

Locked out employee presented work search logs showing he contacted his union for work three times a week. Ordinarily, this would not satisfy § 24(b)'s active work search requirement because his union permitted him to seek other work. However, on two occasions, DCS agents led him to believe that his work search was acceptable. Under the circumstances, Board declined to penalize the claimant for the agency errors.

**Board of Review
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Issue ID: 0027 1108 94

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 reverse.

As a result of a labor dispute, the claimant was locked out from his position with his employer, and he filed a claim for unemployment benefits with the DUA, effective July 1, 2018. In a determination issued on November 28, 2018, the DUA denied benefits for the period July 8 through September 1, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's initial determination in a decision rendered on January 16, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant failed to actively search for work, and, thus, he was disqualified under G.L. c. 151A, § 24(b). 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 by merely contacting his union for work during the period that he was locked out of his job, the claimant failed to satisfy the active work search requirements under G.L. c. 151A, § 24(b), 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 claimant was working for a utility company when contract negotiations broke down and the company locked out the claimant and other co-workers.

2. The claimant filed an unemployment claim having an effective date of July 1, 2018. The Department of Unemployment Assistance (DUA) determined his benefit rate to be \$769 per week.
3. Soon after filing his claim, [the] DUA sent the claimant a pamphlet describing how unemployment works. The claimant did not read the pamphlet.
4. When he filed his claim, the claimant was asked: "Are you a current member of a trade union that requires you to seek work only through that union's hiring hall?" The claimant accurately replied "No."
5. The claimant is a union member, but the union does not require him to only accept work obtained through the union. The union allows him to seek and work non-union jobs.
6. [The] DUA required the claimant to keep a log of his work search activities each week. In July, the claimant went to a career center and asked how to complete the work search log. It is unknown exactly how the claimant phrased the question to the career center representative. The representative informed the claimant he only need show he regularly contacted his union each week.
7. For the weeks ending July 7, 2018 through September 1, 2018, the claimant wrote in his log that he contacted his union on three different days of that week.
8. In August 2018, the claimant attended a reemployment seminar and completed a reemployment review at a career center. The career center representative concluded the claimant contacting his union was a sufficient work search activity and informed [the] DUA of this. If the career center found the claimant had not performed a sufficient work search, DUA would have disqualified the claimant from receiving benefits.
9. Since opening the unemployment claim through September 17, 2018, the claimant only sought work by contacting his union. During each of those weeks, the claimant performed services for the union by walking picket lines, handing out leaflets, or attending rallies. The ultimate purpose of these endeavors was for the employer to agree to a new contract and end the lockout.
10. The claimant requested and received benefits for the weeks ending July 21, 2018, through September 1, 2018.
11. On November 28, 2018, DUA issued a Notice of Disqualification to the claimant finding him disqualified for the period of July 8, 2018 through September 1, 2018, because he did not establish he was capable of, available

for, and actively seek work within the meaning of Section 24(b) of the unemployment insurance law.

12. For the period of July 8, 2018 through September 1, 2018, the claimant was physically capable of working full-time. He was also available to work a full-time schedule.

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 claimant is ineligible for benefits.

The relevant section of law in this appeal is G.L. c. 151A, § 24(b), which provides, in pertinent part, as follows:

[An individual, in order to be eligible for benefits under this chapter, shall] . . . (b)
Be capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted

In the present case, the review examiner found that during the relevant period, the claimant was capable of working full-time and available to work a full-time schedule. Finding of Fact # 12. She disqualified the claimant because she concluded that he failed to actively seek work.

The express terms of the above statutory provision do not state what is expected by "actively seeking work." Pursuant to G.L. 151A, § 24(b), an individual seeking unemployment benefits is required to show that he has made a reasonable good faith effort to find new employment. Evancho v. Dir. of Division of Employment Security, 375 Mass. 280, 282 (1978). In terms of what that means, the Supreme Judicial Court shows deference to the DUA. *See* Grand v. Dir. of Division of Employment Security, 393 Mass. 477, 481 (1984) (giving deference to the DUA Director in setting the work search standards for unemployment compensation).

As a general rule, we would agree with the review examiner's statement that an individual must seek work from a variety of employers as this would be "follow[ing] a course of action which is reasonably designed to result in prompt re-employment in suitable work." DUA Service Representative Handbook, § 1005(C). The DUA has made an exception for union members whose union limits them to obtaining work via a union hiring hall or otherwise prohibits them from performing non-union work. *See* DUA Service Representative Handbook, § 1052. Because the claimant's union does not run a hiring hall, and it permits him to seek and accept non-union work, the review examiner correctly concluded that this exception does not apply to the claimant in the present case. *See* Findings of Fact ## 4 and 5; *see also* Board of Review Decision 0018 3385 28 (Mar. 30, 2018) (following a layoff, claimant's efforts to seek work only by contacting his previous employer and labor union, where union rules permitted him to accept non-union work, did not meet the work search requirements of G.L. c. 151A, § 24(b)).

Nonetheless, when viewing the record as a whole in the present appeal, we believe the claimant is entitled to benefits.

What makes this case different is the role played by the Department of Career Services (DCS), a state agency separate and independent of the DUA, in misleading the claimant. While the claimant endeavored to comply with the DUA's work search requirements, the review examiner found that not one but *two* DCS representatives told the claimant he was doing it correctly, when he was not. At the time he filed his claim, he truthfully reported on the DUA questionnaire that his union did not restrict his ability to obtain other work. *See* Finding of Fact # 4. He faithfully kept a work search log. *See* Exhibit 10. As he began requesting benefits in July, he asked a Career Center representative how to keep the log. *See* Finding of Fact # 6. The first representative misinformed him that he only needed to contact his union each week. Finding of Fact # 6. In August, following his conversation with the first representative, the claimant was called in for a DCS re-employment review. The DCS carries out these reviews pursuant to federal and state laws and regulations. During this review, the claimant showed another Career Center representative his completed log. The second DCS representative effectively approved a log showing that he only contacted his union for work. *See* Finding of Fact # 8. Not until seeing a new issue placed on his claim in the DUA's electronic record-keeping system around September 18, 2018, which indicated that he was failing to meet the work search requirements, did the claimant realize he was doing anything wrong, and he begin searching for other work.¹ We note that, at his hearing, the claimant was able to identify with specificity when and with whom he had spoken. The claimant corroborated his testimony in this regard by producing documentation from the Massachusetts One-Stop Employment System, a database shared by both agencies. The review examiner concluded that the specificity of the claimant's testimony combined with the collaboration he produced lent significant credence to the claimant. We concur.

Simply put, the claimant believed that he was engaged in an active work search pursuant to G.L. c. 151A, § 24(b), based upon his meetings with the DCS. Unfortunately, two DCS representatives on two separate occasions misled him to believe he was meeting his legal obligations. We think that these agency personnel were largely responsible for the claimant's failure to demonstrate an active work search during the weeks at issue. The DUA is not responsible or accountable for the acts or omissions of the DCS, a separate and independent agency. Nonetheless, because the claimant at all times acted honestly and in good faith to try to do what agency personnel expected of him, we decline to penalize the claimant for another agency's errors.

We, therefore, conclude as a matter of law that under the circumstances, the claimant may not be denied benefits pursuant to G.L. c. 151A, § 24(b) for the limited period at issue.

¹ While not explicitly incorporated into the review examiner's 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).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning July 8 through September 1, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 28, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
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.

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