

The claimant brought about his own unemployment and is disqualified under G.L. c. 151A, § 25(e)(1), because he failed to make sincere efforts to fulfill the continuous progress requirements needed to keep his teaching waiver.

**Board of Review
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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 separated from his position with the employer on June 19, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on February 3, 2020.¹ The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on March 26, 2020.

Benefits were awarded after the review examiner determined that the claimant was laid off by the employer and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we accepted the employer's application for review and remanded the case to the review examiner to take additional evidence regarding the circumstances of the claimant's separation from work. Both parties attended this remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. After reviewing the record of the remand hearing and the consolidated findings of fact, we remanded the matter again for additional evidence about the claimant's efforts to secure the credentials to retain his employment. Both parties also participated in this hearing. The review examiner has now issued a final set of 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 decision that the claimant was laid off from his teaching position and eligible for benefits under G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

¹ The DUA approved benefits pursuant to G.L. c. 151A, § 25(e)(1). *See* Exhibit 11.

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

1. The claimant worked for the employer, a municipal public school, from August 20, 2018, to June 19, 2019, as a Special Education Teacher under a waiver granted by the Department of Elementary and Secondary Education (DESE). The claimant was previously employed as a Substitute Teacher since September 14, 2017.
2. A waiver, granted by DESE, is valid for one school year expiring on June 30th. DESE allowed for renewal of a waiver if an Educator showed continuous progress towards obtaining licensure. Up to June 30, 2019, continuous progress was defined as obtaining six points upon successful completion of various progress indicators (*e.g.* MTEL, college coursework, SEI endorsement, competency mentored experience, *etc.*).
3. Earning one semester credit of college coursework was valued at one point. Passing a full MTEL was valued at two points and passing a sub-part was valued at one point. SEI endorsement was valued at two points. Ten hours of professional development for individuals requiring a competency review (*e.g.* moderate disabilities, severe disabilities, library, *etc.*) was valued at one point.
4. DESE also required that, before a subsequent waiver to be applied for, the employer is to post the position filled by the non-licensed Educator in order to find a licensed, qualified Educator to fill the role and the employer is to provide detailed information regarding its search for a licensed Educator. The application for a waiver is done on or after July 1st for the next school year and the employer is to provide an explanation as to why the unlicensed candidate is qualified and be able to show that the candidate made continuous progress.
5. During the 2018–19 school year, the claimant generally received correspondence from the employer via U.S. Mail, the claimant generally received email correspondence from the employer, and the claimant generally received correspondence in hand. The claimant does not recall what and when.
6. During the 2018–19 school year, the employer sent reminders via certified mail to the claimant (and all Teachers on a waiver) regarding the continuous progress requirements.
7. The claimant's address at the time was [Street Address A], [City A], Massachusetts [Zip Code A], and it did not and has not changed.
8. The employer had access to the claimant's DESE records and other records for continuous progress verification, but it required Teachers on a waiver to submit proof by April 15th because the number of Teachers on a waiver in the district made it too burdensome for the employer to actively verify on its own.

9. On April 5, 2019, the employer sent a letter dated April 1, 2019, to the claimant at [Street Address A] in [City A], Massachusetts [Zip Code A] certified mail receipt number 7018 1830 0002 2192 2431. The employer did not verify receipt.
10. The letters dated April 1 and April 30, 2019, were chosen just as reminders and to get updates before the end of the school year.
11. That claimant maintains that he did not receive the reminders.
12. The claimant verbally communicated his progress to his Principal during the school year.
13. The claimant informed his Principal because he was aware of the continuous progress requirements of DESE.
14. The claimant knew that verbal updates were not sufficient and that documentation showing completion was required.
15. The claimant did not provide documentation to the employer because he had none to provide at the time.
16. The claimant prepared for upcoming MTEL exams by utilizing the DESE website which offered practice tests and other study materials. The school district offered preparation courses, of which the claimant did not take advantage. The claimant did not purchase any study materials.
17. The claimant completed the SEI endorsement on February 20, 2019.
18. On April 11, 2019, the claimant took the Communications and Literacy – Reading MTEL and failed.
19. On May 2, 2019, the claimant took the Communications and Literacy – Writing MTEL and failed.
20. The claimant took no other MTEL exams during the 2018-19 school year.
21. In May of 2019, the employer notified the claimant that his last day will be June 19, 2019, and that he can re-apply for a position with the school.
22. The claimant last worked on June 19, 2019.
23. On July 1, 2019, DESE changed its requirements.
24. On July 11, 2019, the employer approved the claimant for rehire.

25. The claimant received a waiver certificate (Teaching Students with Moderate Disabilities) effective August 19, 2019, through June 20, 2020.
26. The claimant returned to work for the employer as a Special Education Teacher for the 2019–20 school year.

Credibility Assessment:

The claimant initially testified to certain efforts that were not substantiated and, in some cases, were refuted by his own documentation proffered as evidence. For instance, the claimant initially stated that he took an MTEL in October of 2018, but his documentation shows no MTEL's being taken within several months of that time, before or after. The claimant took and failed an English MTEL in May of 2018 and he took and failed two MTEL sub-parts (Reading and Writing) in April and May of 2019. The claimant offered no evidence of being awarded points for any failed attempt, which would be necessary especially in light of DESE requiring one to pass the tests to be awarded any points. Furthermore, the claimant testified to the points that he allegedly earned which were not consistent with the DESE point-value system. For instance, the claimant testified that he received four points for SEI endorsement, but DESE only valued an SEI endorsement at two points. The claimant suggested that the Structured Guidance and Support (SG&S) course, which he allegedly completed and for which he received a certificate, was valued at four points, but the claimant offered no proof of completion though requested by the Board, no proof that DESE awarded points for SG&S participation at all, and no proof of any points actually being awarded by DESE to the claimant for his alleged completion. What was substantiated was completion of the SEI endorsement in February of 2019, a failed attempt at an MTEL sub-part in April, and a failed attempt at an MTEL sub-part in May of 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 consolidated 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 consolidated findings of fact and deems them to be supported by substantial and credible evidence, except for the portion of Consolidated Finding of Fact # 16, which states that the claimant used "other study materials" from the DESE website to prepare for his MTEL exams.² We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. As discussed more fully below, we reject the review examiner's legal conclusion that this case is controlled by G.L. c. 151A, § 25(e)(2). Rather, we conclude that the claimant is not eligible to receive benefits under G.L. c. 151A, § 25(e)(1).

² During the second remand hearing, the claimant testified that he went "onto the Massachusetts teaching site for the MTELs, where you can register for MTEL testing and I had downloaded their practice tests. The free versions. And I would just practice, and download and print, and study on my own." When asked if there were any other ways he prepared for the tests, he responded, "no." No specific "other study materials" were mentioned.

The DUA and the review examiner applied different statutory provisions in deciding that the claimant was eligible to receive unemployment benefits. We must first decide which section of law controls the claimant's separation. Although the claimant's employment ended because the employer informed him that his last day of work would be June 19, 2019, *see* Consolidated Finding of Fact # 21, we think that G.L. c. 151A, § 25(e)(2), is not applicable in the circumstances presented by this case. When a claimant somehow precludes an employer from continuing to employ him, the claimant is deemed to have brought on his own unemployment, and G.L. c. 151A, § 25(e)(1), the section applicable to voluntary separations, applies. *See Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002 (1985) (claimant who could not get to work because he lost his license brought unemployment upon himself and suffers disqualification under G.L. c. 151A, § 25(e)(1)); *Rivard v. Dir. of Division of Employment Security*, 387 Mass. 528, 528–529 (1982) (“a person who causes the statutory impediment that bars his employment leaves his employment ‘voluntarily’ within the meaning of Section 25(e)(1) when the employer realizes the impediment and terminates the employment”); *Borroni v. Dir. of Division of Unemployment Assistance*, No. 13-P-442, 2014 WL 2861755 (Mass. App. Ct. June 25, 2014), *summary decision pursuant to rule 1:28* (upholding disqualification under G.L. c. 151A, § 25(e)(1) for teacher who failed to take action toward obtaining standard educator certificate when she knew that her provision certificate would soon lapse).

As we will discuss below, in this case, the claimant did not make continuous progress toward obtaining a teaching license. Because of this, the employer would not have been able to retain him in the same teaching position for the following school year. He brought his unemployment upon himself.³ Therefore, the claimant's eligibility for benefits is governed by G.L. c. 151A, § 25(e)(1), which provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under this section of law, the claimant has the burden to show that he is entitled to benefits. *Crane v. Comm'r of Department of Employment and Training*, 414 Mass. 658, 661 (1993).

More specifically, when a claimant becomes separated due to the loss of a license required for the performance of his job duties, or for failing to maintain a license, or for not undertaking efforts to obtain a license, the claimant's fault with respect to the loss or failure must be considered. This is so, because unemployment benefits are intended for persons who are out of work and unable to secure work through no fault of their own. *Connolly v. Dir. of Division of Unemployment*

³ We have applied G.L. c. 151A, § 25(e)(1) in similar cases, where the claimant has failed to make continuous progress towards obtaining teaching license and, thus, was unable to obtain a waiver for the following school year. *See* Board of Review Decision 0031 4188 32 (Dec. 30, 2019); Board of Review Decision 0031 2994 69 (Nov. 25, 2019); Board of Review Decision 0031 6661 27 (Nov. 22, 2019). We do not believe that this case is different from our prior decisions. The DUA takes a similar approach in cases where a claimant loses a license needed for a job. *See* DUA Adjudication Handbook, Chapter 6, Section 1(9).

Assistance, 460 Mass. 24, 25 (2011) (quotes and citations omitted). If a claimant makes diligent efforts to obtain or retain his license, but circumstances combine which nonetheless result in a separation, the claimant would not be at fault and would be eligible for benefits. *See* Board of Review Decision 0012 7337 53 (Oct. 10, 2014). On the other hand, if a claimant makes little, or token, efforts to fulfill the licensure requirements, and the employer must end the claimant's employment due to a lack of a license, then the claimant would be subject to disqualification. *See* Board of Review Decision 0015 7052 69 (Sept. 8, 2015).⁴

The above-cited statute and reasoning applies, even though the employer would have to replace the claimant if it found a qualified, licensed teacher to take over the claimant's position. *See* Consolidated Finding of Fact # 4. For the claimant to keep his job, two conditions needed to be met: (1) there was no qualified, licensed teacher available, and (2) the claimant had made continuous progress. The claimant had control over the latter requirement, and he needed to put himself in a position where he could be retained as an employee in the same capacity as he had been teaching in the 2018–2019 school year. To do this, he needed to make continuous progress.⁵

The parties disputed whether the claimant obtained the six points necessary to satisfy the continuous progress requirements in effect during the 2018–2019 school year. The employer offered that the claimant had not shown that he made continuous progress. The claimant maintained that he had obtained the six points. It is clear from the review examiner's credibility assessment and the consolidated findings of fact, both of which we have adopted, that a large part of the claimant's testimony, specifically regarding whether the claimant made continuous progress, was not credited by the review examiner. Much of the claimant's testimony was unsupported by documentary evidence, and some of it was contradicted by evidence in the record. For example, the claimant testified that he completed a Structured Guidance and Support course and that the course was worth four points towards continuous progress. However, he did not submit into evidence the certificate he allegedly received for completing the course, and he did not show that completing the course was worth four points. He also testified that attempting to take an MTEL test was worth two points. He presented no documents to support this testimony. Moreover, the letters submitted by the employer show only that passing an MTEL earned continuous progress points, not attempting the tests. *See* Exhibits 8 and 9. The review examiner's consolidated findings of fact show that the claimant did not obtain the six points necessary to satisfy the continuous progress requirement.

The legal question before us, then, is whether the claimant's failure to obtain six points was due to his own lack of effort and diligence, thereby bringing his unemployment upon himself. The review examiner found that the claimant received two points by obtaining the SEI Endorsement in February of 2019. He also took two MTEL tests but failed both. Although the claimant

⁴ Board of Review Decisions 0012 7337 53 and 0015 7052 69 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

⁵ The claimant was re-hired by the employer for the 2019–2020 school year. Consolidated Finding of Fact # 22. However, the Commonwealth's continuous progress requirements changed as of July 1, 2019, and the claimant was able to be re-hired pursuant to the new requirements. *See* Consolidated Finding of Fact # 23. No changes had been made in June of 2019, and there is nothing in the record from which we could conclude that the parties knew that the requirements would change in July. Thus, at the time of his separation, the parties were under the impression that the claimant had to make continuous progress under the former rubric to remain employed, *see* Consolidated Finding of Fact # 3, and we analyze his separation under that framework. His subsequent re-hire after the change in requirements is not relevant to his separation on June 19, 2019.

downloaded and took practice tests from the DESE website, he made no other efforts to pass those MTEL tests. He did not take courses offered by the employer. He did not purchase any study materials. Taking a few practice tests constitutes a minimal effort at passing the tests and earning more points towards his continuous progress requirement. Where his only effort at passing the MTEL tests was taking practice tests from the DESE website, his other efforts at obtaining points were not credible, and the only points he obtained were from the SEI Endorsement, we conclude that the claimant failed to make sincere efforts to make continuous progress.

In addition, the claimant did not offer any testimony to suggest that something, such as compelling personal circumstances, prevented him from obtaining the six points. He did not testify that he could not afford to purchase study materials, or that he could not attend the courses offered by the employer.⁶ By failing to make continuous progress, the claimant was not in a position to be retained by the employer. Thus, we cannot conclude that he was without fault in his separation from employment.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits pursuant to G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law. The claimant is subject to disqualification under G.L. c. 151A, § 25(e)(1), because the claimant failed to take adequate steps to make continuous process towards obtaining a teaching license and, therefore, caused his own unemployment.

⁶ In fact, the claimant testified that he believed that no courses were available to him. The review examiner did not credit that testimony. *See* Consolidated Finding of Fact # 16.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning June 16, 2019, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.



BOSTON, MASSACHUSETTS

Paul T. Fitzgerald, Esq.
Chairman

DATE OF DECISION - July 17, 2020



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
(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