

**A firefighter EMT town employee, who was indicted for offenses that occurred years prior while employed as a teacher by another town, is subject to disqualification during the period of his suspension pursuant to G.L. c. 268A, § 25, and not G.L. c. 151A, § 25(f). Held the offenses were “misconduct in office” within the meaning of the statute.**

**Board of Review  
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**Issue ID: 0031 1643 54**

### 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 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 August 24, 2018. He filed a claim for unemployment benefits with the DUA, effective May 26, 2019, which was approved in a determination issued on June 14, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency’s initial determination in a decision rendered on August 2, 2019. We accepted the employer’s application for review.

Benefits were awarded after the review examiner determined that the claimant was placed on an indefinite suspension from employment and was, therefore, eligible for benefits pursuant to G.L. c. 151A, § 25(f). After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the employer’s appeal, we remanded the case to the review examiner to take further testimony and provide notice to the parties of G.L. c. 268A, § 25. Both parties attended the remand hearing. Following this hearing, the Board reviewed the record and consolidated findings and remanded the case to the review examiner for a second time, as further information was necessary regarding the reason for the claimant’s suspension from employment and to determine where the claimant was employed at the time of the misconduct that triggered his suspension. Only the employer attended the second remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s original decision, which concluded that the claimant was eligible for unemployment benefits while out on an indefinite disciplinary suspension, is supported by substantial and credible evidence and is free from error of law, where the present employer suspended him due to an indictment for misconduct while he was employed as a teacher for a different Massachusetts municipality.

### Consolidated Findings of Fact

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

1. The claimant worked full-time as a firefighter/paramedic for the instant employer, a Massachusetts municipality, from 12/23/14 to 8/22/18. The claimant was a municipal employee from 12/23/14 to 1/5/20.
2. The claimant was a certified Emergency Medical Technician (EMT) between 12/23/14 and 8/31/18.
3. The instant employer offered the claimant full-time employment as a firefighter/paramedic, with the condition that he maintain his EMT-P certification and CDL Class B license with air brake endorsement.
4. The instant employer presented no applicable written rules or policies.
5. On or about 8/23/18, the claimant was indicted on three counts of rape of a child under sixteen years of age, and one count of indecent assault and battery on a child under fourteen years of age. This conduct occurred on multiple dates between 2003 and 2005.
6. The claimant did not work for the instant employer between 2003 and 2005, when he engaged in the above conduct.
7. The claimant worked as a high school Physical Education and Health teacher from September 2002 to June 2006, for a different Massachusetts municipality. He was a municipal employee from September 2002 to June 2006.
8. On or about 8/23/18, the claimant informed the instant employer's Fire Chief he was indicted on the above charges. The Fire Chief informed the claimant he was suspended, with pay, pending the outcome of the case.
9. The instant employer suspended the claimant because he was indicted on three counts of rape of a child under sixteen years of age, and one count of indecent assault and battery on a child under fourteen years of age.
10. On or about 8/27/18, the claimant was arraigned in Superior Court on the above charges. The claimant was released and ordered to stay away from the victim, the victim's family, and named witnesses.
11. On 8/31/18, the Commissioner of the Department of Public Health issued a Notice of Agency Action. The Commissioner suspended the claimant's EMT certification, pursuant to M.G.L. Chapter 111C, Sections 2(1) and 16, and 105 CMR 170.750. The suspension was based upon the above criminal case, as well as court-imposed restrictions placed upon the claimant.
12. In the above Notice of Agency Action, the Commissioner wrote that the claimant was unable to fulfill the duties of an EMT, given the conditions set by

the Court, as it was possible for the claimant to be called to the victim's residence or school, to treat the victim's family members, or witnesses, all of which are prohibited per Court Order.

13. On 8/31/18, the Director of the Office of Emergency Medical Services sent the claimant a letter stating his certification as an EMT was suspended immediately.
14. The claimant had the right to request an adjudicatory hearing on the above suspension; the claimant failed to do so.
15. The instant employer suspended the claimant before the claimant's EMT certification was suspended.
16. The instant employer would have suspended the claimant even if his EMT certification was not suspended, because he was indicted on the above charges.
17. On 9/24/18, the Director of the Office of Emergency Medical Services issued a Final Agency Decision regarding the suspension of the claimant's EMT certification. The claimant's EMT certification remains suspended per the Final Agency Decision.
18. The instant employer paid the claimant from 8/24/18 to 5/12/19. The claimant was on unpaid suspension effective 5/13/19.
19. The claimant filed an unemployment insurance claim on 5/28/19, and obtained an effective date of his claim of 5/26/19.
20. The claimant informed the Fire Chief of his resignation on 1/5/20, effective immediately. On 1/6/20, the claimant pleaded guilty to the above charges.

### 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 consolidated 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 consolidated findings of fact, except as follows. We reject the portion of Consolidated Finding # 1, which states that the claimant's employment for the instant employer ended on August 22, 2018. It is inconsistent with Consolidated Finding # 8, which states that he was suspended with pay on or about August 23, 2018, and with Consolidated Finding # 20, which shows that the claimant did not resign until January 5, 2020. We deem the remainder of the findings 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 eligible for benefits.

As a result of the employer placing the claimant on an indefinite suspension, the review examiner applied the provisions of G.L. c. 151A, § 25(f), which states:

[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.

Because of the indefinite nature of the suspension and the lack of evidence that the claimant had broken any established rules or regulations of the employer, the review examiner awarded the claimant benefits pursuant to G.L. c. 151A, § 25(f). However, because the findings and the employer's appeal suggested that the claimant's suspension was connected to a criminal indictment, we remanded the case for additional evidence and to provide notice to the parties to be prepared to address issues relevant to G.L. c. 268A, § 25. That statute provides, in pertinent part, as follows:

An . . . employee of a . . . city, town or district . . . may, during any period such . . . employee is under indictment for misconduct in such office or employment or for misconduct in any elective or appointive public office, trust or employment at any time held by him, be suspended by the appointing authority.... **Any person so suspended shall not receive any compensation or salary during the period of suspension**, nor shall the period of his suspension be counted in computing his sick leave or vacation benefits . . . . If the criminal proceedings against the person suspended are terminated without a finding or verdict of guilty on any of the charges on which he was indicted, his suspension shall be forthwith removed, and he shall receive all compensation or salary due him for the period of his suspension . . . .

(Emphasis added.)

G.L. c. 268A, § 25, is relevant to this appeal because the Supreme Judicial Court has deemed unemployment benefits to be "compensation" under this statute. City of Springfield v. Dir. of Division of Employment Security, 398 Mass. 786, 789 (1986). Thus, if the claimant were suspended due to a criminal indictment while a municipal employee, G.L. c. 268A, § 25, could preclude the payment of any unemployment benefits, even if the suspension was indefinite.

After the first remand hearing, it remained unclear whether the claimant was suspended due to the suspension of his EMT-P certification and CDL Class B license, which would invoke G.L. c. 151A, § 25(f), or due to his indictment, which could invoke G.L. c. 268A, § 25. The Board remanded the matter for a second time to clarify the reason for the claimant's suspension in order to apply the appropriate statute.

Following the second remand hearing, the consolidated findings now show that the employer suspended the claimant from employment after being informed of his indictment, and before the suspension of his EMT-P certification and CDL Class B license. Consolidated Finding # 15.

We note that the applicability of G.L. c. 268A, § 25, is conditional on the nature of both the position held by the claimant at the time of the indictment, as well as when the misconduct occurred. Given

the record before us, we believe G.L. c. 268A, § 25, applies to the misconduct at issue. At the time of indictment, and at the time of the misconduct alleged in the indictment, the claimant was employed by a city, town, or district. Consolidated Finding ## 1, 5, and 7. He was indicted while working for the current employer, a municipality, for misconduct that occurred while he was employed as a Physical Education and Health teacher for a different municipality.

The fact that the charges in the indictments concerned acts which took place between 2003 and 2005 does not alter our analysis as to the applicability of G.L. c. 268A, § 25. In so concluding, we apply the general rule of statutory construction that a statute is to be interpreted “according to the intent of the Legislature ascertained from all its words construed by the ordinary and approved use of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished, to the end that the purpose of its framers may be effectuated.” Commonwealth v. Galvin, 388 Mass. 326, 328 (1983), *quoting* Board of Education v. Assessor of Worcester, 368 Mass. 511, 513 (1975). Our starting point is, therefore, the plain language of statute. *See, e.g., Simon v. State Examiners of Electricians*, 395 Mass. 238, 242 (1985).

As cited above, G.L. c. 268A, § 25, plainly states that the relevant employee may be suspended “for misconduct in such . . . employment or for misconduct in any . . . appointive public office, trust or employment **at any time** held by him . . .” (Emphasis added.) A plain reading of G.L. c. 268A, § 25, indicates that the Legislature intended that municipalities be able to suspend any employee who engaged in on duty misconduct while employed in any public employment. To read the statute otherwise would suggest that a municipality would be required to retain an employee, who had violated the public trust as a result of on-duty misconduct while in other public employment. Such a reading would be contrary to the main object to be accomplished by G.L. c. 268A, § 25, namely to preserve the trust the people of Massachusetts may have in the honesty and integrity of public employees, and ensure that such employees render fair and honest service. Given the intent of the Legislature, we conclude that the provisions of G.L. c. 268A, § 25, are applicable to the claimant’s conduct at issue.

The next questions is whether the claimant’s indictment for three counts of rape of a child under the age of sixteen and one count of indecent assault and battery on a child under the age of fourteen is considered misconduct in employment within the meaning of G.L. c. 268A, § 25.

Although the misconduct alleged in the indictment occurred while the claimant was employed as a teacher, the record is void of any indication that it was on-duty conduct, meaning that it took place on school grounds, during school time, involving a student under his tutelage, etc. Generally, indictments for crimes stemming from off-duty conduct are not considered misconduct within the meaning of G.L. c. 268A, § 25. *See Attorney General v. McHatton*, 428 Mass. 790, 793 (1999). The Massachusetts Appeals Court has, however, held that “certain forms of employment which carry a position of trust so peculiar to the office and so beyond that imposed by all public service that conduct consistent with this special trust is an obligation of employment.” Perryman v. School Committee of Boston, 17 Mass. App. Ct. 346, 349 (1983). *See also Dupree v. School Committee of Boston*, 15 Mass. App. Ct. 535, 537–539 (1983). Teachers have been found to be in that special position of trust and their off-duty misconduct has been deemed to be “misconduct in . . . office” under G.L. c. 268A, § 25. Perryman, *supra* at 350–351. In Perryman, the Court opined that “[a]s role models for our children [teachers] have an extensive and peculiar opportunity to impress

[their] attitude and views upon their pupils.” *Id.* at 349, *citing Dupree, supra* at 538 (further citations omitted).

Holding such a position of special trust does not, however, imply that all off-duty misconduct occurring while in such office falls within the purview of G. L. c. 268A, § 25. “There must be a direct relationship between the activity and the trust before the conduct in question can be said to constitute misconduct in office within the comprehension of G. L. c. 268A, § 25.” *Perryman, supra*, at 350.

The claimant in this case not only held a position of special trust while in his employ as a public-school teacher, but he was indicted for violating the most basic tenet of that trust by victimizing a child while holding that office. In *Dupree*, the Massachusetts Appeals Court held that the Boston School Committee could reasonably consider a public school teacher’s indictment for possession of cocaine with intent to distribute an indictment for misconduct in office withing the meaning of G.L. c. 268A, § 25, as the alleged crime was in direct conflict “with the message his teaching should impart.” 15 Mass. App. Ct. at 538–539, *quoting McLaughlin v. Machias School Committee*, 385 A.2d 53, 56 (Me. 1978). Again, in *Perryman*, the Appeals Court upheld a G.L. c. 268A, § 25, suspension of a teacher indicted for welfare fraud, where it held that charges involving lying and stealing “directly contradicts the most fundamental values which all segments of our society expect teachers to inculcate in the children entrusted to them.” 17 Mass. App. Ct. at 351. The underlying misconduct in the present case is no less egregious.

We, therefore, conclude as a matter of law that, in light of the claimant’s suspension pursuant to G.L. c. 268A, § 25, he is ineligible for benefits under G.L. c. 151A, § 25(f), for the duration of his suspension from employment.

The review examiner’s decision is reversed. The claimant is denied benefits for the week beginning April 1, 2019, through January 4, 2020.

**BOSTON, MASSACHUSETTS**  
Fitzgerald, Esq.  
**DATE OF DECISION - May 28, 2020**



Paul T.

Chairman



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 ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until June 1, 2020<sup>1</sup>. If the thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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.

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<sup>1</sup> See Supreme Judicial Court's Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.