

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

**Board of Review
19 Staniford St., 4th 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**

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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 affirm.

The claimant separated from his position with the employer on June 17, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 31, 2019. The claimant 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 and denied benefits in a decision rendered on August 23, 2019.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and, thus, was 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 claimant's appeal, we accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the claimant's efforts to make continuous progress toward obtaining a teaching license. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the review examiner's consolidated findings of fact show that the claimant did not make continuous progress towards obtaining a teaching license during the 2018-2019 school year.

Findings of Fact

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

1. The claimant worked full-time for the employer, a public school, from October of 2018 to June 17, 2019 as a 7th Grade Science Teacher with a Waiver.
2. Waivers are granted on a year-to-year basis expiring on June 30th of each year.
3. The employer had an expectation that the claimant make continuous progress towards obtainment of professional licensure. Continuous progress towards obtainment of professional licensure was defined as obtaining six points per the DESE Continuous Progress Point Value System in the 2018-19 school year. The point value system awarded one point for each credit of college course work, two points for passing a full MTEL, one point for passing a subtest of the MTEL, two points for Sheltered English Immersion (SEI) Endorsement, and one point for ten hours of professional development mentored experience.
4. The claimant was aware of the expectation due to receipt of periodic reminders from the school.
5. The purpose of the expectation is to comply with state regulations (at the time).
6. The claimant already passed the Reading portion of the MTEL when he began work for the 2018-19 school year.
7. When the claimant first began employment, he took a SEI course, which he completed in December of 2018 and was valued at two points. The claimant completed the SEI requirements and did not need to take additional steps.
8. From January of 2019 to June of 2019, the claimant participated in a “mentored experience” for one point and self-studied for the Writing portion of the MTEL valued at zero points. The material the claimant used to self-study was from a preparation course he previously took.
9. The claimant did not take college coursework.
10. The claimant did not register for or take an MTEL exam.
11. On May 23, 2019, the employer informed the claimant that his employment as a non-licensed, waiver Teacher will not be continued beyond the last day of the school year. The SEI endorsement was not enough per the regulations as known to the employer at the time.
12. The employer filled the claimant’s position in the next academic year with a professionally licensed educator as required by the Commonwealth. The

employer could not re-offer the same position to the claimant under those circumstances.

13. The Commonwealth requires that the position held by a non-licensed educator be reposted and the employer make attempts to find a professionally licensed educator for that position. If a suitable candidate is unavailable or declines the position, the employer may request a subsequent waiver by showing that it made attempts to hire a professionally licensed educator and that the non-licensed educator is otherwise qualified for the position, but furthermore, that the non-licensed educator has made continuous progress toward meeting the license requirements (*see* Exhibit #5 & Remand Exhibit #7).
14. On August 17, 2019, the employer offered the claimant a position as a non-licensed, waiver 4/5th Grade Special Education Teacher for the upcoming academic year. The employer was able to hire the claimant on a waiver for the next school year because the waiver was different; in the 2018-19 school year, the Commonwealth granted a hardship waiver and in the 2019-20 school year, the Commonwealth granted a special education waiver.
15. The current DESE requirements (Remand Exhibits # 7 & 8), which the claimant researched and submitted a portion of on appeal during the 2019-20 school year, are different than the previous requirements. The parties are unaware of any changes that occurred on or around July 1, 2019 and cannot explain why there is a difference.

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 original 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. We conclude, as the review examiner did, that the claimant is not eligible to receive unemployment benefits.

As an initial matter, we must decide which section of law controls the claimant's separation from employment. The review examiner applied G.L. c. 151A, § 25(e)(2), the section of law related to employer-initiated separations, or discharges.¹ Although the claimant's employment ended because the employer informed him that it could no longer keep him employed, *see* Consolidated Finding of Fact # 11, 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

¹ In its initial determination, the DUA stated that the separation was "voluntary and without good cause attributable to the employing unit," suggesting that G.L. c. 151A, § 25(e)(1) was applicable, but nevertheless applied G.L. c. 151A, § 25(e)(2). *See* Exhibit # 9.

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). Here, as we discuss more fully below, the claimant did not make continuous progress towards attaining his teaching license, and this caused his employer to have to sever the employment relationship at the end of the 2018-2019 school year.

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).

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 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).²

It was undisputed that the claimant needed to make continuous progress in order for the employer to continue to employ him on the hardship waiver during the 2019–2020 school year. This is true, 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 ## 12 and 13*. For the claimant to keep his job, two conditions needed to be met: (1) there was no

² Board of Review Decisions 0012 7337 53 and 0015 7052 69 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

qualified, licensed teacher available, and (2) the claimant had made continuous progress. The claimant had control over the latter requirement. Although the employer ended up hiring someone else for the claimant's position, *see* Consolidated Finding of Fact # 11, the claimant 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.³

The parties offered conflicting views of what continuous progress meant for the claimant. The employer's evidence indicated that the claimant needed to earn six points by undertaking an array of different activities in order to meet the continuous progress requirement. *See* Consolidated Finding of Fact # 3 and Exhibits ## 4–7. The claimant offered that he needed to complete at least one of the activities listed on the Massachusetts Department of Elementary and Secondary Education (DESE), Office of Educator Licensure website. *See* Remand Exhibit # 7. The review examiner resolved this conflict by, in effect, finding that the six-point requirement was the relevant requirement during the 2018–2019 school year. *See* Consolidated Findings of Fact ## 3, 5, and 15. We believe that this was a reasonable interpretation of the evidence. All of the documents submitted by the employer, which were dated at times within the 2018–2019 school year, refer to the six-point requirement. As indicated in Consolidated Finding of Fact # 15, the claimant testified during the remand hearing that he printed his version of the continuous progress requirement in the summer of 2019, after the school year had ended. The claimant did not provide any documentation to show that his version of the continuous progress requirements was in effect during the 2018–2019 school year. He did not testify that he spoke with the employer during the 2018–2019 school year to say that the requirements noted on the employer's letters were different from the requirements stated on DESE's website. Indeed, the review examiner found that the claimant was aware of the six-point requirement during the 2018–2019 school year. Consolidated Finding of Fact # 4. Therefore, we have adopted the review examiner's findings that the six-point requirement was in effect during the relevant period of time.

As to whether the claimant met the continuous progress requirement, the claimant never asserted that he did, in fact, obtain six points. At most, the claimant obtained three points, two for the Sheltered English Immersion course and one for the "mentor experience" he had in 2019. *See* Consolidated Findings of Fact ## 7–8. He made no other efforts to obtain any points. *See* Consolidated Findings of Fact ## 6, 9, and 10. The claimant did not offer any testimony to suggest that something, such as compelling personal circumstances, prevented him from obtaining the six points. By failing to make continuous progress, the claimant was not in a position to be retained in his seventh grade science teacher position. 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 deny benefits is supported by substantial evidence and free from error of law. However, we conclude that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(1), because the claimant failed

³ If the claimant had fulfilled the state requirements to be eligible for re-appointment but was let go because the employer was able to find a fully licensed educator, then his separation would have been viewed differently for purposes of unemployment benefits. We would have concluded that he separated through no fault of his own and he would have been eligible under G.L. c. 151A, § 25(e)(2).

to take adequate steps to make continuous process towards obtaining a teaching license and, therefore, caused his own unemployment.

The review examiner's decision is affirmed. 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
DATE OF DECISION - November 22, 2019



Paul T. Fitzgerald, Esq.
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 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