While on a disciplinary suspension for working under the influence, the claimant could not be denied 10 weeks of benefits under G.L. c. 151A, § 25(f), because he did not have a right to return to work after a fixed period of time. The employer would not permit him to return earlier than 16 weeks later and only after he obtained a medical opinion that he was fit to work in construction-type environment while on prescribed medication.

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Issue ID: 0028 9572 66

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) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant was suspended from his position with the employer in December, 2018. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 14, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner modified the agency's initial determination, denying benefits from December 9, 2018, through February 16, 2019, but awarding benefits thereafter, in a decision rendered on December 19, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had been suspended from employment as discipline for breaking an established rule and, thus, he was disqualified only for a 10-week period pursuant to G.L. c. 151A, § 25(f). 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, pursuant to G.L. c. 151A, § 25(f), the claimant was entitled to benefits after serving a 10-week disqualification, is supported by substantial and credible evidence and is free from error of law, where the claimant's ability to return to work following his suspension was contingent upon a number of factors.

Findings of Fact

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

1. The claimant worked full-time as an installer for the employer, a heating and cooling company, from 07/31/18 until on or about 12/08/18.

2. The employer expects employees not to report to work under the influence of drugs or alcohol and prepared to perform their job.

3. The purpose of the expectation is to ensure safety and productivity so that the employer's business needs are met.

4. On 12/12/18, the General Manager (GM) was notified by an employee who worked with the claimant that the claimant appeared to be under the influence of something on 12/07/18 and 12/08/18. The employee reported that the claimant was very lethargic and could barely keep his eyes open. The employee reported that the claimant has exhibited similar behavior intermittently over the last few months.

5. The GM immediately pulled the claimant off the job for safety reasons and met with him. The GM observed the same behavior that had been reported by the employee. The claimant indicated that he was solely taking prescription medications.

6. The GM felt that it was obvious the claimant was under the influence of some type of substance and didn't feel the need to send him for a drug test. The GM notified the claimant that he was suspended, and they would meet again on 12/17/18 to discuss his ongoing employment.

7. On 12/17/18, the claimant was presented with an option to sign an agreement that he would enter in the appropriate counseling or treatment program. The claimant had to provide the employer proof of enrollment in a treatment program no later than 01/11/19.

8. The agreement indicated that the claimant could return to work no earlier than 04/01/19 provided that he supply proof of completion of the treatment program, successfully pass an alcohol and drug test, and supply the employer with a note that he is capable of working in a construction type environment when using prescription or medicinal drugs.

9. If the claimant chose not to sign the agreement, he would be immediately terminated.

10. On 12/17/18, the claimant signed the agreement and complied with the requirements of the agreement.

11. On 01/06/19, the claimant filed a claim for unemployment benefits with an effective date of 01/06/19.

12. On or about 04/30/19, the claimant returned from the suspension and successfully passed the drug and alcohol test.

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 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 disagree with the review examiner's legal conclusion that the claimant should be disqualified from receiving benefits while he was suspended from work.

At the outset, we note that the employer's appeal objects to the review examiner's decision to grant unemployment benefits after April 30, 2019. Our statutory obligation under G.L. c. 151A, § 41(b), requires us to review the review examiner's decision in its entirety to determine whether it is supported by the evidence and free of legal error. We are not limited to the portion of the decision that awarded benefits.

We first consider the review examiner's decision to disqualify the claimant from receiving benefits during the first 10 weeks of his suspension, the week beginning December 9, 2018, through February 16, 2019. In rendering this disqualification, the review examiner relied upon a provision under G.L. c. 151A, § 25, which provides, is relevant part, as follows:

> [No waiting period shall be allowed and no benefits shall be paid to an individual pursuant to this chapter] . . . (f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

Application of G.L. c. 151A, § 25(f), is further explained by regulation, 430 CMR 4.04(4), which states the following:

> A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he or she has been suspended, but in no case more than ten weeks, provided it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit, that such suspension was for a fixed period of time as provided in such rules or regulations, and that a claimant has a right to return to his employment with the employing unit if work is available at the end of the period of suspension.

The claimant's suspension began during the week beginning December 9, 2018. *See* Findings of Fact ## 4–6. Pursuant to a written agreement, the employer would not permit the claimant to

return from his suspension any earlier than April 1, 2019. *See* Finding of Fact # 8. Thus, at a minimum, this suspension would run for 16 weeks.

G.L. c. 151A, § 25(f), states that a claimant is denied benefits during the first 10 weeks of a suspension for breaking an established employer rule. No written rule was entered into evidence. Nonetheless, we will assume for purposes of analysis that the employer did have some sort of safety rule that prohibited working under the influence of drugs or alcohol, and that the claimant violated this rule on December 12, 2018. As a result, he was given a disciplinary suspension. *See* Findings of Fact ## 2–6. Before a claimant may be denied 10 weeks of benefits, however, 430 CMR 4.04(4) requires, *inter alia*, that the employer show that the suspension was for a fixed period of time and that the claimant had a right to return at the end of the suspension.

Here, the written agreement provided that the claimant could return no earlier than April 1, 2019. Finding of Fact # 8. This means that the suspension could last longer. In fact, the claimant did not return until April 30, 2019. *See* Finding of Fact # 12. Thus, when issued, the suspension was not actually for a fixed period of time.

Moreover, before the employer would permit the claimant to return, he had to satisfy three conditions: (1) written proof that he successfully completed a treatment program; (2) passing an alcohol and drug test; and (3) providing a note from a physician allowing him to work in a construction-type environment when using prescription or medicinal drugs. *See* Finding of Fact # 8 and Exhibit 7.[1] Without even discussing the first two conditions, it is evident that the third one placed the claimant's ability to return to work on a medical doctor's opinion of the claimant's capabilities 16 weeks into the future. Since no one could be sure what that medical opinion would be, we believe the claimant's right to return was speculative.

We, therefore, conclude as a matter of law that the employer has not shown that the claimant had a right to return after a fixed period of time. Pursuant to 430 CMR 4.04(4), he may not be disqualified during the first 10 weeks of his disciplinary suspension under G.L. c. 151A, § 25(f).

As to the employer's objection to awarding benefits thereafter, it is important to note that the only issue before us is the claimant's eligibility for benefits under G.L. c. 151A, § 25(f), while out on disciplinary suspension. The claimant was not eligible for benefits when he returned to his full-time job with the employer. Whether he was eligible after his permanent separation from the employer has been addressed under a separate issue. *See* Issue ID # 0033 0799 09.[2]

[1] Exhibit 7 is the parties' December 17, 2018, written agreement. While not explicitly incorporated into the review examiner's findings, the terms of this agreement are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

[2] In response to the employer's concern, we further note that, according to the DUA's electronic record-keeping system, UI Online, the claimant only certified for unemployment benefits under this claim through the week ending February 23, 2019. Also, in a third issue, he was disqualified from receiving benefits from January 6 through April 30, 2019. *See* Issue ID # 0033 0798 91. Thus, our decision today only affects the claimant's ability to keep six weeks of benefits already paid to him at the beginning of his claim.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the week beginning December 9, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 30, 2020

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.

AB/rh