

Review examiner improperly put form over substance in imposing the penalties of denying party status and the ability to be relieved from charges under G.L. c. 151A, §§ 38(a) and 38A, simply because the employer's agent did not name the individual who filled out a timely and detailed fact-finding questionnaire.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

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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), which concluded that the employer failed to adequately 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 reverse.

After separating from the employer in December, 2017, one of the employer's former employees applied for unemployment benefits. In order to determine whether she was eligible for benefits, the DUA sent the employer a fact-finding questionnaire, which was timely returned to the agency. However, on February 5, 2018, the DUA determined that the employer's response was inadequate pursuant to G.L. c. 151A, § 38A. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the employer's representative, the review examiner affirmed the agency's initial determination, denying the employer party status to contest the unemployment claim and to be relieved of charges, in a decision rendered on August 31, 2018. We accept the employer's application for review.

The review examiner denied party status and relief from charges upon concluding that the employer's fact-finding questionnaire was inadequate under G.L. c. 151A, § 38A. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that an unsigned but timely, detailed response to a fact-finding questionnaire is grounds for denying party status or relief from charges under G.L. c. 151A, § 38A, 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 employer was issued an initial request questionnaire regarding the claimant's working status with the employer. There was a timely response with detailed [sic] but the person's name who supplied the information was not provided as required.
2. The Representative who did [sic] completed the response did not provide his name as required when certifying the response as truthful under the pains and penalties of perjury.
3. While the answers to the questions were not in the spaces provided, the Agent Representative did provide detailed separation information at the end of the form.
4. On 02/05/18, the employer was notified that the information provided in response to DUA's request for information has been determined to be inadequate.
5. The employer requested a hearing on the issue of inadequate response.

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 original 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, we reject the review examiner's legal conclusion that the employer is subject to the statutory penalty of losing party status or the potential to be relieved from charges.

As an initial matter, we wish to clarify the applicable sections of law and related penalties. Citing G.L. c. 151A, § 38A, the review examiner imposed penalties because he concluded that the response to the fact-finding questionnaire was inadequate. Specifically, the review examiner decided that the employer would "not be considered a party to further proceedings relating to allowance of the claim and/or relief of charges." 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.)

Even if we agreed that the employer's fact-finding questionnaire response was inadequate, which we do not, the only penalty imposed by G.L. c. 151A, § 38A, is to preclude the employer from being relieved of charges on account of any payment of benefits under the claim. A separate section of law imposes the penalty of denying the employer party status due to an inadequate fact-finding questionnaire response. G.L. c. 151A, § 38(b), 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

The requirement to provide an adequate response to the DUA's fact-finding questionnaire is driven by the DUA's need to obtain the pertinent facts necessary to determine whether a claimant is entitled to benefits under G.L. c. 151A. *See* G.L. c. 151A, §§ 38(a) and 38A. It cannot make this determination without knowing what caused the claimant's separation from employment. In this case, however, the fact-finding questionnaire included detailed separation information. *See* Finding of Fact # 3. Indeed, Exhibit 1 sets forth the several events leading up to the claimant's discharge, including the specific dates, the full names of the individuals involved, and the reason that the employer terminated her employment.¹ There is enough information in this response from which the DUA could make an initial determination about the claimant's eligibility for benefits under G.L. c. 151A, § 25(e).

Presumably, the agent who completed the questionnaire simply cut and pasted the employer's detailed response, inserting it at the end of the form instead of answering each discrete question. Because the response was substantively complete, we decline to penalize the employer for this. To do so would be to put form over substance. *See* Board of Review Decision 0020 6593 63 (June 27, 2017) (response returned to the DUA on a separate piece of paper rather than on the

¹ While not explicitly incorporated into the review examiner's findings, the information contained in Exhibit 1 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).

DUA's form was sufficient for purpose of submitting a timely response under G.L. c. 151A, § 38(b)).²

We also decline to penalize the employer for omitting the name of the individual agent who submitted the form. While we do not condone this as a regular practice, there is nothing to indicate that this is anything but an isolated omission, and we do not see how this omission interferes with the DUA's ability to render an eligibility determination.³

We, therefore, conclude as a matter of law that the employer's response was timely and adequate within the meaning of G.L. c. 151A, §§ 38(b) and 38A.

The review examiner's decision is reversed. The employer is entitled to participate as a party in further proceedings relating to the allowance of the claim and shall be entitled to the relief of charges on account of any improper payment of benefits on the claim at issue.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 21, 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

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

² Board of Review Decision 0020 6593 63 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

³ Should this practice become routine, the DUA could address it through its regulatory authority. See G.L. c. 151A, § 38A(b).