

The employer's response to the agency's request for information was adequate, as the employer answered the questions on the questionnaire according to the instructions provided.

**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: 0027 4662 20

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) denying the employer relief of benefit charges. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits on July 12, 2018. The agency sent the employer a questionnaire to complete regarding the claimant's employment status. The deadline to respond to the questionnaire was July 26, 2018. The employer returned the completed questionnaire to the agency on July 26, 2018. Subsequently, on October 18, 2018, the agency determined that the employer's response to the questionnaire was not timely and/or adequate. The employer appealed, and its agent attended the hearing. In a decision rendered on December 12, 2018, the review examiner affirmed the part of the agency determination that concluded the employer had not adequately responded to the agency's request for information, as required by G.L. c. 151A, § 38A, and, as a result, the employer would not be relieved of benefit charges on account of any payment of benefits on the claim at issue. We accepted the employer's application for review.

The issue on appeal is whether the review examiner's decision, which concluded that pursuant to G.L. c. 151A, § 38A, the employer's response to a request for information was inadequate, is supported by substantial and credible evidence and is free from error of law, where the documentary evidence in the record establishes that the employer responded to the agency's request for information in accordance with the instructions provided on the questionnaire.

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.

Findings of Fact

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

1. The claimant (Claimant Identification Number 10704385) filed a claim for unemployment benefits. The effective date of the claim is 7/01/18.

2. The claimant worked for the employer.
3. The DUA created Issue Identification Number 0026 4403 73-01. This issue involves the claimant and the employer. The DUA sent a still employed questionnaire to the employer on this issue (Questionnaire 1). The DUA transmitted Questionnaire 1 to the employer's UI Online Inbox.
4. Questionnaire 1 was the first still employed questionnaire that the DUA transmitted to the employer after the claimant established her claim. Questionnaire 1 was the first questionnaire of any sort that the DUA transmitted to the employer after the claimant established her claim.
5. The employer's agent entered information into Questionnaire 1 and returned it to the DUA on 7/26/18. Questionnaire 1 was due on 7/26/18.
6. Questionnaire 1 features questions about on-call employment. In Questionnaire 1, the agent reported, "[The claimant] is still an active employee with us. She works PT for our Media Department. [The claimant] makes \$16/hour and her weekly hours vary. For the week in question, 7/08-7/14, she worked 4.75 hours and her gross was \$76.00. [The claimant] has worked a total of 104 hours since January. That averages out to less than five hours per week. She has not refused any work." The agent did not provide any additional information in Questionnaire 1. Questionnaire 1 features the question, "Did the claimant work for you (the employer) during the week beginning 7/22/18?" Questionnaire 1 features the sub questions, "If Yes, How many hours did the claimant work?" and "If Yes, claimant's gross earnings." The agent did not answer these questions.
7. The DUA created an approval notice for Issue Identification Number 0026 4403 73-01 (Approval Notice 1). Approval Notice 1 reads, in part, "The claimant established subsidiary employment during the base period and is currently accepting all available work during the benefit year. Therefore, the claimant is entitled to partial benefits for any week in which the hours of scheduled work are less than full-time." Approval Notice 1 reads, in part, "The claimant is entitled to receive benefits beginning 7/15/18 and thereafter if otherwise eligible."
8. The DUA created Issue Identification Number 0026 2429 05-01. This issue involves the claimant and the employer. The DUA sent a still employed questionnaire to the employer on this issue (Questionnaire 2). The DUA transmitted Questionnaire 2 to the employer's UI Online inbox.
9. The employer's agent entered information into Questionnaire 2 and returned it to the DUA on 8/09/18. Questionnaire 2 was due on 8/10/18.

10. Questionnaire 2 features questions about on-call employment. In Questionnaire 2, the agent reported, "She works part time for the town's media department." The agent did not provide any other information in the questionnaire.
11. The DUA created an approval notice for Issue Identification Number 0026 2429 05-01 (Approval Notice 2). Approval Notice 2 reads, in part, "The claimant was hired to work a part-time schedule. The claimant is accepting all available work. Therefore, the claimant is entitled to partial benefits for any week in which the hours of scheduled work are less than full-time." Approval Notice 2 reads, in part, "The claimant is entitled to receive benefits beginning 7/08/2018 and thereafter if otherwise eligible."
12. The DUA determined that the employer must incur a penalty because it submitted late and/or inadequate information.

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 except as follows. The portion of Finding of Fact # 6, which states that the agent did not provide any additional information in Questionnaire 1 is unsupported. In adopting the remaining findings, we deem 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's response to the agency's request for information was inadequate.

G.L. c. 151A, § 38A, provides, in pertinent 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.

The only issue before the Board is whether the claimant's response to Questionnaire # 1 was adequate within the meaning of G.L. c. 151A, § 38A. As noted by the review examiner in his decision, because the employer responded to the questionnaire by the deadline of July 26, 2018, the employer's party status is not in question.¹

The review examiner concluded that the claimant's response to the questionnaire was inadequate, because the employer did not answer all of the questions in the questionnaire. We disagree with this conclusion. Question # 1 under Part 1 of the questionnaire states, "Is/was the claimant an on-call employee? Yes No . . . If **No**, provide any information you may have about this person's claim for benefits, then to go to **Part 2**."² The employer's agent answered that the claimant was not an on-call employee and added that she worked part-time in the media department,³ before proceeding to Part 2. Under Part 2, the employer's agent answered all pertinent questions. Since the employer filled out the questionnaire according to the instructions provided in the questionnaire, we cannot conclude that its response was inadequate.

¹ See G.L. c. 151A, § 38(a).

² See Exhibit 2, the fact-finding questionnaire, which the review examiner refers to as Questionnaire 1. While not explicitly incorporated into the review examiner's findings, Exhibit 2 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).

³ The additional information about the claimant which the review examiner includes in Finding of Fact # 6, (*i.e.*, claimant's rate of pay, hours worked, and that she had not refused any work) actually appears in Questionnaire 2. See Exhibit 2. This error does not change our decision.

We reverse the review examiner's decision that the employer is not entitled to a relief of charges on this claim, as its response to the agency's request for information complied with the adequacy requirement set forth in G.L. c. 151A, § 38A. We further note that the employer retains its party status, as it responded to the agency's request for information by the deadline provided by the agency, as required under G.L. c. 151A, § 38(a).

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 24, 2019



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.

SVL/rh