Where the claimant was discharged for allegedly lying about his criminal record on his employment application, the claimant is not subject to disqualification under § 25(e)(2) because the application itself—as well as state law—authorized the claimant to omit misdemeanor convictions more than five years old.

Board of Review
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Issue ID: 0021 0196 49

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Peter Sliker, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was discharged from his position with the employer on February 10, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 14, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on May 11, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was 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 claimant'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 committed deliberate misconduct by failing to disclose several past criminal convictions on his initial employment application 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 as a maintenance worker for the employer, a municipality. The claimant began work for the employer on March 10, 2010. He worked in the employer's police department.

2. Between November 1978 and September 1996 the claimant was charged with 15 crimes in Massachusetts. He pled guilty or was found guilty to 7 of the charges including a 1994 charge for assault and battery, which is a felony.

3. When the claimant applied to the employer, he completed an employment application. One of the questions on the application asks: "Have you ever pled "guilty" or "no contest" to, or been convicted of a crime. The claimant checked the box: "No".

4. The claimant was interviewed by the chief of police. The chief of police was aware of the claimant's criminal history.

5. The appointing authority for the employer is the town manager.

6. In early 2016, the employer discharged the chief of police.

7. An interim chief of police began work at the employer on July 26, 2016.

8. At the end of December, 2016, the interim chief of police was cleaning drawers used by the former police chief. He found the claimant's employment application and his Criminal Offender Record Information (CORI) report from March 2, 2010.

9. The interim chief of police called the Massachusetts Criminal Justice Information Services (CJIS) Division. They informed him that because the claimant was guilty of a felony it would not be appropriate to give him access to a police department.

10. On January 3, 2017, the interim chief of police and deputy chief met with the claimant. The interim chief of police told the claimant about the CORI report. He told the claimant he could not be granted access to a police department. He suspended the claimant with pay pending the outcome of his investigation. He asked the claimant if he would submit to a fingerprint background check and the claimant agreed.

11. The claimant gave the employer his fingerprints, which were sent to CJIS. The employer received a report from CJIS which confirmed the same charges and convictions from the 2010 CORI report.

12. On Friday, February 10, 2017, the interim chief of police and the town manager met with the claimant. They told him the fingerprint background check confirmed the charges from the CORI check. They suggested he resign in lieu of discharge. They discussed a position he could apply for with the employer's department of public works.

13. The claimant asked if he could think about it over the weekend. The town manager told him he could not. The claimant asked if he could make a phone call which he was allowed to do. After the call, he asked again if he could think about the offer over the weekend. The town manager told him he could not.

14. The town manager discharged the claimant for lying on his employment application.

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. After such review, the Board adopts the review examiner's findings of fact and credibility assessment except as follows. As discussed in more detail below, the second sentence of Finding of Fact # 2 is contrary to the claimant's Board of Probation (BOP) criminal history report (Exhibit # 12), which is the only evidence in the record regarding the details of the claimant's criminal record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's original conclusion that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest under G.L. c. 151A, § 25(e)(2). Rather, the findings establish that the claimant was not deliberately or knowingly being untruthful by failing to disclose his previous convictions on his initial job application.

Because the claimant was terminated 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 . . . .

Under this provision of the statute, "[T]he burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). The question is not whether the employer was justified in firing the claimant, but whether the Legislature intended that unemployment benefits should be denied under the circumstances. Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 95 (1979).

In order to establish either a knowing violation or deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). Specifically, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield, 377 Mass. at 97.

In this case, the employer maintained that the claimant was discharged for providing false information on his initial employment application when he was hired in 2010. It was undisputed that the claimant indicated "no" in response to the question, "Have you ever pled 'guilty' or 'no contest' to, or been convicted of a crime?" despite having several previous criminal convictions. However, a closer inspection of the employment application itself (Exhibit # 14) reveals that the claimant's response was not necessarily untruthful, as the instructions accompanying this question state, in relevant part: "You may respond "no" if you: have been arrested, but never convicted within (5) years prior to making this application, and have only on your record misdemeanors more than five (5) years old."[1] Though this fine print was not discussed at the hearing or in the decision, the claimant testified that he did not think he was required to disclose his previous convictions because they were all misdemeanors, and that the Chief of Police specifically advised him to answer "no" to this question. Though the review examiner's decision does not address this portion of the claimant's testimony, the review examiner did credit similar testimony from the claimant. Finding of Fact # 4 states that the Chief of Police was aware of the claimant's criminal history at the time of his job interview.

The question, then, is whether the claimant's only convictions consisted of "misdemeanors more than five (5) years old." As the most recent charge in the claimant's record was well beyond five years old at the time of the claimant's job application — according to the terms of the application instructions and G.L. c. 151B, § 4(9) — the claimant would only be required to disclose his criminal history if he had been convicted of a felony[2]. In determining whether the claimant was ever convicted of a felony, we look to the claimant's BOP criminal history report (Exhibit # 12), as the employer's testimony regarding the details of the claimant's criminal record was based solely on this document, rather than based any direct knowledge.

The employer's witness, the Interim Chief of Police, testified that the BOP report indicated that the claimant was convicted of felony unarmed robbery, which constituted a felony. And while unarmed robbery, as defined by G.L. c. 265, § 19(b), does indeed constitute a felony, the claimant's

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[1] This language appears to be a reflection of G.L. c. 151B, § 4(9), which states, in relevant part:

> [It shall be an unlawful practice] . . . For an employer, himself or through his agent, in connection with an application for employment, or the terms, conditions, or privileges of employment, or the transfer, promotion, bonding, or discharge of any person, or in any other matter relating to the employment of any person, to request any information, to make or keep a record of such information, to use any form of application or application blank which requests such information, or to exclude, limit or otherwise discriminate against any person by reason of his or her failure to furnish such information through a written application or oral inquiry or otherwise regarding: . . . (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred five or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within five years immediately preceding the date of such application for employment or such request for information.
>
> No person shall be held under any provision of any law to be guilty of perjury or of otherwise giving a false statement by reason of his failure to recite or acknowledge such information as he has a right to withhold by this subsection."

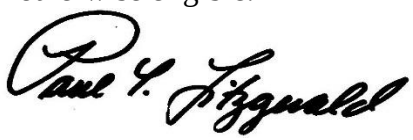
[2] Generally speaking, under Massachusetts law, any crime punishable by confinement in a State prison is a felony. All other crimes are misdemeanors. *See* http://www.mass.gov/courts/selfhelp/criminal-law/misdemeanors-felonies.html

BOP report provides that the claimant was not convicted of this charge. Rather, this charge was continued without a finding (CWOF) and ultimately dismissed. Despite the fact that a CWOF requires a defendant to admit to sufficient facts to warrant a finding of guilty, it is not considered a judgment of guilt. Wardell v. Dir. of Division of Employment Security, 397 Mass. 433, 435–436 (1986). Finding of Fact # 2 states that the claimant was convicted of assault and battery in 1994, and that such an offense constitutes a felony. While it is true that the BOP report indicates that the claimant was convicted of assault and battery, simple assault and battery without any aggravating factors, as defined by G.L. c. 265, § 13A(a), only constitutes a misdemeanor. Each of the claimant's five other convictions (indicated by a 'G' on the BOP report) were misdemeanors as well.[3]

In light of the above, the record fails to establish by substantial and credible evidence that the claimant was ever convicted of a felony. It was also undisputed that the claimant was not convicted of any crime within the five years prior to completing his employment application, and that the employment application itself instructed the claimant that he could answer "no" to the question about prior criminal convictions. Moreover, nothing in the record suggests that the claimant was ever dishonest about his criminal history at any other time during the course of his employment.

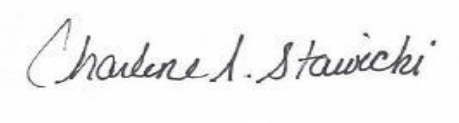
We, therefore, conclude as a matter of law that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employing unit's interest or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending February 11, 2017, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - September 29, 2017

Paul T. Fitzgerald, Esq.
Chairman



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)

[3] We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

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.

JRK/rh