

Because the claimant, a public employee, was not suspended due to an indictment, neither G.L. c. 268A, § 25, nor G.L. c. 30, § 59, apply. Since the claimant was on an indefinite disciplinary suspension and there is no indication in the record that he could return to work at the end of the suspension, he is entitled to unemployment benefits under G.L. c. 151A, § 25(f).

**Board of Review
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Issue ID: 0035 6971 88

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 reverse.

The claimant was placed on an unpaid administrative leave by the employer on February 23, 2020. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 14, 2020. 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 November 9, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was suspended from work due to an indictment and, thus, was disqualified under G.L. c. 151A, § 25 and G.L. c. 30, § 59. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the criminal charges brought against the claimant. Both parties participated in the remand hearing. 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 was disqualified because he was suspended from work due to an indictment, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that a grand jury did not issue an indictment against the claimant in connection with his arrest on February 23, 2020.

Findings of Fact

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

1. The claimant worked as a full-time Patrolman for the employer, a municipality, from June 6, 2011, until being placed on unpaid administrative leave beginning February 23, 2020.
2. The employer Rules and Regulations includes a “Conduct Policy” indicating in part “a) Employees shall so conduct themselves in both private and professional lives as to avoid bringing discredit upon the Department. b) Employees shall not engaging [sic] in conduct on- or off-duty, which adversely affects the efficiency of the Department, or engage in conduct on- or off-duty, which impairs public respect for the employee and/or the Department and/or impair [sic] confidence in the operation of the Department.”
3. The employer also has a department policy addressing “Allegations of Domestic Abuse Against Law Enforcement Personnel”, indicating in part, “Officers who are subject of an *arrestable domestic abuse* related offense shall be immediately placed on *administrative leave without pay*.” “*Reinstatement shall be determined based upon the outcome of the Department investigation and/or judicial outcome of the matter.”
4. The Department policies were issued to the claimant when hired and are maintained (updates included) on the employer’s Digital Headquarters SharePoint file for employees to access.
5. On September 22, 2017, the claimant was issued an Employee Counseling Form, Written Reprimand for his conduct.
6. On November 5, 2019, the claimant was issued a letter from the Chief indicating in part that “This is a serious matter. You are hereby being given notice that as a result of your conduct from October 10th to October 29th, 2019 you are being suspended without pay for a period of four (4) days effective 11/5, 11/12, 11/13, 11/14.” The claimant was suspended due to incidents of conduct unbecoming, unacceptable conduct, and unacceptable judgement.
7. On January 6, 2020, the claimant entered into an agreement with the employer, which included the issuance of a suspension from February 5, 2020, to February 20, 2020. As part of that agreement it indicates “It is important for (claimant) to understand through this agreement that, if, at any time in the future, during the course of the performance of his duties as (employer) Police Officer he is involved in any further incident involving unacceptable judgement; unacceptable conduct or conduct unbecoming of a Police Officer, there will be scheduled a Chapter 31, Section 41 termination hearing, utilizing (claimant) overall history as noted.”
8. The claimant returned to work for the employer on February 21, 2020.
9. On February 23, 2020, when off-duty, the claimant was involved in an argument with his girlfriend while he was driving his vehicle. The claimant’s girlfriend

was intoxicated. As he was driving, she began striking the claimant and ripped his shirt. The claimant pulled up to the police station. There was some interaction between the claimant and his girlfriend within the vehicle. The claimant's girlfriend fell or got out of the vehicle. The claimant told her that he was going to go inside for assistance. The claimant's girlfriend agreed to calm down and be driven home, getting back in the vehicle. The claimant then drove his girlfriend to her mother's house. The claimant provided his girlfriend's telephone to her mother, who gave the phone back to the claimant's girlfriend. The claimant's girlfriend then contacted the police.

10. When the police arrived, both the claimant and his girlfriend had visible signs of being involved in an altercation. The claimant's girlfriend alleged that the claimant had ripped out her hair extensions. The claimant alleged that his girlfriend had assaulted him, ripping his shirt. Both the claimant and his girlfriend were arrested.
11. On February 23, 2020, the claimant was arrested in the municipality where he worked. The claimant was charged with domestic assault and battery and intimidation of a witness. The claimant's girlfriend was charged with domestic assault and battery.
12. The claimant was placed on an unpaid administrative leave by the employer on the February 23, 2020, date when becoming aware of the arrest. There was no end date indicated for that leave.
13. The employer administratively suspended the claimant pursuant to its policies, as a result of the claimant's arrest on February 23, 2020, for domestic assault and battery and intimidation of a witness.
14. As part of their investigation, the employer reviewed the video surveillance from the front of the police station. The video surveillance of February 23, 2020, showed the claimant's girlfriend falling or getting out of the claimant's vehicle. It also showed some interaction between the occupants when inside the vehicle, which appeared to be movement of the occupant(s) hands when facing each other. The employer also tried to speak with the girlfriend and the girlfriend's mother regarding the incident, but they chose not to speak with the employer.
15. On April 14, 2020, a Notice of Disqualification was issued indicating, "You were suspended from work because of an indictment for misconduct in office. Such suspension was under M.G.L. c. 30, § 59. The above-mentioned law provides that no further compensation, including unemployment benefits shall be paid to the indicted employee. Therefore, you are not entitled to unemployment benefits pursuant to M.G.L. c. 151A, § 22. You were indicted on 2/25/2020." It further indicates "You are not entitled to receive benefits beginning 3/22/2020 and for an indefinite period of time thereafter." The claimant filed an appeal to that determination.

16. After an employer hearing of May 28, 2020, to address the claimant's conduct, in light of the June [sic] 6, 2020, agreement, the claimant was discharged on June 1, 2020.
17. The charges brought against the claimant were not issued by the Grand Jury on an indictment against the claimant in connection with his arrest but were criminal charges as a result of a complaint filed in District Court. (On August 5, 2020, the charges against the claimant and the claimant's girlfriend were dismissed, as they refused to testify against each other.)
18. To date (January 12, 2021), the claimant has not received any back wages from the employer.

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, with the exception of Finding of Fact # 16, which appears to have a typographical error. The claimant entered into an agreement with the employer on January 6, 2020, and not June 6, 2020. This is consistent with the testimony of the parties, as well as Finding of Fact # 7.

As discussed more fully below, we reject the review examiner's legal conclusion that the claimant, a public employee, is subject to disqualification because he was suspended from his employment as a result of an indictment. The consolidated findings of fact establish that the claimant was not indicted.

The claimant was out of work between February 23, 2020, and June 1, 2020, because he was placed on an unpaid suspension. His eligibility for benefits is, thus, properly analyzed pursuant to G.L. c. 151A, § 25(f), which provides, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual pursuant to this chapter] . . . (f) For the duration of any period, but in no case more than ten weeks, for which he has been suspended from his work by his employing unit as discipline for violation of established rules or regulations of the employing unit.

Application of G.L. c. 151A, § 25(f), is further explained by regulation. 430 CMR 4.04(4), provides, in pertinent part, as follows:

A claimant who has been suspended from his work by his employing unit as discipline for breaking established rules and regulations of his employing unit shall be disqualified from serving a waiting period or receiving benefits for the duration of the period for which he or she has been suspended, but in no case more than ten

weeks, *provided* it is established to the satisfaction of the Commissioner that such rules or regulations are published or established by custom and are generally known to all employees of the employing unit, that *such suspension was for a fixed period of time* as provided in such rules or regulations, and that a claimant has a right to return to his employment with the employing unit if work is available at the end of the period of suspension.

(Emphasis added.)

The review examiner initially disqualified the claimant under G.L. c. 30, § 59, which provides that public officials who have been suspended due to an indictment are precluded from receiving unemployment benefits. The review examiner denied benefits to the claimant under this section of law even though it had not been established that the claimant had been indicted in connection with his arrest on February 23, 2020. As an initial matter, we note that, even if the claimant had been suspended due to an indictment, because he is not a state employee, G.L. c. 30, § 59, would not apply. In suspensions involving county and municipal employees, such as the claimant, G.L. c. 268A, § 25, which is identical in operative language to G.L. c. 30, § 59, applies.

Because it was unclear whether the claimant had been suspended as a result of an indictment, we remanded this case to obtain evidence on the matter, and the review examiner subsequently found that the claimant was not indicted in connection with his arrest. The criminal charges brought against the claimant were the result of a complaint filed in district court. Based on these findings, we conclude that G.L. c. 268A, § 25, does not apply in this case, as the claimant was not suspended due to an indictment.

The review examiner further found that the employer placed the claimant on an unpaid disciplinary suspension because his arrest was a violation of its policy against domestic abuse. Since the claimant was on an unpaid and indefinite disciplinary suspension and there is no indication in the record that he had a right to return to work at the end of the suspension, pursuant to 430 CMR 4.04(4), the claimant may not be denied unemployment benefits.

We, therefore, conclude as a matter of law that the claimant is not disqualified from receiving benefits pursuant to G.L. c. 151A, § 25(f), G.L. c. 268A, § 25, or G.L. c. 30, § 59.

The review examiner's decision is reversed. The claimant is entitled to receive benefits between the weeks ending February 29, 2020, and May 30, 2020, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 30, 2021



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

**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.

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