

**Board of Review  
19 Staniford St., 4<sup>th</sup> 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: 0029 4061 19**

## **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 the claimant benefits following his separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On March 15, 2019, the agency initially determined that the claimant was not entitled to unemployment benefits. The claimant appealed, and both parties attended the hearing. In a decision rendered on May 24, 2019, the review examiner reversed the agency determination, concluding that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). The Board accepts the employer's application for review.

### **Findings of Fact**

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

1. The claimant worked for the instant employer as a full-time Public Safety Officer from 2012 until his separation on 1/30/2019.
2. The employer has a company policy titled Standards of Conduct which states that sleeping on the job will result in discipline up to and including termination.
3. The claimant was provided this policy in writing at the time of hire.
4. The claimant never had any prior incident of sleeping on the job.
5. On the evening of 1/19/2019 into the morning of 1/20/2019, the claimant was working in the employer's security vehicle as normal while snow operations were being performed in the parking lot.
6. The claimant had two issues [sic] radios and needed to keep both turned down due to the radios squealing when together when the volume was up.

7. The claimant never heard any calls from the plows to remove his vehicle and was not in their way.
8. A snow plow operator knocked on the claimant's window once during the shift and informed him that he would need to move the vehicle as they planned to plow the area where he was parked.
9. The claimant was not asleep during his shift.
10. The snow plow contactor [sic] reported to the employer that the claimant was asleep when he knocked on his window.
11. The employer questioned the claimant about the sleeping on the job and the claimant stated that he was not sleeping as suggested by the contractor.
12. As a result of the complaint, the employer informed the claimant that he was discharged for sleeping on the job.

### Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we conclude that the review examiner's findings of fact are supported by substantial and credible evidence in the record, except for the title of the person who allegedly saw the claimant sleeping during his shift. *See* Findings of Fact ## 8, 10, and 11. There was no dispute during the hearing that the individual who allegedly saw the claimant sleeping was the building services manager. The review examiner's findings of fact refer to this person as a "snow plow contractor." That is not supported by the record. Regardless of this one issue, however, the decision to allow benefits is free from any error of law affecting substantive rights.<sup>1</sup>

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<sup>1</sup> The employer asserts in its appeal that the review examiner erroneously referred to some of the employer's evidence as hearsay. The review examiner accepted into evidence the written statements supplied by the employer. *See* Exhibit # 19. Even if they are admissible via the business records exception to the hearsay rule, *see* G.L. c. 233, § 78, the review examiner does not have to accept the statements as true. The review examiner found the claimant's testimony to be credible. It should be noted that the employer did not offer for cross-examination either individual who wrote the statements. It was not unreasonable or legally erroneous for the review examiner to credit the claimant's testimony over the evidence submitted by the employer.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning January 20, 2019, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION – July 10, 2019**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, 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](http://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