consistently during questioning by the review examiner, his own attorney, and the employer's attorney, that, having gone over the incident repeatedly in the intervening months, he is certain that he did not do it, and that he would have remember doing it, if he had. The claimant also offered hearsay evidence, some of it multi-layered, supporting his version of events. His partner has given several consistent statements clearly denying that the claimant engaged in the alleged conduct, *i.e.*, her interviews with the State Police (recorded on CD, Exhibit # 20) and with the Chief as well as a sworn affidavit prepared for the instant hearing (Exhibit # 19), in which she stated that she was present during the entire incident alongside the claimant, that the claimant did not strike the student, and that she (the partner) would have reported it, if it occurred, because she has a mentally handicapped sister. The claimant submitted CD's of the State Police interviews of five other employees of the school that were present during the incident, none of whom stated that they saw the claimant strike the student.

As noted above, the employer has relied entirely upon hearsay, sometimes multi-leveled, in attempting to meet its burden to establish that the claimant committed the alleged action for which he was discharged. This is not necessarily fatal. Hearsay evidence is not only admissible in informal administrative proceedings, but it can constitute substantial evidence on its own if it contains "indicia of reliability." Covell v. Department of Social Services, 439 Mass. 766, 786 (2003), *quoting* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission, 401 Mass. 526, 530 (1988). Indicia of reliability can be assessed by determining, among other things, whether the underlying testimony was presented under oath, whether it was detailed and consistent, resistant to the suggestiveness of leading questions, credible, and whether it was corroborated by other evidence in the record. Covell, 439 Mass. at 786. Even if the proffered hearsay is lacking as to some of these indicia of reliability, the hearsay may still suffice if the countervailing direct testimony is itself not credible — for example, if it is inconsistent, illogical, or presented with a nervous or deceitful demeanor. *See* Covell, 439 Mass. at 786–787.

Here, as the employer pointed out on appeal, the review examiner's initial decision did not address in any detail the reliability of the employer's hearsay or the credibility of the claimant's direct testimony. The review examiner merely stated, "[t]he claimant provided direct testimony that he did not engage in the act alleged by his employer. The claimant's direct testimony must be deemed more credible than the employer's hearsay testimony in this case. As such, it cannot be concluded that the claimant engaged in the conduct in question." Given that the claimant's statements had not been consistent about what he remembered about the incident, and given that the main witness against the claimant, [C], had been consistent and detailed across several transcribed or recorded statements as well as in her testimony at the claimant's termination hearing (as described by the Town Administrator at the instant hearing), the review examiner's conclusory credibility assessment in her initial decision was not sufficient to demonstrate that she had properly weighed the competing factors. Accordingly, we remanded the case to the

review examiner to provide an adequate credibility determination and to issue consolidated findings of fact adjusted as appropriate in accordance with that determination.

The review examiner's consolidated findings of fact issued in response to the Board's remand order contain eight new findings (## 27, 29, 30, 31, 32, 33, 50, and 51) and one modified finding (# 28), as well as a lengthy and detailed credibility assessment, which is set forth in full, above. She explained that she found the claimant's direct testimony credible (that he did not hit the student), because he had been aware that his actions were being video-recorded, he had a detailed recollection of the entire incident, he forthrightly acknowledged his previous inconsistency, and his testimony was consistent throughout the instant hearing. She noted that his account was supported by hearsay in the form of the sworn affidavit of his partner, who was present and in close proximity to the claimant during the entire arrest. She noted that the employer presented significant hearsay evidence from [C], but that she had been behind the door with a broken plexiglass window during the actual arrest. She noted that [C]'s account seemed to portray the claimant's action as relatively harmless, a "flick," which was not intended to hurt the student. This portrayal was at odds with the [G]'s interview — the only other eyewitness who stated that the claimant had struck the student — because SF stated that the claimant had hit the student "pretty good." [C] had identified two other individuals as witnesses to the event, [B] and [F], but neither of them stated in their interviews that the claimant hit the student. The review examiner pointed out that three other individuals who were present also denied in their recorded interviews that the claimant had hit the student. Ultimately she attributed little weight to the [C] interview transcripts or to the recorded interviews, because, without these individuals being present at the hearing to answer questions about what they had observed or what position that they had been in to observe during the relatively fleeting moment of the claimant's alleged misconduct, it was not possible to rely upon their accounts as substantial evidence of what occurred.

It is the review examiner's role to weigh conflicting evidence and assess credibility, and the review examiner's findings will generally not be disturbed on appeal, unless they are unreasonable in relation to the evidence presented. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). The findings must be supported by substantial evidence. "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.'" *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627–628 (1984), *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted). In this case, the review examiner chose to give less than substantial weight to the employer's evidence, all of which was hearsay, and instead to credit the claimant's direct testimony. Her reasons for doing so are thoughtful, detailed, and reasonable in relation to the evidence. We see no reason to disturb her assessment.

We, therefore, conclude as a matter of law that the employer has failed to establish that the claimant actually engaged in the alleged misconduct of striking a disabled student in the course of an arrest, and that the claimant was not discharged for a disqualifying reason, 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 beginning March 27, 2016, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - April 14, 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](http://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/th