Where the claimant contended that he failed to attend a required appointment because he obtained the employer's permission to reschedule it for a later date, but the claimant's contention was not credited by the review examiner, the claimant's resulting discharge was attributable to deliberate misconduct. It is not relevant why he missed a later re-scheduled appointment, as this was not the reason for his discharge.

Board of Review
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Issue ID: 0032 0964 95

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 discharged from his position with the employer on August 29, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 2, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant and his attorney, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on January 28, 2020. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant's discharge was not attributable to deliberate misconduct in wilful disregard of the employer's interest or to a knowing violation of a reasonable and uniformly enforced rule or policy of 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 remanded the case to the review examiner to allow the employer an opportunity to testify and provide other evidence. Both parties attended the remand hearing, which was conducted via telephone. 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 decision, which concluded that the claimant's failure to attend a required counseling session did not constitute deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a part-time Custodian for the employer, a University, from August 5, 2010, until becoming separated from employment on August 29, 2019.

2. The claimant was working for the employer, approximately 24 hours per week. The claimant was being paid approximately $19.08 per hour.

3. The employer has a written Professional Standards of Conduct policy, indicating that professional standards of conduct presume that employees will not engage in conduct inimical to the interests of the University. It indicated that the failure to adhere to professional standards of conduct or engaging in unacceptable behavior may be [sic] subject the employee to disciplinary action including discharge. One of the infractions listed was the misrepresentation or falsification of University documents or information provided to the University.

4. The employer policies were located online and posted on the employer work premises in the break rooms.

5. The employer's progressive disciplinary process consisted of issuing a verbal warning, a written warning, a one-day suspension, a three-day suspension, a five-day suspension, and then termination. In the event of theft of time, the employer would issue a five-day suspension then termination upon a further infraction.

6. In or around 2016 or 2017, the claimant obtained a new supervisor, the Facility Manager (hereinafter "Manager"), who had come from another campus location. The claimant had discipline issued due to his attendance prior to the new Manager's arrival.

7. During 2018, the claimant was caring for his grandfather. While in the claimant's care, his grandfather suffered an injury, was hospitalized, and died shortly thereafter. One week after his grandfather's death, the claimant's pet of twelve years died. Thereafter, the claimant was experiencing depression and was having trouble sleeping.

8. The claimant's condition affected his work performance and sometimes impacted his attendance at work. The claimant was performing his position to the best of his ability, given his condition.

9. On October 24, 2018, the claimant as issued a verbal warning due to his attendance and poor performance.

10. On December 7, 2018, the claimant was issued a five-day suspension due to his attendance and poor performance. The claimant was found to be sitting in an

employer closet and not performing his work. As a result, the claimant was issued a five-day disciplinary suspension from the employer. The claimant grieved that disciplinary action.

11. On February 11, 2019, a second step grievance of the five-day suspension was held. The claimant acknowledged that he was sitting in the closet at work on the December 7th date. The claimant informed the employer that he was experiencing issues related to his grandfather passing, a pet he had passing, and he was having trouble sleeping. The claimant indicated that those issues were impacting his performance.

12. The suspension was then reduced to a one-day suspension by settlement letter dated June 21, 2019. The letter indicated in part that "After discussion and review, the University is offering to settle this grievance by reducing the five-day suspension, with the following stipulations: (a) that (claimant) meeting with his manager, shop steward and Union representative to review attendance requirements and any potential consequences of failure to maintain acceptable attendance from the date of this letter onward; and (b) that (claimant) seek counseling from the Faculty and Staff Assistance Office regarding any issues impacting his ability to maintain acceptable attendance and performance no later than July 17, 2019, and submits documentation to this office confirming that he has sought counseling." The claimant signed the letter, along with the Union Representative and the Executive Director of Facilities.

13. Upon issuance of the June 11, 2019, letter, the claimant was aware that he would be required to schedule an appointment with the employer's Faculty Staff Assistance (hereinafter "FSA") by July 17, 2019.

14. On July 1, 2019, the employer received a complaint that the bathroom had not been cleaned. The Manager again located the claimant sitting in the closet and not working. The claimant was not on break period. The claimant was being paid by the employer for the time that he was sitting in the closet.

15. On July 15, 2019, the claimant was issued a Disciplinary Notice which was a "5-day suspension and final warning" due to the July 1, 2019, incident. The infractions that were checked on the disciplinary notice were "Attendance", "Customer Service", Failure to Comply with University Policies", "Performance", and "Other (specify) — Sitting in closet during work hours". The claimant had union representation present when the discipline was issued. The claimant informed the employer that he was in the closet because he had a headache and a chipped tooth. The disciplinary notice indicated in part "Your repetitive disregard for work schedules and policies and procedures will not be tolerated. This document will be placed in your file for two years. It is essential that you understand that any further infractions may result in termination from your position as LPT Custodian at (employer)." The claimant signed the disciplinary notice.

16. The claimant had not contacted the FSA by the July 17, 2019, date to schedule an appointment, because it had slipped his mind.

17. On July 22, 2019, the Assistant Director of Support Services (hereinafter "Assistant Director") contacted the FSA to see if the claimant had scheduled his appointment. On July 23, 2019, the Assistant Director was notified by the FSA staff person that they had not heard from the claimant.

18. The Assistant Director reached out to the Manager by e-mail instructing him to sit with the claimant and find out why he had not made an appointment and give him one last opportunity to schedule the appointment with FSA. The Assistant Director wanted to give the claimant another opportunity, as the employer was trying not to be "mean".

19. On August 1, 2019, the Manager met with the claimant and his union representative. During that meeting the Manager asked the claimant why he had not adhered to the settlement letter requiring him to seek counseling through the FSA. The claimant stated that he was having a difficult time due to his grandfather and his pet passing. The claimant made the call to the FSA with the Manager present, making his appointment with FSA for August 9, 2019. The claimant was informed that he was getting an "extra chance" and if he did not go to that meeting, he could be discharged.

20. On August 9, 2019, the claimant agreed to watch his 3-year-old nephew to allow his sister to go to work. The claimant cancelled the FSA appointment rescheduling it for August 19, 2019, at 1:00 p.m. The claimant did not notify the Manager or anyone else on behalf of the employer that he was cancelling the August 9th appointment.

21. On the morning of August 19, 2019, the claimant was contacted by his mother indicating that his father had severed his finger. (The claimant's father lived 2 hours away, in the state of Maine.) The claimant got into his vehicle and began to travel to Maine to be with his father.

22. The claimant contacted the FSA at or around 10:10 am on August 19th to notify them that he could not make the appointment scheduled for that day. While on the phone the claimant rescheduled the appointment for September 5, 2019.

23. After traveling halfway to Maine, the claimant was notified that this father's finger was not severed but had been sliced open. (The claimant would not have been able to get back in time, had his cancelled appointment with the FSA still been available.)

24. On an unknown date after August 9, 2020, the Assistant Director reached out to the FSA staff to inquire if the claimant attended the August 9th appointment. The FSA staff is only able to provide limited information. The Assistant Director was informed that the claimant did not attend the August 9th

appointment. There was no mention of any other appointment being scheduled for a date after August 9th. The Assistant Director then began the process to termination the claimant.

25. The claimant worked for the employer from August 9th until August 29th. The claimant served a five-day suspension due to the July 15, 2019, discipline. The suspension was served from August 19th through August 23rd, 2019.

26. On August 29, 2019, the clamant was brought into the office prior to the start of his shift. The claimant met with his Manager, another Manager, and the union representative. The claimant was informed that he was being discharged at that time because he had cancelled the appointment with the employer's Faculty Staff Assistance program.

27. During the August 29th meeting, the claimant was provided with a written notice of termination due to his his [sic] failure to comply with University policies, Professional Standards of Conduct and violations of settlement dated June 21, 2019. The claimant initialed for receiving the notice of termination.

28. The claimant was a member of the union. The claimant did not file a grievance to his discharge, as he was under the belief that the employer would not protest his receipt of unemployment if he refrained from filing a grievance.

29. The claimant filed his claim for unemployment benefits with an effective date of September 8, 2019.

Credibility Assessment:

The employer witness testified to the final incident resulting in the claimant's separation from work, when he was given an extension of the July 17, 2019, deadline date to seek counseling through FSA, making an appointment in the presence of the his Manager for the August 9, 2019, date and then not attending that appointment. It is unrefuted that the claimant did have an appointment with FSA on August 9, 2019, that he did not attend. The claimant contended that on August 1st, 2019, when meeting with his Manager, he was informed by the Manager that it would be okay if he needed to reschedule the August 9th appointment. However, the claimant's testimony was deemed not to be credible, based upon the totality of the circumstances.

It was unrefuted that the claimant was issued a five-day suspension and final warning on July 15, 2019, then missed the deadline date of July 17, 2019, to seek counseling. It was further unrefuted that the employer reached out to the claimant to meet on August 1, 2019, to ensure that he scheduled the appointment with FSA, as he had already gone two weeks beyond the deadline date. Both employer witnesses testified that the purpose of the August 1st meeting was to give the claimant a last "extra chance" to comply with the settlement letter. Given that the employer was attempting to get the [sic] attend the counseling, it did not make sense

> that the Manager would then give the claimant authorization to cancel the August 9th appointment without restriction. As such, the Manager's direct and consistent testimony that during the meeting of August 1st, the claimant was not informed that he could cancel and/or reschedule the August 9th appointment, but instead was informed that if he did not attend that appointment he could be terminated, was more plausible and deemed credible.

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 further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion finding the claimant eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2). Rather, we conclude that the claimant's failure to attend a required counseling session constituted deliberate misconduct in wilful disregard of the employer's interest, as outlined below.

Because the claimant was terminated from his employment, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), 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 . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest . . . .

Under this section of law, the employer bears the burden to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employing unit's interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985). The focus of this inquiry is on the claimant's state of mind. In order to evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

It was undisputed that the claimant was discharged for failing to attend a counseling appointment with the employer's Faculty Staff Assistance program, which was a requirement pursuant to a June 21, 2019, settlement agreement related to the claimant's prior misconduct. It was also undisputed that the claimant failed to schedule a counseling session by the July 17, 2019, deadline set by that settlement agreement, but that the employer then gave him another opportunity to meet the obligation.

Whereas the employer testified that the claimant was discharged specifically for missing a scheduled August 9, 2019, appointment, the claimant maintained that he was given permission to re-schedule that appointment and that the final incident was missing an appointment scheduled for

August 19, 2019. The review examiner credited the employer's version of events, finding that the claimant never notified the employer that he would not be attending the August 9, 2019, appointment, and that the employer was never informed of a later appointment. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Even if we were to reach a different conclusion from the review examiner, we must accept her consolidated findings because they are reasonable in relation to the evidence presented at the hearing. Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979).

The claimant's primary explanation for missing the August 9, 2019, appointment — that the employer had given him permission to miss this appointment and that he had re-scheduled it with the employer's knowledge — was explicitly rejected by the review examiner. Rather, at the time the claimant had scheduled the appointment on August 1, 2019, the employer emphasized that the claimant was being given one "extra chance" and that he could be discharged for not attending this appointment. While the claimant missed this appointment in order to babysit his young nephew, the record does not indicate that this was necessary or beyond his control. The absence of mitigating factors for the claimant's misconduct indicates that the claimant acted in wilful disregard of the employer's interest. *See* Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

As the employer was unaware of the claimant's appointment scheduled for August 19, 2019, and the employer had already begun the bureaucratic process of discharging the claimant by this date, the reasons for the claimant's failure to attend this later appointment are not relevant to his discharge.

We, therefore, conclude as a matter of law that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending August 31, 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 - July 10, 2020

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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 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 July 1, 2020[1]. 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

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.

JRK/rh

[1] *See* Supreme Judicial Court's Second Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 5-26-20.