

Claimant, who was discharged because he failed to secure required licenses before the employer's October 2016 deadline, became separated involuntarily. The test center had sent authorization forms to the wrong address and was unresponsive to telephone inquiries, and an intervening Medicare audit forced the employer to discharge unlicensed technicians one month before the deadline it had given its employees to secure those credentials.

**Board of Review
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Issue ID: 0019 7562 62

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Marielle Abou-Mitri, 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 affirm the award of benefits, but under a different provision of the law.

The claimant was separated from his position with the employer on September 12, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 5, 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 January 12, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, was entitled to benefits, pursuant to G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 claimant's separation for failure to obtain licenses necessary for the performance of his job was voluntary with good cause attributable to the employer, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as an event technician for the employer, a care facility for sleep apnea patients and a cardiac department, from October 26, 2010 through September 10, 2016.
2. The claimant's direct supervisor was the Lab Supervisor.
3. At the time of his hire, the claimant was required to have a certified cardiographic technician (CCT) license.
4. The claimant's CCT license expired on June 30, 2015. The claimant did not realize that his CCT license had expired at this time. The claimant was a per diem employee in June of 2015 and the employer did not require that the claimant renew his CCT license.
5. In October 2015, the employer updated the claimant's job description. Employees now needed a certified rhythm analysis technician (CRAT) credential or a CCT license to maintain their employment. The employer notified employees that they had one year to complete the CRAT credential. The CRAT credential was required by Medicare.
6. In January of 2016, the Lab Supervisor emailed all employees reminding them that they needed to begin the process of obtaining the CRAT credential.
7. In February of 2016, the claimant and a group of his coworkers filled out the CRAT credential application and submitted the documents to the Lab Supervisor, who mailed out the applications. In order to obtain the CRAT credential, employees were required to wait for an authorization to test from the company that administers the test. After an employee obtained an authorization to test, the test could be scheduled.
8. The claimant became a full-time employee in April of 2016. At the time, the Lab Supervisor reminded the claimant that he needed to obtain the CRAT credential. The Lab Supervisor pushed for the claimant to obtain the CRAT credential rather than the CCT license.
9. The claimant's coworkers began hearing back from the administrators of the test regarding the authorization to test in July of 2016. The claimant's coworkers began taking the test at the end of July 2016.
10. The claimant did not hear back from the test administrators. The claimant began calling the company that administers the test regularly to attempt to find out the status of his application. The claimant was directed to speak to the Director of Operations but was unable to get in contact with her. The claimant left the Director of Operations many voicemails but did not get a response.

11. The claimant notified the Lab Supervisor that he was having difficulty obtaining his authorization to test. The Lab Supervisor also attempted to contact the Director of Operations but was unsuccessful.
12. The claimant eventually spoke to the Director of Operations from the testing administrator and was notified that his authorization to test had been sent to the wrong mailing address. The authorization to test was mailed to [Address A], Massachusetts. The claimant lived at [Address B], New Hampshire. The claimant previously lived in [Town A] at a different address.
13. On August 22, 2016, the claimant also submitted a letter to the testing administrator to appeal a renewal of his CCT license.
14. The claimant scheduled the test for the CRAT credential for September 16, 2016. The claimant believed that he had until October of 2016 to obtain the CRAT credential.
15. In September of 2016, the employer was audited by Medicare.
16. The employer terminated the claimant on September 12, 2016 for failing to have a valid CCT or CRAT license at the time of the Medicare audit.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we believe that the review examiner's findings of fact support the conclusion that the claimant is entitled to unemployment benefits, but we do so on different grounds.

The review examiner awarded benefits after analyzing the claimant's separation 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 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

We believe the case is more properly considered under G.L. c. 151A, § 25(e), which provides, in pertinent part, as follows:

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.

As the review examiner properly noted in her analysis, where a claimant becomes separated after losing a license required for the performance of his job duties, the separation is not regarded as a discharge, and the claimant's fault with respect to the loss of license must be considered. However, we disagree with the review examiner that a separation resulting from a claimant losing his license without fault is a separation for good cause attributable to the employer.

The review examiner found the claimant knew he had to have one of two valid licenses to retain his job as a technician. At one point, the claimant had one of those licenses, but his CCT license had expired on June 30, 2015. In October 2015, the employer gave its technician employees, including the claimant, one year to secure a valid CRAT license in order to retain their jobs. Throughout 2016, the claimant took steps to secure his CRAT license, ultimately scheduling the CRAT examination for September 16, 2016, prior to the employer's one-year deadline to obtain that credential. Although this test date was only two weeks before the employer's deadline, the process was hindered by the testing center's lack of responsiveness to calls from both the claimant and employer, as well as by the testing center sending confirmation for the test to the claimant at a wrong address. *See Exhibit # 6.*

The review examiner also found that the claimant's separation was triggered by an intervening federal Medicare audit of the employer in September, 2016. At the time of the Medicare audit, the employer could not retain unlicensed technicians and was required to discharge the claimant.

We believe the facts here support the conclusion that the claimant's separation was involuntary. He believed that he had until October, 2016, to secure the necessary licenses to retain his job with the employer and was taking steps to complete the credentialing process. The employer would have allowed the claimant to complete the licensing process by the deadline it had set a year earlier, but for the intervention of a federal Medicare audit that forced it to discharge unlicensed technicians like the claimant.

We, therefore, conclude as a matter of law that the claimant's separation from this employer was involuntary and attributable to urgent, compelling, and necessitous circumstances, within the meaning of G.L. c. 151A, § 25(e).

The review examiner's decision awarding benefits to the claimant is affirmed. The claimant is entitled to receive benefits for the week ending September 17, 2016, and for subsequent weeks if otherwise eligible. However, because we find the claimant's separation to be involuntary, benefits shall not be charged to the employer's account but shall be charged to the solvency account, pursuant to G.L. c. 151A, § 14(d)(3), so long as the employer is entitled to such relief from charges.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 29, 2017



Paul T. Fitzgerald, Esq.
Chairman



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.

JPC/rh