Although the findings suggest that the claimant may have engaged in misconduct by contacting the employer's customers via e-mail rather than by a phone call, he cannot be denied benefits under G.L. c. 151A, § 25(e)(2), because when he was engaging in the conduct, he was doing the work as he was trained to do it and did not know this was changed by new management.

Board of Review
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Issue ID: 0023 0945 03

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 September 22, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 16, 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 January 31, 2018.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, 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 accepted the employer's application for review and remanded the case to the review examiner to take additional evidence regarding the circumstances of the claimant's separation and to allow the employer an opportunity to provide 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 conclusion that the claimant is not subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the claimant made contacts with the employer's customers according to his training, but the employer's management team felt that the claimant's methods of logging his contacts were deceptive and inaccurate.

Findings of Fact

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

1. On 04/27/15, the claimant began full-time work as a non-union Account Manager for this employer's company, from 04/27/15 until he was discharged on 09/22/17.

2. On 09/08/17, the claimant's supervisor gave the claimant a verbal warning for contacting customers via e-mail rather than by telephone. This was the only disciplinary warning the claimant ever received.

3. The claimant on 09/08/17 explained to his supervisor that he had been encouraged to perform such contacts by e-mail under the prior management team and he was unaware of the change in preference under the new management.

4. The claimant, because of his success, had always been given great freedom in how he chose to best manage his accounts. Prior to receiving the 09/08/17 verbal warning, the claimant believed he was performing his job properly.

5. The claimant had been trained by previous supervisors how to quickly process through the phone log / spreadsheet to end that task and allow more time for the e-mail contacts that at that time had been the management preference.

6. The employer's Human Resources Department was not involved in the issuing of the 09/08/17 verbal warning. Typically, Human Resources would not be aware of a verbal warning and would not become involved in discipline unless a more serious written warning is being issued.

7. On four occasions after being issued the verbal warning, the claimant asked his supervisor if there were any ongoing concerns with the e-mail / phone contact issue and he was assured there were no problems that the matter was resolved. His supervisor told the claimant, "don't worry about it, this is in the past". The claimant's supervisor explained that the 09/08/17 verbal warning was not a problem but moving forward the claimant must focus on making telephone calls instead of e-mail contacts as management priorities had changed.

8. The phone/log spreadsheet is auto generated in the sales force program Customers Relations Management CRM. It indicates call activity and duration of calls. The information comes from various inputs into the system.

9. The claimant completed the log in the manner he had been trained when e-mails and not telephone calls were management's focus. The choice "spoke to a decision maker" is the first drop down selection in the system that the claimant would use to process through the task quickly. The first comment

option was always the one chosen. When trained on the log, the focus was to speed through it to spend time on more fruitful efforts.

10. The claimant did not derive any personal benefit or bonus from completing the log in the manner he was initially trained other than to save time so he could focus on his e-mail work that at the time he understood to be management's priority. This was a productivity decision to move on to more productive account management of the 1,400 accounts the claimant was managing. The claimant's intent was to be efficient. The claimant was never acting to be deceptive.

11. The claimant, when completing the telephone contact tasks, chose the "spoke to a decision maker" drop down option because this was the first option offered that allowed him to process through quickly as he had been trained to get to the more important e-mail tasks. The new employer management team viewed the "spoke to a decision maker" option as an indicator of actually speaking to someone who may purchase a product.

12. The claimant was aware that his calls indicated that they lasted only seconds and he was not concerned prior to receiving his verbal warning because it was how he had been trained and he understood the focus was still on e-mails and not telephone calls. The new employer management, in viewing the duration of the calls showing only a few seconds incorrectly, understood that the claimant was being deceptive and discharged him for that reason.

13. The claimant after 09/08/17 worked closely with his supervisor to make more telephone calls to please the new management team. After receiving the verbal warning on 09/08/17, the claimant never again rushed through the telephone contact phases and he focused on telephone calls rather than e-mails.

14. On Friday, 09/22/17, when his supervisor unexpectedly discharged the claimant, she tearfully told him that the decision had come from senior management and Human Resources without explanation and there was nothing she could do to keep the claimant employed.

15. At the time of the discharge, the claimant had explained that his actions prior to the 09/08/17 verbal warning were [in] accord with how he had been trained and he was aware his actions could be monitored and he never intentionally acted to deceive anyone. Employer senior management, despite the defense offered by the claimant and the claimant's immediate supervisor on his behalf, opted to discharge the claimant, believing the claimant was dishonest when putting information in to the telephone log.

16. On 09/25/17, the claimant filed a claim for unemployment benefits effective 09/24/17.

17. The claimant requested a hearing on the 12/16/17 initial determination that he was not eligible for benefits.

CREDIBILITY ASSESSMENT

The claimant's testimony, that prior to receiving the 09/08/17 verbal warning he believed he was performing his job duties properly and in accordance with his training and the management priorities as he understood them, is credible. The claimant was aware that his actions could be tracked and because he believed he was properly following work directives as he had been trained, he was not concerned. The claimant was aware his calls would show durations of a few seconds only, but because he understood that management was aware this was done to focus time on e-mail work, he was surprised when he received the 09/08/17 verbal warning. The claimant gained nothing financially by entering the telephone log information as he did. The claimant believed, in good faith, that he was meeting his supervisor's job expectations. After receiving the 09/08/17 verbal warning, the claimant never repeated the telephone log practices that the new management team expressed as a concern and he worked closely with his immediate supervisor to best meet the wishes of senior management given the new client contact priorities.

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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we conclude that the review examiner's decision to award benefits is supported by the full record, especially where the claimant did not possess a disqualifying state of mind at the time he allegedly engaged in misconduct.

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 section of law, the employer has the burden to show that the claimant is not eligible to receive unemployment benefits. After the initial hearing, the review examiner concluded that the employer had not carried its burden.

The review examiner has found that the employer discharged the claimant because it believed that "the claimant was dishonest when putting information in to the telephone log." Consolidated Finding of Fact # 15. The log contains information relating to the claimant's contacts with the employer's customers. Portions of the log are auto-generated from information in the employer's computer system. Consolidated Finding of Fact # 8. One portion of the log allows for an employee to choose a status or outcome for the specific contact. In this case, the claimant chose "spoke to a decision maker" for a vast majority of the contacts that the employer found suspicious prior to the separation. *See* Consolidated Findings of Fact ## 9 and 11. The log also showed that the contacts with the customers lasted only a few seconds.[1] *See* Exhibit # 9 and Remand Exhibit # 5. The employer noted dozens of these alleged short calls, and questioned how the claimant could have had such short calls with an outcome of "spoke to a decision maker." Ultimately, the claimant's questionable entries led the employer to discharge him.

The findings lack specificity as to the employer's expectations or any policies applicable to the claimant's conduct with the telephone log. It appears that the employer expected that the claimant contact customers via phone call, rather than by e-mail. This was the subject of the September 8, 2017, warning. *See* Consolidated Finding of Fact # 2. The claimant, however, was operating under a different protocol. Rather than make calls to customers, he had been trained to contact customers via e-mail and then quickly log that a contact had been made. *See* Consolidated Findings of Fact ## 3, 5, 9, and 11. It appears that he knew that the computer records and/or telephone log were possibly inaccurate or misleading, but he did not think it was a problem given his understanding of how the employer wanted him to contact customers and record those contacts. *See* Consolidated Finding of Fact # 12. For purposes of our decision, we assume that, by making contact via e-mail with the employer's customers and thereby creating an inaccurate log of contacts, the claimant had been violating the employer's expectations.

However, the brunt of our decision in this case does not primarily rest on the evidence surrounding the claimant's alleged misconduct. We affirm the review examiner's decision, because the claimant clearly did not have the state of mind necessary to disqualify him under G.L. c. 151A, § 25(e)(2). To carry its burden, the employer must show that the claimant intended to violate a policy or deliberately engaged in misconduct. *See* Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 810–813 (1996). Here, there is no showing that the claimant was deliberately or knowingly doing his job incorrectly. When he was hired, he was taught to perform his customer contacts by e-mail. The review examiner found that "he was unaware of the change in preference [to phone call contact] under the new management." Consolidated Finding of Fact # 3. The review examiner further found that the claimant "was never acting to be deceptive," when he chose the "spoke to a decision maker" option. The claimant was merely acting according to his training to move along to productive accounts. *See* Consolidated Findings of Fact ## 5, 9, and 10.

[1] It appears that the call length was auto-generated into the log.

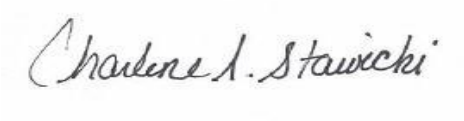
During the hearing, the employer's witness testified that the phone call logs in the record were from prior to the September 8, 2017, warning. Based on this evidence and the claimant's testimony that after the warning he focused on phone call contact, the review examiner found that, after September 8, 2017, "the claimant never again rushed through the telephone contact phases and he focused on telephone calls rather than e-mails." Consolidated Finding of Fact # 13. The claimant's sincere effort to change his work methods suggests that, prior to September 8, 2017, he had been operating under a mistaken belief of how the employer wanted him to contact the customers and fill out the call logs. These findings do not suggest a deliberate intention to act contrary to the employer's interests.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits is based on substantial and credible evidence and free from error of law, because, even if the claimant was violating an employer expectation or policy when he e-mailed rather than called customers, he did so not knowing that the employer's expectations regarding customer contact had changed and so did not have a disqualifying state of mind under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning September 17, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 27, 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.

SF/rh