

**The claimant is not subject to disqualification under § 25(e)(2) where the review examiner's consolidated findings credit the claimant's testimony that he did not intentionally falsify a document, but rather made a careless error while not thinking.**

**Board of Review  
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**Issue ID: 0022 6216 04**

## **BOARD OF REVIEW DECISION**

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

The employer appeals a decision by 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 claimant was discharged from his position with the employer on August 4, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 23, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on February 8, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, and, thus, he 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 allow the employer an opportunity to testify and present evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 decision, which concludes that the claimant did not intentionally falsify a document, 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 are set forth below in their entirety:

1. The claimant worked for the employer, a special education and residential program, from April 28, 2014 to August 4, 2017 as a Lead Teacher.

2. The employer had a policy which prohibited “falsification of employee application or other company record.”
3. The policy stated, “Notwithstanding any other provision of these Personnel Policies, committing any of the following violations will be sufficient grounds for disciplinary action, ranging from reprimand to immediate discharge, depending on the seriousness and frequency of the offense in the judgment of the Executive Director.”
4. The claimant knew the policy.
5. Time cards and work logs (task books) were both considered company records.
6. The employer differentiated between company records (e.g. time cards, task books, etc.) and considered the severity of the offense when meting out discipline.
7. The employer did not apply a progressive system of discipline to that, which gave rise to the claimant’s discharge.
8. Employees who have violated the policy were issued warnings and not discharged on the first instance. On one occasion, the claimant observed a subordinate Teacher (initials [XX]) fill out a task book (a work log) without performing the work and putting the task book away. The claimant wrote up the employee for falsification and submitted the write-up to his supervisor. The employee was not fired and is still employed.
9. On August 2, 2017, the claimant documented that a particular student used the bathroom at 1:50 p.m. The claimant wrote “1:50 p.m.” without the intent to make a false entry, but due to carelessness.
10. The particular student wet himself on the way home.
11. The student’s parents contacted the school to report the issue.
12. On August 3, 2017, the employer placed the claimant on suspension and directed him to meet the next day in the morning.
13. The employer reviewed the log entry.
14. On August 4, 2017, the claimant met with the ABA Therapist, the Manager and a Senior Human Resources Generalist, at which time the claimant was asked if he toileted a particular student. The claimant tried to recall and he stated that he did not and acknowledged that he documented that he did.

15. The employer proceeded to discharge the claimant from employment for admitting to falsifying a company record.

### 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. In addition, as discussed more fully below, we believe that the review examiner's consolidated findings of fact support the conclusion that the claimant did not have the requisite state of mind necessary to support a disqualification under G.L. c. 151A, § 25(e)(2).

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 this case, the employer discharged the claimant for allegedly falsifying a document. The claimant acknowledged that, on the document in question, he did incorrectly state that a particular student had used the toilet. But our analysis does not end there. Under either the deliberate misconduct standard or the knowing violation standard, the employer must establish not only that the alleged conduct actually occurred, but also that the claimant did so deliberately or knowingly. In this regard, 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).

The claimant maintained that he did not deliberately falsify the document, but rather that he carelessly filled out the form without thinking. The review examiner's findings of fact credit the claimant's testimony on this point. While the review examiner did not explicitly prepare a credibility assessment, his credibility assessment is implicit in his findings of fact. See Swansea Water District v. Dir. of Unemployment Assistance, No. 15-P-184, 2016 WL 873008 (Mass. App. Ct. Mar. 8, 2016), *summary decision pursuant to rule 1:28* (the findings "implicitly determined that that affidavits lacked credibility, including findings that they were not notarized and that the

positions stated in the affidavits were contrary to positions the affiants took while commissioners . . .”). Unless the review examiner’s findings are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979) (“[I]nquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited by statute . . . to determining whether the review examiner’s findings are supported by substantial evidence.”). In this case, the claimant’s testimony was consistent and reasonable, while the employer presented no evidence to suggest that the claimant’s actions were in fact intentional. Thus, the review examiner’s findings are eminently reasonable in relation to the record before us.

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 affirmed. The claimant is entitled to receive benefits for the week ending August 12, 2017, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 29, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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](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