

**Where the employer failed to respond to an initial fact-finding questionnaire, without explanation or excuse, the employer cannot be relieved of charges pursuant to G.L. c. 151A, § 38A and is also subject to loss of party status pursuant to G.L. c. 151A, § 38(b).**

**Board of Review  
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**Issue ID: 0022 1159 01**

## **BOARD OF REVIEW DECISION**

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

The employer appeals a decision by Danielle Etienne, a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the employer failed to respond to a DUA fact-finding questionnaire about the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

After separating from the employer, the claimant filed a claim for unemployment benefits with an effective date of May 28, 2017. As the claimant informed the DUA that she was laid off due to lack of work, the DUA issued a Lack of Work Notification to the employer. On May 31, 2017, the employer responded and informed the DUA that the claimant in fact quit her employment. As a result, on June 2, 2017, the DUA issued the employer a questionnaire inquiring about the claimant's resignation. The DUA never received a response to the questionnaire. On June 20, 2017, the DUA determined that the employer's response to the questionnaire was inadequate and/or late pursuant to G.L. c. 151A, § 38A. The employer appealed the determination and participated in the hearing via telephone. In a decision rendered on September 9, 2017, the review examiner affirmed the agency's initial determination, concluding that the employer's response was inadequate under G.L. c. 151A, § 38A, and that, as a result, the employer would not be considered a party to further proceedings on the claim for benefits. The Board accepted the employer's application for review. 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's failure to respond to the agency's request for information about the claimant's separation from employment shall result in the employer's loss of party status 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 filed a claim for unemployment benefits with an effective date of May 28, 2017.
2. On June 2, 2017, the Department of Unemployment Assistance (the DUA) submitted a questionnaire for the employer's completion, notifying the employer the claimant had filed a claim for unemployment benefits and requesting information regarding the claimant's employment.
3. The deadline for return of the questionnaire to DUA was June 7, 2017.
4. As of the date of the hearing, the employer has not returned a completed questionnaire to DUA.

### 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. However, as discussed more fully below, while we agree that the findings support the conclusion that the employer failed without good cause to respond to the agency's request for information, we wish to clarify the applicable sections of law and related penalties, as outlined below.

G.L. c. 151A, § 38A provides, in relevant part, as follows:

- (a) If the director, or the director's authorized representative, determines, after providing written or electronic notice to the employer, that a payment of benefits was made because the employing unit, or an agent of the employing unit, was at fault for failing to respond timely or adequately to any request of the department for information relating to the claim for benefits, then: **(i) the employing unit, except for employing units making payments into the Unemployment Compensation Fund under section 14A, shall not be relieved of charges on account of any such payment of benefits;** and (ii) if the employing unit makes payments into the Fund under section 14A, it shall not be relieved from reimbursing the fund on account of any such payment of benefits. For purposes of this subsection, a response shall be considered inadequate if it fails to provide sufficient facts to enable the department to make the proper determination regarding a claim for benefits. A response shall not be considered inadequate if the department fails to ask for all necessary information, except in any case where there has been a failure to respond. (Emphasis supplied.)

The review examiner concluded that the employer's response was inadequate under G.L. c. 151A, § 38A, and, therefore, that the employer would not be considered a party to further proceedings on the claim for benefits. However, G.L. c. 151A, § 38A, does not provide for such penalty. As emphasized above, under this section of law, the applicable consequence is that the employer cannot be relieved of charges in the event that the claimant is erroneously paid benefits. As the

employer was unable to provide any explanation for its failure to respond to the June 2, 2017, questionnaire, it must be concluded that the employer was at fault for such failure and, therefore, that it cannot be relieved of charges.

Also relevant in this appeal is G.L. c. 151A, § 38(b), which provides, in relevant part, as follows:

Notice of a claim so filed shall be given promptly by the commissioner or his authorized representative to the most recent employing unit of the claimant and to such other employing units as the commissioner may prescribe. If such employing unit has reason to believe that there has been misrepresentation or has other reasons which might affect the allowance of said claim, or has been requested by the commissioner to furnish any other pertinent information relating to said claim, it or he shall return the said notice to the indicated employment office with the reasons or information stated thereon within eight days after receipt, but in no case more than ten days after mailing of said notice . . . . Failure without good cause to return said notice and information within the time provided in this section or prescribed by the commissioner shall bar the employing unit from being a party to further proceedings relating to the allowance of the claim . . . .

Our review of the record before us establishes that G.L. c. 151A, § 38(b), was noticed on the Notice of Hearing, and cited at the introduction to the review examiner's written decision, but not addressed in the review examiner's analysis. Under G.L. c. 151A, § 38(b), a failure by the employer to timely respond to a "notice of claim" or any other "pertinent" information requested by the DUA relative to a claim can result in loss of party status. In the instant matter, the employer did not provide any explanation for its failure to respond to the DUA's initial substantive questionnaire, within either the timeframe requested by the Agency or that allowed under the statute. Consequently, it cannot be concluded that the employer had good cause for such failure. Therefore, under G.L. c. 151A, § 38(b), the employer is not to be considered a party to further proceedings on the claim for benefits.

The review examiner's decision is affirmed. The employer is denied party status, pursuant to G.L. c. 151A, § 38(b), and it shall not be relieved of charges on account of the payment of benefits under this claim, pursuant to G.L. c. 151A, § 38A.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - October 11, 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)**

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.

JRK/rh