

**Although the appealed Notice of Disqualification was properly issued by the DUA and put into the claimant's UI Online inbox, the claimant had justification for the late appeal, pursuant to 430 CMR 4.15(2), where his claim had expired, he changed his e-mail address not knowing that additional correspondence from the DUA could be coming to him, the DUA had not had regular correspondence with the claimant for a lengthy period of time, and he acted upon the Notice of Disqualification when he learned of it.**

**Board of Review  
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**Issue ID: 0031 0115 43**

## **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 dismiss the claimant's appeal of a determination issued by the agency on September 22, 2018. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for benefits, and the claim was determined to be effective July 31, 2016. On September 22, 2018, the DUA sent the claimant a Notice of Disqualification, which informed him that he did not have good cause for failing to certify for benefits in a timely manner. The Notice of Disqualification informed the claimant that he was overpaid unemployment benefits. The claimant appealed the September 22, 2018, notice on May 4, 2019. Because the appeal was not timely filed, it was dismissed by the DUA. The claimant then appealed the dismissal to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's initial determination and dismissed the appeal of the September 22, 2018, determination.

The appeal was dismissed after the review examiner determined that the claimant had not shown justification for the late appeal pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.15. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted 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 to dismiss the claimant's appeal is supported by substantial and credible evidence and is free from error of law, where the September 22, 2018, Notice of Disqualification was sent to the claimant after his unemployment claim had expired, the claimant had not updated his e-mail address on his UI Online account after the expiration of his claim, and the claimant promptly appealed the determination when he learned of it.

## Findings of Fact

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

1. The claimant filed his claim for unemployment benefits with an effective date of July 31, 2016.
2. The claimant elected to receive his correspondence from the Department, electronically.
3. The claimant provided an accurate e-mail and mailing address to the Department.
4. The claimant was aware that he was required to check his DUA inbox on regular basis.
5. The claimant was checking his DUA inbox at least once a week while he was receiving unemployment benefits.
6. The claimant was no longer receiving unemployment benefits after March 8, 2017. The claimant believed that he had exhausted his claim for benefits.
7. The claimant had Verizon as his e-mail provider. In July 2017 when the claimant was at the Career Center, he was advised to change his e-mail from AOL to Gmail as it would look more professional and would assist in obtaining employment. The claimant made that change and had his e-mails forwarded to his Gmail account. (In late 2017 the claimant received notification that Verizon would no longer forward his e-mail.)
8. The claimant did not notify the Department of the change in his e-mail address because at that time, he was not receiving any correspondence from the Department. (The claimant thought that the Department would reach out to him by mail if he didn't respond to communication sent electronically.)
9. On September 22, 2018 the claimant was issued a Notice of Disqualification, under Section 25(a) of the Law, indicating that "without good cause you failed to claim benefits in a timely manner. You failed to claim benefits timely because (reason)." The disqualification period was the period beginning 8/7/2016 through 11/26/2016. It further indicated an overpayment in the amount of \$11,552. The Notice was issued to the claimant electronically and was located in his DUA inbox.
10. In April 2019 the claimant received a NOTICE OF REFUND APPLIED TO DEBT OR TRANSFERRED with a date of April 12, 2019. It indicated that the claimant's Personal Income Tax was intercepted by DUA.

11. After receiving the April 2019 tax intercept notification, the claimant researched his DUA account and saw the September 22, 2018 Notice of Disqualification. The claimant filed an appeal to that determination with a date of May 2, 2019. The claimant's appeal was received by the Department postmarked on May 4, 2019.
12. On May 24, 2019 a Notice of Disqualification was issued to the claimant under section 39(b) of the Law, indicating "Your request for hearing was filed beyond 60 days from the date of the determination. The determination, Form Notice of Disqualification, was mailed to you on 09/22/2018. Your request was received on 05/04/2019, 223<sup>rd</sup> day after such determination was issued. Your reason for filing beyond 60 days has no justification." The claimant filed an appeal to that determination on May 28, 2019.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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, on the highly specific circumstances presented here, we reject the review examiner's legal conclusion that the claimant has not shown justification for his late appeal.

There is no dispute that the claimant appealed the September 22, 2018, Notice of Disqualification late. He appealed the determination on May 4, 2019, which is far beyond the ten-day appeal period provided for in G.L. c. 151A, § 39(b). The appeal date is also beyond the thirty-day period allowed for late appeals if a claimant can show good cause for his failure to appeal timely. *See* 430 CMR 4.14. Since the claimant's appeal was submitted more than thirty days beyond the date the notice was issued, 430 CMR 4.15 is applicable. That regulation provides that "[t]he 30 day limitation on filing a request for a hearing shall not apply where the party establishes" one of the following:

- (1) A Division employee directly discouraged the party from timely requesting a hearing and such discouragement results in the party believing that a hearing is futile or that no further steps are necessary to file a request for a hearing;
- (2) The Commissioner's determination is received by the party beyond the 30 day extended filing period and the party promptly files a request for a hearing;
- (3) The Commissioner's determination is not received and the party promptly files a request for a hearing after he or she knows that a determination was issued;
- (4) An employer threatened, intimidated or harassed the party or a witness for the party, which resulted in the party's failure to file for a timely hearing.

In this case, circumstances (1) and (4) are not applicable. The claimant made no contention at either hearing that someone discouraged him from filing an appeal. In addition, the claimant did eventually see the September 22, 2018, determination. It had been sent to him, and it was

located in his UI Online inbox. Therefore, circumstance (3), which addresses what happens if a determination is “not received” at all, is also inapplicable. Our focus, then, is on provision (2) from the regulation.

In Part III of her decision, the review examiner concluded that the claimant did not have justification for the late appeal, because, although the claimant did not think he would receive any more communications from the DUA after his claim expired, “the Notice of Disqualification was properly issued to the claimant and received in his DUA [UI Online] inbox.” To the best of the Board’s understanding, this conclusion applies the DUA’s approach that a determination is deemed to be received by a claimant when it is properly issued to the claimant’s UI Online inbox.<sup>1</sup> We do not disagree with this policy. It is straightforward to apply in the vast majority of cases for claimants who choose to receive correspondence from the agency via e-mail. They impliedly agree that they have active e-mail accounts and that they can regularly access their UI Online accounts and inboxes. In short, the UI Online inbox acts much like a regular United States Postal Service mailbox, and we treat it accordingly for claimants who choose that method of correspondence.

However, when approaching this case, we recognize that our task is to apply Chapter 151A, and the regulations which interpret and build upon it, liberally. *See* G.L. c. 151A, § 74. We also note the very specific circumstances posed by this matter. The determination at issue was issued over one year after the claimant’s claim had expired.<sup>2</sup> The claimant changed his e-mail address at the suggestion of the Career Center, which, operates under the auspices of the Massachusetts Department of Career Services (DCS). Apparently, the Career Center individual who advised the claimant to change his e-mail address did not remind him to update his contact information in his UI Online account. *See* Findings of Fact ## 7 and 8. In any event, the claimant was no longer receiving regular correspondence from the DUA by the time the agency issued the September 22, 2018, determination.

We think that these very specific circumstances combine to show that the claimant did have justification for the late appeal. In September of 2018, when the Notice of Disqualification was issued, the claimant would have had no reason to think that he should still keep his e-mail address up to date. After all, his claim had long since expired, and there had been no regular contact by the DUA with him. He understandably changed his e-mail address, and he had no reason to think that he needed to also do so on his UI Online account. Given these facts, we conclude that the claimant did not receive the determination until he learned about and saw it in late April of 2019. *See* Findings of Fact ## 10 and 11. He appealed very soon after, thus satisfying the conditions of 430 CMR 4.15(2).

At this stage, we reiterate the limits of our decision and holding in this matter. We accept the DUA’s interpretation of 430 CMR 4.15. However, where a claimant’s claim has expired, where he has changed his e-mail address such that he does not receive notice that the DUA has issued an adverse determination, where the DUA had not had regular correspondence with the claimant for a lengthy period of time (such that the claimant would be on notice that there were ongoing

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<sup>1</sup> This rule or policy is at least true for claimant’s who have chosen electronic correspondence. The claimant did so in this case.

<sup>2</sup> The review examiner found that the claim was effective July 31, 2016. Therefore, the claim expired on July 29, 2017.

or active issues with his claim), and where the claimant acted upon the determination when he learned of it, we think it unnecessarily rigid to apply the regulation as the review examiner did in this case. Such a construction would not be in accord with a liberal interpretation of the unemployment laws. We anticipate that this decision would apply in the future only to those cases with substantially similar facts to the case before us now, and we do not imply that the DUA's current policies are unreasonable or are unsupported interpretations of 430 CMR 4.15. We hold only that, in light of the extreme circumstances presented, it would be unjust to mechanically apply the DUA's policy.

We, therefore, conclude as a matter of law that the review examiner's decision to dismiss the claimant's appeal of the September 22, 2018, Notice of Disqualification pursuant to G.L. c. 151A, § 39(b), is not supported by substantial and credible evidence or free from error of law, because the claimant has shown that he had justification for the late appeal, as provided in 430 CMR 4.15(2).

The review examiner's decision is reversed. The claimant's request for a hearing on the September 22, 2018 determination is allowed, and the DUA Hearings Department should schedule a hearing on that matter as soon as possible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - September 27, 2019**



Paul T. Fitzgerald, Esq.  
Chairman



Michael J. Albano  
Member

Member Charlene A. Stawicki, Esq. declines to sign the majority opinion.

**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.