Where the employer regularly received DUA email alerts to check its UI Online inbox, but it did not receive an email alerting it to check its UI Online inbox for a DUA request for information under this claim, it was not at fault for failing to timely respond pursuant to G.L. c. 151A, § 38A. This also constituted good cause for failing to timely respond under G.L. c. 151A, § 38(a) and (b).

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

Issue ID: 0032 3187 02

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 the opportunity to participate as a party in proceedings related to an unemployment claim or to be relieved of any future charges. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

After separating from the employer, the claimant filed a claim for unemployment benefits. The DUA issued a Lack of Work notification questionnaire to the employer with a response deadline of November 26, 2018. Because the employer failed to respond by the deadline, the DUA issued a Notice to the employer on October 7, 2019, denying the employer the right to participate as a party in further proceedings related to that claim and the right to be relieved of any future benefit charges on that claim. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the employer, the review examiner affirmed the agency's initial determination in a decision rendered on November 5, 2019. We accepted the employer's application for review.

The review examiner concluded that the employer had failed to provide a timely response to the DUA's Lack of Work questionnaire, and, thus, it was denied party status and the right to be relieved of any overpayment charges on the claim, citing G.L. c. 151A, § 38A. 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 obtain subsidiary findings concerning whether the employer received an email communication alerting it to look for the questionnaire and the reason for its failure to timely respond. 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, which concluded that the employer was at fault for its failure to timely respond to the DUA's questionnaire, is supported by substantial and credible evidence and is free from error of law, where the consolidated

findings confirm that the employer never received an email notifying it to look for the questionnaire.

Findings of Fact

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

1. On November 15, 2018, the Department of Unemployment Assistance (DUA) issued the employer a request for information, in the form of a Lack of Work notification (the LOW), a response to which was due on or before November 26, 2018.

2. The employer, which had opted to receive electronic correspondence from the DUA and provided its owner's (the owner) correct email address, received the LOW once it was delivered to its UI Online inbox.

3. The owner did not receive an email from the DUA alerting it to check the employer's inbox on November 15, 2018.

4. The owner regularly received email alerts from the DUA in regards to its UI Online correspondence prior to and after November 15, 2018.

5. At no time did the employer respond to the LOW.

6. The employer did not respond to the LOW because the owner did not receive an email from the DUA alerting him of it and remained unaware of the LOW.

7. On October 7, 2019, the DUA issued the employer a "Notice of Disqualification," indicating that the employer's response to the initial request for information was "inadequate and/or late."

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the employer is to be penalized for its failure to respond to the DUA questionnaire.

Although both the DUA's determination and the review examiner's decision referenced only G.L. c. 151A, § 38A, two sections of the unemployment statute actually require the employer to timely respond to DUA's request for information. G.L. c. 151A, § 38, provides, in relevant part, as follows:

> (a) Benefit claims shall be filed at the employment office at which the claimant has registered as unemployed. The commissioner shall prescribe the form, the time, and the manner in which such claims, other than disputed claims, shall be filed. The commissioner shall also prescribe the form and manner in which reports on claims required from the claimant and the employing units shall be presented . . . . Such procedure shall be designed to ascertain the substantive rights of the parties involved, without regard to common law or statutory rules of evidence and other technical rules of procedure.
>
> For the purpose of this section, the commissioner shall notify so many of the claimant's base period employers to report wages paid such individual during the base period as he finds necessary to make a proper determination on said claim. Each employer shall thereupon promptly report to the commissioner, in such form and manner as the commissioner prescribes, such information as may be necessary to determine a claimant's benefit rights under this chapter. If an employer fails to respond to the commissioner's notice under this section within ten days after such notice was mailed to him, the commissioner shall promptly determine the matter based on the available information. *If an employer fails to respond to the commissioner's notice under this subsection without good cause the employer shall have no standing to contest such determination, and any benefits paid pursuant to such a determination shall remain charged to the employer's account . . . .*
>
> (b) Notice of a claim so filed shall be given promptly by the commissioner or his authorized representative to the most recent employing unit of the claimant and to such other employing units as the commissioner may prescribe. If such employing unit has reason to believe that there has been misrepresentation or has other reasons which might affect the allowance of said claim, or has been requested by the commissioner to furnish any other pertinent information relating to said claim, it or he shall return the said notice to the indicated employment office with the reasons or information stated thereon within eight days after receipt, but in no case more than ten days after mailing of said notice, in accordance with the procedure prescribed by the commissioner. *Failure without good cause to return said notice and information within the time* provided in this section or *prescribed by the commissioner shall bar the employing unit from being a party to further proceedings relating to the allowance of the claim . . . .*

(Emphasis added.) G.L. c. 151A, § 38A, also provides, in pertinent part, as follows:

> (a) If the director, or the director's authorized representative, determines, after providing written or electronic notice to the employer, that a payment of benefits was made because the employing unit, or an agent of the employing unit, was at fault for failing to respond timely or adequately to any request of the department for information relating to the claim for benefits, then: (i) the employing unit, . . . shall not be relieved of charges on account of any such payment of benefits; . . . .

In the present case, DUA records show that its Lack of Work notice and request for information on a claim for benefits was delivered to the employer's UI Online inbox on November 15, 2018. *See* Consolidated Findings ## 1 and 2. On appeal, the employer asserted that it never received any communication to look for this request for information on the claim. Since the employer had requested electronic communication from the DUA, we remanded in order to find out whether the DUA sent an email to the employer to look in its UI Online inbox at the time this DUA request for information was issued. *See* Consolidated Finding # 2.

After remand, the consolidated findings show that the employer's owner had provided the DUA with its correct email address, and that the employer had received DUA email alerts to check its UI Online inbox both before and after November 15, 2018. *See* Consolidated Findings ## 2 and 4. For unknown reasons, the employer did not receive an email on November 15, 2018, to look in its UI Online inbox for the DUA request for information at issue. *See* Consolidated Finding # 3. Since the employer did not receive an alert to look, the owner did not check its UI Online inbox at the time and, therefore, failed to respond to the request for information. *See* Consolidated Findings ## 5 and 6.

The statutory provisions in question do not define what is meant by "good cause" or "at fault." However, fundamental principles of due process dictate that the employer may not be denied its statutory rights without adequate notice. The Supreme Court stated:

> An elementary and fundamental requirement of due process in any proceeding which is to be according finality is notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afform them an opportunity to present their objections. . . . The notice must be of such nature as reasonably to convey the required information, . . .

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted).

Given the regular practice of the DUA to send the employer email alerts to look for information placed into its UI Online inbox, we cannot fault the employer for not looking at its inbox and responding to this request for information in the absence of such an alert. Nothing in the record indicates why the employer did not receive an email alert to check its UI Online inbox when the DUA's November 15, 2018, notice and request for information was placed there. It is feasible that it was due to a computer error over which neither the DUA nor the employer had any control. Nonetheless, since the review examiner found that the employer did not get notice, it may not be denied its statutory rights.

We, therefore, conclude as a matter of law that the employer had good cause under G.L. c. 151A, § 38(a) and (b), for its failure to respond, because it had no knowledge of the DUA's request for information or its deadline. We further conclude that the employer was not at fault pursuant to G.L. c. 151A, § 38A, for failing to timely respond to the DUA's request.

The review examiner's decision is reversed. The employer may participate as a party in future proceedings relating to the allowance of this claim, and it may be relieved of charges in the event of any wrongful payment of benefits.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 29, 2019

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.

AB/rh