

Where a claimant was unable to open a determination on her computer after it was sent to her by the DUA, but she undertook reasonable efforts to try to read the determination and appeal it, the claimant has shown good cause for a late appeal pursuant to G.L. c. 151A, § 39(b) and 430 CMR 4.14.

**Board of Review
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Issue ID: 0029 2124 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), which dismissed her appeal of a determination issued by the agency on January 4, 2019. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA on May 27, 2018. On January 4, 2019, the DUA sent her a Notice of Disqualification pursuant to the provisions of G.L. c. 151A, § 28A. The claimant appealed the determination on January 30, 2019. On February 21, 2019, the DUA issued a Notice of Disqualification, dismissing the claimant's appeal of the January 4, 2019, determination, because it was not timely filed. The claimant appealed the February 21, 2019, determination to the DUA hearings department. Following a hearing on the merits attended the claimant, the review examiner affirmed the agency's determination and dismissed the claimant's appeal.

The review examiner dismissed the appeal after concluding that the claimant did not have good cause for failing to timely appeal the January 4, 2019, determination and, thus, was not entitled to a hearing under G.L. c. 151A, § 39(b), and 430 CMR 4.14. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accept the claimant's application for review. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision that the claimant did not have good cause for failing to timely appeal the January 4, 2019, Notice of Disqualification is supported by substantial and credible evidence and is free from error of law, where the claimant was unable to open the notice when it was initially sent to her and the claimant took several steps to learn what the determination said and to appeal it.

Findings of Fact

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

1. The claimant is an adjunct professor. She filed unemployment insurance claims in 2011, 2012, 2013, 2014, 2015, 2017, and 2018.
2. The claimant uploaded information onto UI Online in response to DUA's requests for information and/or completed Fact Finding Questionnaires online approximately twenty-five times between 12/29/14 and 12/23/18.
3. The claimant appealed a Disqualification regarding a pre-date in Issue Identification Number 0022 7697 03-01, via UI Online, on 9/25/17. This request for an appeal was submitted late.
4. The claimant filed an unemployment insurance claim on 5/27/18. She chose to receive information from DUA electronically, in her UI Online inbox, when she filed the above claim.
5. On 1/4/19, DUA sent a Notice of Disqualification in Issue Identification Number 0028 4459 66-01 to the claimant's UI Online inbox, regarding a reasonable assurance issue from 12/16/18 to 1/19/19.
6. The Notice of Disqualification contains the following information about filing an appeal: "...This determination will become final unless: (1) You request a hearing within ten calendar days after the date of mailing, or (2) You request a hearing within eleven to thirty calendar days after the date of mailing and it is established that such delay was for good cause."
7. Ten calendar days after 1/4/19 is 1/14/19.
8. The claimant viewed her UI Online inbox on 1/4/19, at 3:14 p.m., 3:57 p.m., and 4:44 p.m.
9. The claimant was unable to open the Notice of Disqualification in Issue Identification Number 0028 4459 66-01.
10. The claimant called DUA on 1/4/19, and a DUA employee changed the claimant's correspondence preference to U.S. Mail, per her request, at 4:14 p.m.
11. The DUA employee read the Notice of Disqualification to the claimant, and said he would send the claimant a copy in the mail.
12. The claimant did not go to a Career Center or library to use computers at those locations to try to open the above Notice of Disqualification.
13. On or about 1/17/19, the claimant was able to open the above Notice of Disqualification in her UI Online inbox. She attempted to request an appeal online that day.

14. On 1/25/19, the claimant called DUA, but could not reach anyone.
15. On 1/30/19, the claimant called DUA at spoke with a DUA employee at 3:33 p.m. The DUA employee told the claimant she did not properly request an appeal, and gave the claimant instructions on how to submit her request for an appeal.
16. The claimant submitted a request for an appeal of the above Notice of Disqualification via UI Online on 1/30/19.

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. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject as being unsupported by the record Findings of Fact ## 2 and 3 in their entirety. We also reject as unsupported by the record the portion of Finding of Fact # 10 that follows the introductory phrase, "The claimant called DUA on 1/4/19." In adopting the remaining findings, we deem them to be supported by substantial and credible evidence, whether by the claimant's testimony and/or the documents in the record.¹ As discussed more fully below, we reject the review examiner's legal conclusion that that the claimant did not have good cause for failing to timely appeal the January 4, 2019 determination.

There is no dispute that the claimant was sent a determination by the agency on January 4, 2019. The time limits for appealing a determination are laid out in G.L. c. 151A, § 39(b), which provides, in pertinent part, as follows:

Any interested party notified of a determination may request a hearing within ten days after delivery in hand by the commissioner's authorized representative, or mailing of said notice, unless it is determined . . . that the party had good cause for failing to request a hearing within such time.

This statute provides that the claimant must appeal the determination within ten days. Agency regulations explain what happens if the claimant does not appeal by the tenth day. If the claimant appeals within thirty days, the appeal will be accepted if the claimant shows good cause for appealing beyond the ten-day deadline. Specifically, 430 CMR 4.14 provides, in relevant part, as follows:

The Commissioner may extend the ten day filing period where a party establishes to the satisfaction of the Commissioner or authorized representative that circumstances beyond his or her control prevented the filing of a request for a hearing within the prescribed ten day filing period.

¹ During the hearing, the review examiner entered into the record Exhibits ## 1 through 10. The very specific information contained within Findings of Fact ## 2, 3, and 10 is not contained within those documents.

The regulation gives a lengthy list of circumstances which could constitute good cause. The regulation also includes a catch-all provision, providing that good cause may be found where the claimant submits evidence of “[a]ny other circumstance beyond a party’s control which prevented the filing of a timely appeal.” 430 CMR 4.14(12).

Here, the claimant was not able to open the January 4, 2019, determination when it was sent to her on that day. Rather than take no action to resolve the issue, the claimant contacted the DUA immediately to ask about what the determination said. She was informed about the content of the determination and was told that it would be sent to her via standard mail. It is understandable that the claimant waited to see the determination before she made efforts to appeal it. Although a DUA employee read it to her, that is not the same as having the determination in front of her so that she could understand the contents of the determination. The claimant waited for the determination in the mail² but, in the meantime, was able to open the determination on January 17, 2019. She made an attempt to appeal that day. Nothing in the record suggests that the claimant knew on January 17, 2019, that she did not actually appeal the determination.³ She then waited to hear back from the DUA regarding her appeal. She heard nothing,⁴ so she made efforts to contact the agency again. Finally, she was told on January 30, 2019, that there was no appeal, and the claimant filed her appeal that day.

The entire sequence of events which led to the late appeal was created, at first, by the claimant’s inability to open the January 4, 2019, determination on her computer. This technological issue was not something within her control. Thereafter, she took reasonable steps to find out what the determination said and to appeal the determination when she finally read it. The review examiner dismissed the appeal, because the claimant did not also go to a library or career center to try to open the January 4, 2019, determination on a computer. The claimant certainly could have done that. However, her good-faith efforts show a reasonable course of action undertaken to appeal the determination. Rarely in unemployment law is a claimant required to exhaust all possible options when faced with a certain situation. Time and again, claimants are held to a standard of reasonability. We think that the claimant acted reasonably here to appeal her determination.

We, therefore, conclude as a matter of law that the review examiner’s decision to dismiss the claimant’s appeal is not supported by substantial and credible evidence or free from error of law, because the claimant has shown good cause within the meaning of G.L. c. 151A, § 39(b), for her untimely appeal.

² The review examiner made no finding as to whether the claimant received it in the mail.

³ Because she first attempted to appeal the disqualification on January 17, 2019, we might consider that to be the day that she reasonably could be said to have filed her appeal. However, it is not clear why the appeal was never received by the agency. It may have been a problem with the DUA’s UI Online computer system, or it may have been the claimant’s error.

⁴ What the claimant did immediately after she tried to appeal on January 17, 2019, while not explicitly incorporated into the review examiner’s findings, 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. A hearing on the January 4, 2019, determination should be scheduled as soon as possible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 20, 2019



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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