

Employer testified that it had timely sent a request for a hearing, but the envelope containing the request bore no postmark. DUA received the letter on the 13th day. Request was signed on day 10, a Friday. Was reasonable to assume that it was mailed on a business day, not on the weekend. Board held the employer filed the request in a timely manner.

**Board of Review
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Issue ID: 0032 2352 19

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny the employer a hearing on the merits of a determination awarding benefits to the claimant. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed an unemployment claim, effective January 6, 2019. On September 10, 2019, the DUA issued a notice determining the claimant was entitled to unemployment benefits because the employer failed to establish that the claimant's actions were in knowing violation of a reasonable and uniformly enforced policy or deliberate misconduct in wilful disregard of the employing unit's interest. The agency received the employer's request for a hearing on this determination on September 24, 2019. Because the DUA received the employer's request thirteen days after the initial determination, it denied the request for a hearing in a second determination issued on October 17, 2019. The employer's agent filed a timely appeal of the October 17, 2019 determination to the Hearings Department. Following a hearing on the merits of the October 17, 2019, determination attended by the employer's agent, the review examiner affirmed. We accepted the employer's application for review.

The review examiner reached her decision after concluding that the employer's agent did not have good cause to file a request for a hearing beyond ten days of the September 10th determination and thus it was not entitled to a hearing under G.L. c. 151A, § 39(b). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the employer and its agent an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither the employer nor its agent responded. 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 employer failed to prove that it sent the request for the hearing in a timely manner, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant filed an initial claim for unemployment benefits effective January 6, 2019.
2. On September 10, 2019, the Department of Unemployment Assistance (the DUA) issued the employer a Notice of Approval under Section 25(e)(2) of the Law on the claimant's eligibility for unemployment benefits. Instructions within the Notice explained the means by which the employer could request a hearing on the merits of the determination and the time parameters for which such a request for hearing had to be filed to be considered timely.
3. The employer's third party administrator (the Agent) receives correspondence on behalf of the employer from the DUA.
4. On September 13, 2019, the Agent received the Notice of Approval from the DUA via U.S. Mail.
5. The Agent wrote a letter to the DUA requesting an appeal on the Notice of Approval, which was dated September 20, 2019.
6. On September 24, 2019 at 3:17 p.m., the DUA stamped the appeal request and the envelope it was mailed in as being received. The envelope did not have a postmark date.
7. On October 17, 2019, the DUA issued the employer a Notice of Disqualification under Section 39 of the Law because its Request for an appeal was received late.
8. The DUA received the employer's Request for an Appeal on the Notice of Disqualification dated October 17, 2019 in an envelope, which bore a postmark date of October 21, 2019.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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, we reject the review examiner's legal conclusion that the employer's appeal is untimely.

The unemployment statute sets forth a time limit for requesting a hearing. G.L. c. 151A, § 39(b), provides, in pertinent part, as follows:

Any interested party notified of a determination may request a hearing within ten days after delivery in hand by the commissioner's authorized representative, or mailing of said notice, unless it is determined . . . that the party had good cause for failing to request a hearing within such time. In no event shall good cause be considered if the party fails to request a hearing within thirty days after such delivery or mailing of said notice. . . .

In accordance with G.L. c. 151A, § 39(b), the DUA has promulgated regulations pertaining to the timelines of requests for hearings. The relevant language in 430 CMR 4.13(3) similarly specifies that a "request for a hearing shall be deemed filed . . . on the date postmarked, if mailed."

As the initial Notice of Approval was issued by the agency on September 10, 2019, the deadline for filing a request for a hearing was ten days later, September 20, 2019. Finding of Fact # 2; G.L. c. 151A, § 39(b). At the hearing, the employer's agent testified that it mailed the request for a hearing on September 20, 2019, via the U.S. Mail, and had no indication that there was any issue with the Post Office receiving and processing their letter on that day.¹ This would suggest the letter should have been postmarked September 20, 2019, rendering it timely. Consistent with the employer's agent's testimony, the letter containing the request for a hearing was signed and dated September 20, 2019. Finding of Fact # 5. However, the envelope containing the employer's request for a hearing on the September 10, 2019, determination did not have a postmark date. Finding of Fact # 6.

Neither G.L. c. 151A, § 39(b), nor 430 CMR 4.13(3) articulate how the DUA shall determine the filing date of a request for a hearing received by U.S. Mail when the request does not bear a postmark date. Similarly, the pertinent portion of the DUA's Service Representative Handbook does not address this issue, explaining only that "if mailed, a request for hearing shall be deemed filed on the date contained in the postal cancellation stamp or postmark." *See* DUA Service Representative Handbook, § 1643 (D).

We acknowledge that the DUA marked the request for a hearing received on September 24, 2019, at approximately 3:00 p.m. Finding of Fact # 6. However, both G.L. c. 151A, § 39(b), and 430 CMR 4.13(3) explain that the filing date of a request hand-delivered to the DUA shall be determined differently than the filing date of a request sent to the DUA by U.S. Mail. Specifically, when a request is hand-delivered, the filing date shall be the date the DUA actually received the request; whereas when a request is sent by U.S. Mail, the filing date shall be the date the letter was sent. We cannot read out the postmark rule from the express regulatory provision of 430 CMR 4.13(3). Based on this express distinction, we see no justification in the statutory or regulatory language for treating the day the DUA received the agent's request for a hearing via U.S. Mail as the date it was filed.

Further, we do not see any evidence in the record before us that contradicts the employer's sworn testimony that the letter was mailed to DUA on September 20, 2019. The letter was dated September 20, 2019, and the envelope containing the letter did not bare a postmark indicating it

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

was sent on a day other than September 20, 2019. Findings of Fact # 5 and 6. We note that September 20, 2019 was a Friday, a regular business day. It is reasonable to infer from the record before us that the employer's agent mailed the document on a regular business day and not over the weekend. Given the particular facts of this case, and assuming the regular operation of the U.S. Mail, we do not believe the fact that DUA received the request on September 24, 2019 provides persuasive evidence suggesting the agent did not mail the request on September 20, 2019.

We, therefore, conclude as a matter of law that the employer is entitled to a hearing on the merits of the DUA's September 10, 2019, determination awarding benefits, because the employer's appeal was filed in a timely manner under G.L. c. 151A, § 39(b).

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 30, 2020



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

LSW/rh