

**Review examiner found employer's evidence more credible. The claimant, a residential youth home supervisor, authorized a student to leave with someone who did not have DCF approval. Held it was done deliberately and in wilful disregard of the employer's interest.**

**Board of Review  
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**Issue ID: 0025 2248 86**

## **BOARD OF REVIEW DECISION**

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

The claimant appeals a decision by 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 April 5, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on July 12, 2018. 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 September 14, 2018. 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 rule or 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 afford the claimant an opportunity to 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 original decision, which concluded that the claimant is ineligible for benefits under G.L. c. 151A, § 25(e)(2), because he allowed a client to be transported by someone who did not have permission, 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 assessment are set forth below in their entirety:

1. The claimant worked as a Day Shift Supervisor for the employer, a residential program for youth in the custody of the Massachusetts Department of Children and Families (DCF). The claimant began work for the employer in July 2017.
2. The employer maintains policies and procedures which allow students in their program to leave the employer's facility. The policies state that the student may only leave the facility if accompanied by someone approved of by DCF.
3. The procedures include a "Home Pass" form which documents the employer's expectations of the student and caretakers when the student leaves the facility. The Home Pass is prepared by the student's clinician. It states in part: "The above named student will be transported to and from the above named destination. A responsible adult or family member must supervise the student at all times while on the home pass and must be present to speak with staff for all stated call-in times. The treatment team and the student's legal guardian have approved the home pass and the student has met all of the criteria to go off campus."
4. The procedures also state the employer will provide transportation for the student's home pass unless there had been a problem with their behavior.
5. The purpose of the employer's policies and procedures regarding students' leaving the facility are to comply with DCF policies, promote student safety and protect the employer from liability.
6. The claimant was aware of the employer's policies and procedures.
7. The claimant worked Monday through Friday from 7 AM to 3 PM. He was part of the employer's administrative team and worked on-call. Because of his additional duties, he was considered more senior than other Shift Supervisors.
8. Student A is a 16-year-old male student. One of the employer's clinicians had approved a Home Pass for Student A to visit his grandmother over the weekend beginning Friday, March 30, 2018.
9. During the week leading up to March 30, 2018 the student had behavioral problems at school. The employer decided not to provide him with transportation for his Home Pass in accordance with their policies.
10. On Friday, March 30, 2018 a Caseworker told Student A that if he was going to his grandmother's, she would have to pick him up and return him to the program.
11. Student A arranged for his brother to pick him up at the employer.

12. Student A's brother was not approved for contact with Student A by DCF.
13. The claimant told Student A his brother could transport him.
14. Later in the day, Student A told the Caseworker his brother would pick him up. The Caseworker told him and the claimant that Student A's brother was not approved of by DCF. The claimant told the Caseworker Student A was all set and that she should not concern herself with the matter.
15. Later the Night Shift Supervisor asked Student A about his brother picking him up. Student A told him his brother was picking him up and that the claimant had approved it.
16. The Night Shift Supervisor told the claimant that Student A should not be leaving with his brother or anyone else not approved of by DCF. The claimant told him he had approved it.
17. After the claimant left work for the day, Student A was picked up at the employer by his brother.
18. The Night Shift Supervisor allowed Student A to leave with his brother because the claimant was a more senior employee and told him he approved it.
19. On Monday, April 2, 2018, the claimant's supervisor, the Residential Director, asked the claimant about Student A leaving the facility with his brother. The claimant told him he did not know about it and did not authorize it.
20. The employer suspended the claimant pending further investigation.
21. During the investigation it was revealed that Student A also spent the weekend with his father, who was approved for on-site visitation only.
22. On April 5, 2018, the employer discharged the claimant for allowing Student A to leave the facility with a person not approved of by DCF.
23. The employer disciplined the Night Shift Supervisor and the worker who physically excused Student A from the facility on March 30, 2018. They were not similarly discharged because the claimant authorized Student A's leaving with his brother and he was the more senior employee.

#### Credibility Assessment:

The claimant denied at the hearing that he authorized Student A to leave with his brother. He testified it would have been wrong to do so. He also denied that he was advised by the Caseworker and the Night Shift Supervisor that Student A should not leave with his brother. He suggested that their allegations that he

authorized the claimant to leave with his brother were because they had a personal relationship with each other, and did not like him. However, when asked at the hearing exactly what his interaction was with Student A on Friday, March 30, 2018, the claimant had difficulty articulating what was said. He testified he “approved something” but did not recall what he approved. This discredits the claimant. Also, the Caseworker was present at the hearing and provided a specific and detailed recollection of her interaction with the claimant. She also testified she never has had a personal relationship with the Night Shift Supervisor and did not dislike the claimant. Finally, the record includes the Night Shift Supervisor’s written statement in which he recounts a conversation with the claimant that was similar to the Caseworker’s. This written statement supports the Case Worker’s testimony. Given this evidence, the claimant’s denial that he authorized Student A to leave the employer with his brother is not credible.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and 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 except as follows. In Consolidated Findings of Fact ## 2 and 4, the review examiner wrote that the employer’s policies “state” that a student may only leave the facility accompanied by someone approved by DCF and that the employer will provide transportation for the student’s home pass unless there had been a problem. To the extent this implies that the employer has a written policy, we find no support in the record, as the employer did not provide any document that states either policy. We further note that the reference to “clinicians” approving home passes in Consolidated Findings ## 3 and 8 is inaccurate, as the parties testified that it was “caseworkers” who prepared home passes. In 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 ineligible for benefits, but we do so on different grounds.

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 . . . .

“[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).

In the original decision, the review examiner indicated that the employer has a written policy that states that a client may only leave its facility with an individual approved by DCF. However, when pressed during the remand hearing for a copy of the policy which states that, the employer did not present one. The review examiner also had concluded that the employer established that this policy was uniformly enforced. We found no such evidence. Therefore, we do not agree that the employer satisfied its burden to prove that the claimant knowingly violated a reasonable and uniformly enforced policy.

However, the employer may also meet its burden under G.L. c. 151A, § 25(e)(2), by demonstrating that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest. We believe it has done so.

In order to determine whether an employee’s actions constitute deliberate misconduct, 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). In order to evaluate the claimant’s state of mind, we must “take into account the worker’s knowledge of the employer’s expectation, the reasonableness of that expectation and the presence of any mitigating factors.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (citation omitted).

The employer discharged the claimant for authorizing a student to leave its residential facility on March 30, 2018, with someone who had not been approved by DCF. Specifically, Student A was permitted to leave the building with his brother, who did not have such approval. *See Consolidated Findings ## 12, 17, and 18.* Even though the employer’s written policy was not in evidence, the claimant acknowledged during the hearing that he knew the employer did not allow students to be transported away from the facility by anyone without DCF approval. *See Consolidated Finding # 6.*<sup>1</sup> This acknowledgment satisfied the employer’s burden to show that the claimant was aware of its expectation. Moreover, the objectives of this expectation, to comply with DCF policies, promote student safety, and avoid liability, are reasonable. *See Consolidated Finding # 5.*

The claimant denied engaging in any of the alleged misconduct. He denied telling Student A he could leave with his brother, denied authorizing the night shift supervisor to let the student leave with the brother, and, after being told by the caseworker and night shift supervisor that the brother did not have DCF approval, denied telling them he approved it. It is evident from Consolidated Findings ## 13, 14, and 16 that the review examiner did not believe him. Such assessments are within the scope of the fact finder’s role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). The review examiner’s credibility assessment explains that he found the employer’s evidence to be more credible because it had presented detailed written statements from the caseworker and night

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<sup>1</sup> Although not in the findings, this portion of the claimant’s testimony 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).

shift supervisor about their conversations with the claimant on March 30, 2018, the caseworker provided direct and detailed testimony contradicting the claimant's testimony, and because the claimant's memory was not specific. This assessment is reasonable in relation to the evidence presented and supports the consolidated findings.

Thus, the findings show that the claimant knew students were not to leave the premises with anyone who had not been approved by DCF, and yet, on March 30, 2018, the claimant authorized Student A to be released to his brother, who did not have DCF approval. Since the claimant denied engaging in this misconduct, he did not present any evidence of circumstances that may have mitigated the willfulness of his behavior.<sup>2</sup>

We, therefore, conclude as a matter of law that the employer has shown that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

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<sup>2</sup> At one point, the claimant testified that he thought he might have allowed the student's father to pick him up, which, he argued, would be a reasonable mistake because the father did have visiting privileges. However, the review examiner found that the claimant expressly authorized the brother to transport the student on March 28, 2018.

The review examiner's decision to disqualify the claimant under this section of law is affirmed. The claimant is denied benefits for the week beginning April 8, 2018, 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 – April 24, 2019**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, Esq. 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.

AB/rh