Sufficient evidence showed that the claimant engaged in activity that jeopardized the strict federal security clearance requirements needed to continue working for the employer. Even though criminal charges remained pending, he is disqualified under G.L. c. 151A, § 25(e)(1), because he brought his unemployment on himself.

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Issue ID: 0021 4188 38

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Lauren Johnson, 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 affirm.

The claimant was discharged from his position with the employer on February 24, 2017. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 20, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on August 4, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced policy of the employer, and, thus, he 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 remanded the case to the review examiner to obtain further evidence about the circumstances surrounding the claimant's discharge. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's original conclusion that the claimant is ineligible for benefits due to his failure to comply with the employer's no-call, no-show policy 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 as a full-time supervisor for the employer, an airline company, from August, 2005, until February 16, 2017.

2. The employer maintains a Crewmember Blue Book (the Blue Book) that is issued to all employees.

3. The employer requires all employees to sign and acknowledge receiving a copy of the Blue Book. The claimant electronically acknowledged having received a copy of the Blue Book.

4. The Blue Book contains a section titled "Attendance," which states in relevant part, "Crewmembers should make every effort to contact their Crewleader at least four hours prior to their scheduled starting time to report their absence. If an absence continues beyond one day, the Crewmember is responsible for calling in each day work is missed."

5. The "Attendance" section also states in part, "Job abandonment and a voluntary resignation from employment with the employer may be considered to have occurred when a Crewmember fails to report to work for three consecutive days and does not contact his or her Crewleader."

6. The Blue Book also contains a section titled "Reporting Arrests and Convictions," this section states in part, "Any Crewmember who has been arrested for, pleads guilty or no contest to a job related or drug/alcohol related offense, on or off the employer's property, is required to notify their Crewleader within five business days of the arrest and/or conviction. Depending on the severity of the offense, Crewmembers may be subject to immediate suspension without pay pending investigation by the Corporate Security Department and/or the appropriate law enforcement agency, which may result in e-Guidance up to and including immediate separation of employment."

7. As a supervisor, the claimant was responsible for knowledge of the employer's policies.

8. The claimant's position required him to maintain a security identification display area (SIDA) badge. In order to obtain a SIDA badge an employee must complete an application and agree that if "I am arrested for or convicted or any crimes listed in Section II of this application, within 24 hours I will report the conviction and surrender the SIDA Badge to Airport Operations." It is unknown what the crimes listed in Section II include.

9. On February 16, 2017, the claimant was brought in to the police station for questioning based suspicion of drug related activity after being found with $30,000 in cash. The claimant admitted to having the 30,000 in cash on him.

10. On February 17, 2017, at 12:30 a.m., the claimant sent an email to the manager and the director asking for time off on Monday, February 20th, Tuesday, February 21st, and Wednesday, February 22nd, 2017. The claimant stated he had a family emergency. At no time did the claimant indicate that he was brought into the police station for questioning. At that time, the claimant had not been arrested.

11. The claimant did not receive a response to his email sent on February 17, 2017.

12. Later on February 17, 2017, the claimant was arrested.

13. On February 17, 2017, after the claimant's arrest, the claimant's girlfriend, who also worked for the employer, notified the employer's corporate security department of the claimant's arrest.

14. Prior to the claimant's arrest, the employer was aware of the claimant's relationship with his girlfriend and knew the two employees lived together with their three children.

15. On February 18, 2017, the claimant's girlfriend also notified the employer's human resources (HR) manager of the claimant's arrest.

16. On February 20, 2017, the claimant's girlfriend returned his SIDA badge and credentials to the HR manager. The claimant was suspended pending an investigation.

17. On or around February 20, 2017, the claimant's girlfriend also notified the employer of the claimant's arraignment date.

18. At no time on February 20th, 21st, or 22nd, 2017, did the claimant email the employer to report his absence because he had already been suspended at this time.

19. On February 23, 2017, the claimant was arraigned in court. The employer's HR manager and HR generalist attended the claimant's arraignment.

20. The claimant was released and placed on probation pending trial [for] drug related charges, which included possession with the intent to distribute and distribution.

21. On February 24, 2017, the HR manager conducted an exit interview with the claimant.

22. The employer discharged the claimant due to him being unable to maintain the necessary security clearance and credentials needed to perform him job after his arrest.

23. The claimant filed a claim for unemployment benefits effective March 26, 2017.

24. As of the date of the final unemployment hearing, charges against the claimant were still pending.

25. The claimant was scheduled to attend a trial on January 8, 2017. As of the date of the final unemployment hearing, the claimant believed he would be entering a guilty plea, but the final decision had not yet been made.

CREDIBILITY ASSESSMENT:

At the first hearing, the employer omitted facts relevant to the claimant's discharge which the claimant later brought to light during the remand hearing. The claimant testified that his girlfriend notified both the employer's corporate security team and the HR manager of the claimant's arrest as well as returned his SIDA badge and credentials as of February 20, 2017. During the first hearing, which the claimant did not attend, the employer's witness only offered vague testimony indicating that "another employee" had informed the employers of the claimant's arrest. The claimant also directly testified that the employer's HR manager and HR generalist attended his arraignment on February 23, 2017, and thereafter, the HR manager conducted an exit interview via telephone with the claimant. The additional evidence supplied by the claimant's testimony was supported by the employer's witness during the remand hearing. As such the claimant's testimony is credible.

In addition, the remand hearing was continued to the third day for the sole purpose of having the claimant supply court documents, specifically the claimant's docket sheet. The only documents the claimant supplied to the DUA were the pretrial release reporting instructions and receipt that the claimant turned over his passport in compliance with his release instructions.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. The portion of Consolidated Finding # 1, which states that the claimant worked until February 16, 2017, refers to his last physical date of work and not his formal separation from the company. This happened on February 24, 2017.[1] In

[1] The employer's termination letter, Remand Exhibit # 8, states that the claimant's separation from employment was effective February 24, 2017. While not explicitly incorporated into the review examiner's findings, this exhibit is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is not eligible for benefits, but on slightly different grounds.

Because the claimant was terminated from his employment, the review examiner analyzed his qualification for benefits under 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 . . . .

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the 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).

Under either the knowing violation or the deliberate misconduct prong of G.L. c. 151A, § 25(e)(2), the employer has the initial burden to establish its reason for terminating the claimant's employment. The employer's termination letter states that it fired the claimant for violation of the company policy and guidelines, but does not identify which specific policy or guidelines he violated. *See* Remand Exhibit # 8. The employer's human resources witness testified that the claimant was discharged for violating two specific policies — failing to personally report his own absences on three consecutive days and failing to personally notify the employer that he had been arrested within five days of the arrest.

We consider first the no-call, no-show violation. As provided in Consolidated Findings ## 4 and 5, an employee must call in to report each day of absence and is deemed to have voluntarily abandoned his job if he does not. In this case, the dates of absence in question are February 20, 21, and 22, 2017. On February 18, 2017, the claimant's girlfriend had notified the employer that the claimant had been arrested. Consolidated Finding # 15. On February 20, 2017, his security badge and credentials were returned to the employer, and he was suspended. Consolidated Finding # 16. The suspension meant that the employer would not permit him to work and it is not reasonable to expect him to call-in. For this reason, we decline to deny benefits for violating the no-call, no-show portion of the employer's policies.

As for violating the "Reporting Arrests and Convictions" policy, set forth under Consolidated Finding # 6, we disregard the testimony of the human resources witness, who insisted that the claimant violated this policy by not personally reporting his arrest. The claimant testified that he

could not call the employer, because his phone was taken away upon being arrested.[2] Moreover, immediately after the arrest on February 17, 2017, his girlfriend notified the employer's corporate security department of the arrest. Consolidated Finding # 13. In our view, this satisfied the policy's notice requirement.

Consolidated Finding # 22 states that the employer discharged the claimant because he was unable to maintain the necessary security clearance and credentials needed to perform his job after his arrest. This key finding is a reasonable inference based upon the totality of the record before the examiner. It is apparent that the underlying purpose of the policy requiring employees to report arrests is to alert the employer to any criminal charges that might jeopardize an employee's security clearance and ability to perform his job. Both witnesses testified that the claimant could not work for the employer without a SIDA badge and credentials, as the claimant's job required the security clearance. Remand Exhibit # 13 is the first page of the airport's SIDA badge application form. This exhibit refers to the federal regulation, 49 C.F.R. § 1542, which mandates reporting an arrest or conviction for certain criminal offenses.[3] Specifically, 49 C.F.R. § 1542.209, states, in relevant part, as follows:

> (g)(2) When a [fingerprint-based criminal history records check] on an individual with unescorted access authority discloses an arrest for any disqualifying criminal offense without indicating a disposition, the airport operator *must suspend the individual's unescorted access authority* . . . unless the airport operator determines, after investigation, that the arrest did not result in a disqualifying criminal offense . . . If there is no disposition, or if the disposition did not result in a conviction . . . the individual is not disqualified under this section.

(Emphasis added.) Among the disqualifying criminal offenses listed in another subsection of the regulation is distribution of, or intent to distribute, a controlled substance. 49 C.F.R. § 1542.209(d)(23). Consolidated Finding # 20 provides that the pending charges against the claimant were drug-related charges, including possession with intent to distribute and distribution.[4]

During the hearing, the claimant testified that he assumed the employer suspended him because of his arrest. It discharged him the day after his arraignment. At that point, and continuing through the most recent remand hearing session, there had not been a criminal conviction on these charges. However, under the federal regulation cited above, the mere existence of such charges meant that the claimant could not have the security credentials to perform his job. *See* Consolidated Finding # 24. We express no opinion as to whether the employer made the right decision to terminate the claimant's employment at that time. The issue before us is whether he is eligible for unemployment benefits.

The Supreme Judicial Court has stated the following:

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[2] 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).

[3] Remand Exhibit # 13 is also part of the unchallenged evidence presented during the hearing.

[4] The claimant testified that the charges were for possession and distribution of cocaine.

> The language of G.L. c. 151A, § 25, and our cases interpreting that language, demonstrate that the word 'voluntarily,' as used in § 25(e)(1), is a term of art that must be read in light of the statutory purpose of 'provid[ing] compensation for those who 'are thrown out of work through no fault of their own.'. . . Thus, for example, in Rivard v. Dir. of Division of Employment Security, . . . we concluded that 'a person who causes the statutory impediment that bars his employment leaves his employment 'voluntarily' within the meaning of § 25(e)(1) when the employer realizes the impediment and terminates the employment.' As Rivard demonstrates, in determining whether an employee left work 'voluntarily' for purposes of § 25(e)(1), the inquiry is not whether the employee would have preferred to work rather than become unemployed, . . . but whether the employee brought his unemployment on himself. (Citations omitted.)

Olmeda v. Dir. of Division of Employment Security, 394 Mass. 1002 (1985)(rescript opinion) (the Court upheld the denial of unemployment benefits to a claimant who was unable to work, because his driver's license was suspended for a year following a conviction for driving while intoxicated).

With the outcome of the pending criminal charges unknown, we must rely upon the totality of the existing record to decide whether there is substantial evidence to show that the claimant brought his unemployment on himself. When the review examiner asked the claimant why he was arrested, he testified that he had $30,000 in cash on his person. *See* Consolidated Finding # 9.[5] At a later hearing, he indicated that he would likely be entering a guilty plea. *See* Consolidated Finding # 25. We believe this evidence is sufficient to show that the claimant voluntarily engaged in some activity to cause his arrest. In light of the strict security regulations imposed upon the employer, this was enough to jeopardize the security clearance necessary for his continued employment.

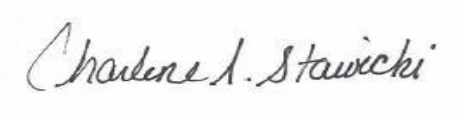
We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant voluntarily separated from employment pursuant to G.L. c. 151A, § 25(e)(1).

[5] When asked why he had so much money, the claimant stated simply that he was in a situation and had made some very bad mistakes. Without further testimony that would explain a logical, legal reason for possessing so much cash, it is not unreasonable to infer that he somehow participated in an illegal sale of drugs.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning February 19, 2017, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 26, 2018

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)

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.

AB/rh