A claimant showed justification for a late appeal pursuant to 430 CMR 4.15(2), where he was locked out of his UI Online Account, was unaware of the notice of disqualification, he made several attempts to log into the system to no avail, he called the DUA many times seeking assistance, and finally appealed the day he regained access to his account and read the notice of disqualification.

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

Issue ID: 0025 6888 02

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), which concluded that the claimant did not have justification for failing to timely request a hearing on a determination issued on March 13, 2018. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On March 13, 2018, the DUA sent the claimant a Notice of Disqualification, which indicated that he was not eligible for benefits pursuant to G.L. c. 151A, § 25(e)(1), beginning April 23, 2017. The claimant appealed that determination on May 29, 2018. The DUA then sent the claimant another Notice of Disqualification, on July 6, 2018, informing him that he did not have justification for failing to appeal the March 13, 2018, in a timely manner. The claimant appealed the July 6, 2018, determination and attended the hearing. In a decision rendered on August 24, 2018, the review examiner affirmed the agency determination, concluding that the claimant did not have justification for failing to timely request a hearing pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.15. Thus, he was not entitled to a hearing on the March 13, 2018, determination. The Board accepts the claimant's application for review. 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 claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not have justification pursuant to 430 CMR 4.15, for the late appeal, is supported by substantial and credible evidence and is free from error of law, where the claimant was locked out of his UI Online account, he was unaware of the March 13, 2018, notice of disqualification until May 29, 2018, he had called the DUA multiple times asking for assistance with his claim, and he promptly appealed the March 13 notice when he learned of it.

Findings of Fact

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

1. The claimant elected to receive his communications from the Department of Unemployment Assistance (hereinafter the Department) by electronic communication (Exhibit 4).

2. On March 13, 2018, the Department electronically mailed a Notice of Disqualification, Issue Identification Number 0023 5565 43, to the claimant's UI Online Inbox denying the claimant benefits under Section 25(e)(1) of the Law commencing April 23, 2017 (Exhibit 5). The claimant received this Notice of Disqualification within his UI Online Inbox.

3. The claimant was not initially aware the Notice of Disqualification was in his UI Online Inbox.

4. In March 2018, the claimant got locked out of his UI Online Account.

5. From March 2018 until prior to May 29, 2018, the claimant initiated about 6 to 10 telephone calls to the Department inquiring about the status of his claim and spoke with workers from the Department. The claimant does not know the specific dates of the calls. Every time the claimant spoke with a worker from the Department during this time period, the worker told the claimant that the system was down at that time and try again back in two weeks. The workers also told the claimant [that] a decision would be sent to the claimant electronically or by US Mail. The claimant notified the workers he was locked out of his UI Online account.

6. The claimant knew where the Career Center was located in [City A], Massachsuetts [sic]. The claimant did not go to a Career Center any time prior to May 29, 2018 for assistance with his unemployment information.

7. On May 29, 2018, the claimant had a telephone conversation with a worker from the Department. During this telephone call, the worker informed the claimant about the Notice of Disqualification that was issued on March 13, 2018 and the appeal process.

8. On May 29, 2018, the claimant with the assistance of his wife was able to reset his UI Online password and access his UI online account.

9. Prior to May 29, 2018, the claimant made attempts to gain access to his UI Online account but was unsuccessful.

10. The first time the claimant read the Notice of Disqualification was on May 29, 2018. The claimant was not aware the Notice of Disqualification was in his inbox until this date.

11. On May 29, 2018, the claimant appealed the Notice of Disqualification, Issue Identification Number 0023 5565 43, that was issued on March 13, 2018. The appeal request was late.

12. The claimant waited until May 29, 2018 to appeal the Notice of Disqualification that was issued on March 13, 2018 as the claimant was locked out of his UI Online Account, was unware of the Notice of Disqualification within his UI Online Inbox until May 29, 2018, and had called the Department about 8-10 times between March until May for assistance but was informed the system was down and to call back.

13. On July 6, 2018, the Department electronically mailed to the claimant's UI Online Inbox a Notice of Disqualification, Issue Identification Number 0025 6888 02, denying the claimant's appeal request for the underline [sic] matter due to lateness under Section 39 of the Law (Exhibit 9). On the Notice of Disqualification, the Department wrote: "Your request for hearing was filed beyond 30 days from the date of the determination. A determination was mailed to you on 3/13/18. Your requested was received on 5/29/18, the 77th day after such determination was issued (Exhibit 11)." On July 16, 2018, the claimant appealed this Notice of Disqualification electronically (Exhibit 12)."

14. The claimant got locked out of his UI Online account again after May 29, 2018. On July 7, 2018 a worker from the Career Center helped the claimant with gaining access again to his UI Online Account while he was attending a Career Center Seminar.

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.[1] However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant did not have justification for the late appeal of the March 13, 2018, notice of disqualification.

Pursuant to G.L. c. 151A, 39(b), the claimant had ten days to appeal the March 13, 2018, notice of disqualification. Since the claimant did not file the appeal until several months after the issuance of the underlying determination, the standard is whether there is justification for considering the appeal to be timely, rather than whether there is good cause for the late appeal. *Compare* 430 CMR 4.14 (allowing hearing on late appeal if appeal is filed within thirty days of issuance of determination and good cause is shown) *with* 430 CMR 4.15 (allowing hearing on late appeal if appeal filed after thirty days and justification shown). 430 CMR 4.15 provides:

[1] In this case, whether the claimant "received" the March 13, 2018, notice of disqualification is the crux of the matter to be decided. We accept Finding of Fact # 2 to the extent that it means that the notice of disqualification was deposited into the claimant's UI Online account. As will be discussed below, we believe that the claimant "received" the notice, for purposes of 430 CMR 4.15, on May 29, 2018.

> The 30 day limitation on filing a request for a hearing shall not apply where the party establishes that:
>
> > (1) A Division employee directly discouraged the party from timely requesting a hearing and such discouragement results in the party believing that a hearing is futile or that no further steps are necessary to file a request for a hearing;
> >
> > (2) The Commissioner's determination is received by the party beyond the 30 day extended filing period and the party promptly files a request for hearing;
> >
> > (3) The Commissioner's determination is not received and the party promptly files a request for a hearing after he or she knows that a determination was issued;
> >
> > (4) An employer threatened, intimidated, or harassed the party or a witness for the party, which resulted in the party's failure to file for a timely hearing.

Per the language of this regulation, the claimant has the burden to show that one of these four circumstances is true. We need not consider (1) and (4), because the findings of fact do not support a conclusion that those circumstances are at all applicable here. The question presented to the Board is whether, under circumstance (2), the claimant received the notice of disqualification "beyond the 30 day extended filing period and [he] promptly file[d] a request for hearing." Because 430 CMR 4.15(3) contemplates that the determination is never received, we do not believe that this provision applies to the facts here.

As noted above, the March 13, 2018, notice of disqualification was sent to the claimant and was put into his UI Online inbox by the DUA. However, the claimant could not access his account, including the UI Online inbox, because he was locked out. Finding of Fact # 4. Consequently, he was totally unaware of the notice of disqualification until May 29, 2018. Finding of Fact # 10. The review examiner summarized in Finding of Fact # 12 why the claimant could not appeal the disqualification prior to May 29, 2018. She found:

> The claimant waited until May 29, 2018 to appeal the Notice of Disqualification that was issued on March 13, 2018 as the claimant was locked out of his UI Online Account, was unware of the Notice of Disqualification within his UI Online Inbox until May 29, 2018, and had called the Department about 8-10 times between March until May for assistance but was informed the system was down and to call back.

Normally, we would conclude, as the review examiner did, that the depositing of the notice into the UI Online inbox constitutes receipt of the notice. When a claimant has free access to his account, there is no reason why the claimant cannot access it, read a determination, and then take appropriate action in response. Even if a claimant may have trouble reading a document (it may not open properly, or it is in a different language), the claimant would still be aware of the existence of a document and it would be incumbent upon the claimant to seek out assistance

from the DUA regarding its content. However, when a party, such as the claimant, has no access at all to the account, it is difficult to conclude that the party has received the determination for purposes of 430 CMR 4.15.[2]

It is important to note the efforts which the claimant made to try to access his account and, thus, any notices or communications which were in his UI Online inbox. He contacted the DUA at least a half-dozen times. He made repeated attempts to access UI Online, to no avail.[3] It was not until a DUA representative finally explained the appeals process and assisted the claimant with accessing his account did he finally see the March 13, 2018, determination.

The claimant's situation and actions persuade us that the review examiner's decision is not in accord with the spirit of 430 CMR 4.15 or with the liberal interpretation of unemployment laws which we must use pursuant to G.L. c. 151A, § 74. We think it irrational to read 430 CMR 4.15(2) as meaning that the determination will be deemed to have been received even when the DUA's own system does not allow access to the determination itself. Under these circumstances, we think that the claimant received the determination beyond the extended 30-day appeal period, and the claimant promptly appealed once he learned of the notice of disqualification.

We, therefore, conclude as a matter of law that the review examiner's conclusion that the claimant did not have justification for the late appeal is not supported by substantial and credible evidence and is not free from error of law, because the claimant did not timely receive the DUA's determination (due to problems with the agency's own computer system), he did not know of the determination itself until May 29, 2018, and the claimant appealed the determination at that time, thus satisfying the conditions of 430 CMR 4.15(2).

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[2] *See also* Board of Review Decision 0015 5339 12 (September 28, 2015) (employer had justification for the late appeal, where it did not receive correspondence due to problems accessing the UI Online, it only knew of the determination several months later, and appealed soon after learning of the determination). This is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

[3] The claimant could have gone in person to a Career Center to receive assistance. *See* Finding of Fact # 6. However, no one told him to do that, and the claimant was following the directives of the DUA employees to call back every two weeks to see if the problem with the UI Online system could be fixed. *See* Finding of Fact # 5. We cannot fault the claimant for failing to go into an office in person, when it was not apparent that going in person would have helped him at all.

The review examiner's decision is reversed. The DUA shall schedule a hearing on the March 13, 2018 notice of disqualification as soon as possible.



BOSTON, MASSACHUSETTS
DATE OF DECISION – September 6, 2018

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

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