

0029 0310 98 (June 19, 2019) – Because state employee’s indictment was for non-work related misconduct, the Perry Law does not prohibit her from collecting unemployment compensation while on an indefinite suspension. She is eligible for benefits under G.L. c. 151A, § 25(f).

Board of Review
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Issue ID: 0029 0310 98

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.

The claimant was suspended from her position with the employer on January 15, 2019. She filed a claim for unemployment benefits with the DUA, effective January 20, 2019, which was denied in a determination issued on February 8, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on March 8, 2019. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant was precluded from receiving unemployment benefits under G.L. c. 151A, § 25(f), while on an indefinite suspension. After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s decision, which concluded that the a criminal indictment precluded the claimant from receiving any unemployment benefits while out on a disciplinary suspension, is supported by substantial and credible evidence and is free from error of law, where the charges do not involve any alleged misconduct at work.

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 Assistant Clerk Magistrate for the employer, a superior trial court, since 01/02/01. The claimant’s annual salary was approximately \$119,000.

2. The employer expects employees not to be arrested and indicted on criminal charges.
3. On 12/21/18, the claimant was arrested and charged with three criminal counts involving drug offenses and money laundering.
4. A third party informed the employer of the claimant's arrest and criminal charges.
5. On 12/21/18, the claimant was indicted on the charges.
6. On 12/27/18, the employer placed the claimant on paid Administrative Leave.
7. On 01/15/19, the employer indefinitely suspended the claimant pending the outcome of her case.
8. On 01/20/19, the claimant filed a claim for unemployment benefits with an effective date of 01/20/19.
9. M.G.L. Chapter 268A, § 25 precludes public officials suspended due to indictment from receiving unemployment benefits.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. Finding of Fact # 9 is not a finding of fact, but a conclusion of law, which, as discussed below, is not applicable in this case. In adopting the remaining findings, we deem 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 is ineligible for benefits.

The claimant is out of work because she has been placed on a suspension. Her eligibility for benefits is, thus, properly analyzed pursuant to G.L. c. 151A, § 25(f), which provides, 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), provides, in pertinent part, as follows:

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.

(Emphasis added.)

In the present case, the findings show that after learning of the claimant's arrest and criminal charges, the employer placed the claimant on a disciplinary suspension for failing to comply with its expectation that employees not be indicted. *See* Findings of Fact ## 2–4 and 7. Because the claimant's disciplinary suspension is indefinite, 430 CMR 4.04(4) provides that the claimant may not be denied unemployment benefits.

The review examiner nonetheless disqualified the claimant under a different section of law. Citing City of Springfield v. Dir. of Division of Employment Security, 398 Mass. 786 (1986), the review examiner held that public officials who had been suspended due to an indictment were precluded by G.L. c. 268A, § 25, from receiving unemployment compensation. This was an error of law. First, G.L. c. 268A, § 25, applies to county and municipal employees. The claimant in the case before us is a state employee. Another statute, G.L. c. 30, § 59 (the Perry Law), is identical in operative language to G.L. c. 268A, § 25, but applies to state employees. *Id.* at 788, *citing* Massachusetts Bay Transportation Authority v. Massachusetts Bay Transportation Authority Retirement Board, 397 Mass. 734 n. 8 (1986).

Second, the claimant is not precluded from receiving unemployment benefits by the Perry Law because the statute prohibits compensation only if the indictment is “for misconduct in office.” The Supreme Judicial Court has stated that, with the exception of teachers and police officers, this phrase excludes an employee's off-duty conduct. Brittle v. City of Boston, 439 Mass. 580, 594 (2003). Here, it is undisputed that the criminal charges pending against the claimant were for conduct which was not work-related.¹

We, therefore, conclude as a matter of law that the claimant is not disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(f), G.L. c. 268A, § 25, or G.L. c. 30, § 59.

¹ Both parties agreed on this point in the written arguments which they submitted to the Board. *See also* Exhibit 2, the employer's completed DUA fact-finding questionnaire. While not explicitly incorporated into the review examiner's findings, the entry on page 3 of this exhibit stating that the indictment was non-job-related 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 January 20, 2019, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 19, 2019



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.

AB/rh