

Since the employer's suspension notice recommended discharge following the claimant's suspension, he did not have the right to return to work at the end of his suspension, and he is entitled to benefits pursuant to G.L. c. 151A, § 25(f) and 430 CMR 4.04(4).

**Board of Review
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Issue ID: 0030 4784 50

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 his position with the employer on March 29, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 26, 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 June 13, 2019. We accepted the claimant's application for review.

Benefits were denied pursuant to G.L. c. 151A, § 25(f), after the review examiner determined that the claimant was suspended as discipline for breaking established rules and regulations of the employer, and the suspension was for less than 10 weeks. 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. Neither party responded. 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 claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not entitled to benefits while suspended from his position, is supported by substantial and credible evidence and is free from error of law, where the claimant's suspension notice included a recommendation for discharge.

Findings of Fact

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

1. The claimant works as a bus driver for the employer, a municipal transportation authority. The claimant began work for the employer in 2004.
2. The employer maintains an attendance policy which states in part that employees "...may be subject to discipline if they have more than one Unexcused Absence, or more than two Tardies, or a single AWOL."
3. The claimant was aware of the employer's policies.
4. The claimant has lower back pain which sometimes caused him to miss work.
5. Because the claimant missed work, the employer issued him progressive discipline, including a final warning on June 26, 2018.
6. In January 2019, the claimant submitted an FMLA application to the employer's third-party benefits administrator. The application requested intermittent FMLA for the period beginning February 5, 2019 through February 4, 2020. The portion of the application completed by the claimant's physician was incomplete.
7. On February 8, 2019, and March 1, 2019, the claimant called out sick.
8. On February 26, 2019, the employer's third-party benefits administrator informed the claimant that his FMLA application was not approved because it was incomplete. On March 4, 2019, the claimant submitted a new FMLA application.
9. On March 29, 2019, the employer suspended the claimant for 70 days with a recommendation for discharge in accordance with their attendance policy.

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 and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we believe that the review examiner's findings of fact support the conclusion that the claimant is entitled to benefits while suspended from his position with the employer.

Where an employer has suspended an employee for violating an employment policy, we consider the claimant's eligibility under G.L. c. 151A, § 25(f), which provides, in 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 the DUA regulation 430 CMR 4.04(4), which provides:

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.

Thus, in order to deny benefits to a claimant who has been suspended from his position, the claimant's suspension terms must meet several criteria, including that the claimant has a right to return to his employment at the end of the suspension period. *See* 430 CMR 4.04(4). Here, the review examiner found that, when the employer suspended the claimant on March 29, 2019, a recommendation for discharge was included with the suspension notice. Since the employer recommended that the claimant be discharged at the end of his suspension period, he did not have a right to return to his employment and is, therefore, entitled to benefits under G.L. c. 151A, § 25(f), and 430 CMR 4.04(4).

We, therefore, conclude as a matter of law that the claimant is entitled to unemployment benefits while suspended from his position with the employer.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending April 6, 2019, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 27, 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.

SVL/rh