**The claimant was twice instructed by a DUA service representative that he needed to report all wages he earned on a weekly basis. Because he repeatedly failed to report his wages from one of his employers, he failed to provide information that he knew or should have known would be material to his claim for benefits. He is therefore at fault for the overpayment and subject to interest and penalties.**

**Board of Review**
**19 Staniford St., 4th Floor**
**Boston, MA 02114**
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**Paul T. Fitzgerald, Esq.**
**Chairman**
**Charlene A. Stawicki, Esq.**
**Member**
**Michael J. Albano**
**Member**

**Issue ID: 0053 7779 79**

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to assess interest and penalties on overpaid unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with the DUA, effective April 5, 2020, which was approved. Subsequently, the DUA issued a Notice of Disqualification concluding that the claimant was overpaid benefits in the total amount of $20,458.00 for the week beginning April 5, 2020, through August 29, 2020 (Issue ID # 0052 3309 58). The present case arises from a separate DUA determination, a Notice of Fault and Fraud Finding, issued on September 17, 2020, in which the agency imposed a one-time penalty assessment of 15% of the overpayment amount, a separate 12% interest penalty on any remaining balance of overpaid benefits, and a compensable week disqualification. The claimant appealed this determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's initial determination and upheld the assessment of interest and penalties in a decision rendered on December 26, 2020. We accepted the claimant's application for review.

The assessment of interest and penalties was based upon the review examiner's conclusion that the claimant's overpayment was due to "fraud," and, thus, he was subject to such penalties pursuant to G.L. c. 151A, §§ 69(a) and (e). 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 further evidence pertaining to the claimant's understanding of the claims process at the time he reported incorrect information. The claimant attended 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 gave information that he reasonably should have known was inaccurate, and reasonably should have known would be considered important in deciding whether to pay benefits, 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 is a Pilot and a college Professor. He possesses a Masters' Degree.

2. The claimant filed an unemployment insurance claim himself, on 4/9/20, and obtained an effective date of his claim of 4/5/20.

3. The claimant received "A Guide to Benefits and Employment Services for Claimants" (Guide) when he filed the above claim.

4. Page 19 of the "Guide" states, in part, "When requesting benefits, you must report gross wages for work performed and any income payable to you that week". It also states, "You must report all of your wages for the week (Sunday through Saturday) in which it is earned, even if you have not been paid yet..." and "You must report all income, except Social Security Benefits."

5. Page 19 also states, "Note: DUA uses a variety of methods to detect unreported wages and income. The law provides penalties for failure to truthfully report income and employment."

6. Page 20 of the "Guide" states, in part, "If you work full time hours in any given week, you will be considered employed full-time, regardless of wages, and you will not be eligible for UI benefits that week". It also states, "Full-time is generally between 35 and 40 hours per week. You are considered employed full-time if you are working the customary full-time schedule in your job or occupation."

7. The claimant read the portions of the "Guide" that he believed pertained to him. He did not read the entire "Guide". The claimant did not understand all of the information he read in the "Guide".

8. The claimant worked part-time as a Professor at community college "[A]" from 7/8/19 to 4/9/20 and reported that he was still working for this employer in his application for unemployment insurance benefits filed on 4/9/20.

9. The claimant worked full-time as a Professor at university "[B]" from 9/1/15 to 4/9/20 and reported that he was still working for this employer in his application for unemployment insurance benefits filed on 4/9/20.

10. The claimant is a member of the Massachusetts Teachers' Association (MTA).

11. The claimant worked on-call as a Pilot for airline "[C]" from 8/30/07 to 3/23/20 and reported that he was laid off from employment with "[C]" in his application for unemployment insurance benefits filed on 4/9/20.

12. The claimant requested unemployment insurance benefits each week between 4/5/20 and 8/29/20.

13. The claimant worked full-time at "[B]" and was paid biweekly between 3/29/20 and 8/29/20. He worked 37.5 hours per week and earned $2,880.75 biweekly, which is $1,440.37 per week, from 3/29/20 to 7/4/20.

14. The claimant requested benefits for the week beginning 4/5/20 to 4/11/20. When he requested benefits that week, he was asked, "Did you work during the reporting period listed above? This included full-time, part-time, temporary, self, or military employment." The claimant answered, "No."

15. The claimant answered the above question in the same manner when he requested benefits for the weeks beginning 4/5/20 to 6/6/20; 6/14/20 to 6/20/20; and 7/5/20 to 7/18/20.

16. For the week beginning 4/5/20 to 4/11/20, when the claimant was asked to describe his work search activities, he wrote, "My work ended due to the Coronavirus. I stayed in contact with my [name of airline] employer, requested work, was available to work, and was refused work. Therefore, I satisfy the work search, availability, and capability requirements."

17. For the week beginning 4/12/20 to 4/18/20, the claimant reported staying in contact with the airline and requesting work, when he answered the above question about which work search activities he performed. He reported the same for the week beginning 4/19/20 to 4/25/20.

18. On 5/7/20, the claimant received an e-mail from the MTA regarding a workshop regarding unemployment insurance benefits on 5/20/20. The claimant did not attend this workshop.

19. For the weeks beginning 4/26/20 to 6/6/20; 6/14/20 to 6/20/20; and 7/5/20 to 7/18/20, the claimant checked off "Other" when describing his weekly work search activities and wrote "Covid-19".

20. On 6/5/20, the claimant spoke with DUA employee, "[D]", who told the claimant he would be placed on an escalated list due to a breach in the claimant's account, and there would be an identity verification process after that.

21. On 6/9/20, the claimant e-mailed a colleague at "[B]" asking if the MTA could assist him with unlocking his UI Online account. The claimant received an e-mail from this colleague a few days prior, stating that the MTA would help faculty with this issue. The claimant's colleague replied and said she would forward this request to the MTA.

22. On 6/11/20, the claimant communicated with DUA employee, "[E]", via telephone. The claimant asked "[E]" for his e-mail address and "[E]" gave the claimant his e-mail address.

23. At 10:59 a.m. on 6/11/20, "[E]" re-opened the above claim on the claimant's behalf.

24. On 6/11/20 at 11:03 a.m., "[E]" e-mailed the claimant and wrote, "Questions 1-3 Answer No; Question 4 (has three parts) answer Yes; How did you look for work choose Other; How many days did you look choose 3." At 11:09 a.m. "[E]" e-mailed the claimant and added, "...after you choose Other, type COVID-19 in the comments box."

25. Questions 1 through 3 "[E]" referred to in the 6/11/20 e-mail are the following questions asked when a claimant requests weekly benefits: "Did you work during the reporting period listed above? This included full-time, part-time, temporary, self, or military employment"; "During the week listed above: Were you offered employment? Quit a job? Were you discharged from a job?"; and "During the week listed above, did you receive or apply for income from any other sources that you have not previously reported to us?", respectively.

26. On 6/12/20, at 10:31a.m. the claimant e-mailed "[E]" and asked, "For the weeks I received benefits for so far, I received $823 plus the extra $600, for a total of $1423 each week. Since I do qualify for that extra $600, why does this Request Receipt say I won't receive it for the week of 4/26/20 through 5/2/20? (By the way, the "Payment Request Status" section actually DOES list the extra $600 as pending for that week's claim, so I'm confused here.) Regarding the remaining weeks that I have not requested benefits for yet...How long do I have to submit the claim for them? Why aren't any weeks in June listed for me to claim? Since they're not listed, how can I submit claims for those weeks?"

27. "[E]" replied on 6/12/20 at 11:01, "The additional $600.00 shouldn't show up on the request benefits, it will show up as an addition on your payment request status. In regards to your remaining weeks you need to request them today by 7:00pm after that the older weeks will go away and I will need to reopen them for you (not a big deal at all if you miss them let me know) The weeks in June are there. The picture you sent below only shows the next four weeks you have available. So even if you have 10 weeks available it will only show 4 weeks, the newer weeks will keep rotating up until you are out of weeks."

28. On 6/12/20, the claimant replied to "[E]" at 1:18 p.m. and said, "On 6/7 and 6/11, I worked about 9 hours on each of those days for my employer. How should I indicate that? Since I worked those hours that week, will my benefits for that week be lower? Also, my employer now says he's unlikely to have any work for a while again. Therefore, will my benefits after that week automatically go back up to what they were previously, once I indicate on

subsequent requests that work is not available to me once again?" The claimant was referring to employer "[C]", the airline.

29. "[E]" replied at on 6/12/20 at 3:05 p.m. and said, "If you have worked any hours then answer yes to question 1 Answer question 2-3 NO Question 4 YES It well then ask the amount of hours you have worked and on another page it will ask you to report your wages (the amount made from the 9 hours of work) Your benefit amount is 823, so if you make 400 then you will get 423 form the state plus the 600. the state will make up the difference. I hope I'm explaining this clearly, it all gets so confusing. Next week when you file, if you have not worked your benefit amount form the state will be the 823 again."

30. The claimant reported working 20 hours for the airline between 6/7/20 and 6/13/20 and reported earnings of $601.69. He reported working 12 hours for the airline between 6/21/20 and 6/27/20 and reported earnings of $368.76. He reported working 24 hours for the airline between 6/28/20 and 7/4/20 and reported earnings of $737.52.

31. On 6/18/20, the claimant e-mailed "[E]" questions about an identity verification issue. "[E]" replied on 6/19/20 and listed the documents the claimant may submit to verify his identity. The claimant subsequently e-mailed "[E]" when he had trouble submitting the documents on UI Online.

32. On 6/23/20, the claimant followed up with "[E]" about the identity verification issue, via e-mail. "[E]" replied that day and said he was going to speak with his supervisor about this issue. The claimant replied to "[E]" and said he started receiving benefits again.

33. On 7/19/20, the claimant re-opened his claim after a period of inactivity. He e-mailed "[E]" and asked to request benefits retroactively. On 7/20/20, "[E]" e-mailed the claimant and confirmed that he made retroactive weeks requestable to the claimant.

34. On 7/24/20, at 2:16 p.m., the claimant e-mailed "[E]" and said in a few weeks he was going to receive a stipend for a five-week class he just started teaching. He asked whether he should report these earnings over the course of each week the class was in session, or if he should report that he received the single lump sum.

35. "[E]" replied to the claimant at 4:26 p.m. on 7/24/20 and instructed him to divide the earnings over each week the claimant taught this class.

36. At 6:48 p.m. on 7/24/20, the claimant e-mailed "[E]" and reported that he was going to receive a $4,446 stipend in August for a five-week course he was teaching now and asked how to report the earnings. At 6:58 p.m. "[E]" replied and instructed the claimant to report the wages over the five-week time period class was in session.

37. The five-week time period above was from 7/19/20 to 8/22/20. $4,446 divided by five is $889.20.

38. On 7/27/20, after the above e-mail exchange with "[E]", the claimant reported working 34 hours for "[B]" between 7/19/20 and 7/25/20 and reported wages of $1,482.00.

39. The week beginning 7/19/20 to 7/25/20 was the only week the claimant reported earnings with "[B]", from 4/5/20 to 8/29/20.

40. The claimant reported working 13 hours for the airline between 7/26/20 and 8/1/20 and reported earnings of $407.17. He reported working 12 hours for the airline between 8/2/20 and 8/8/20 and reported earnings of $368.76.

41. The claimant reported working 33 hours for the airline between 8/9/20 and 8/15/20 and reported earnings of $1,021.77. He reported working 43 hours for the airline between 8/16/20 and 8/22/20 and reported earnings of $1354.11. He reported working 10 hours for the airline between 8/23/20 and 8/29/20 and reported earnings of $307.30.

42. The claimant's 7/5/20 to 7/18/20 and 7/19/20 to 8/1/20 paystubs from "[B]" each show an additional 16.5 hours' pay, equal to $1,778.40 each pay period, on top of his regular pay of 37.5 hours per week.

43. The claimant's 8/2/20 to 8/15/20 paystub from "[B]" shows an additional 8.5 hours' pay, equal to $889.20, on top of his regular pay of 37.5 hours per week. His 8/16/20 to 8/29/20 paystub from "[B]" shows that the claimant was paid a $100 stipend during that pay period, on top of his regular pay of 37.5 hours per week.

44. On 8/21/20, MTA sent the claimant an e-mail regarding an unemployment insurance workshop on 8/27/20. The claimant participated in this workshop.

45. On 8/31/20, the claimant e-mailed the above colleague at "[B]" and said he recently re-opened his unemployment insurance claim but was unable to request retroactive benefits and each time he called DUA, his call was dropped. He asked for assistance.

46. The claimant's colleague replied and said she was forwarding this request to the MTA.

47. On 9/3/20, the claimant e-mailed the above colleague and said DUA wanted him to complete a questionnaire about his separation from employment with "[B]". He asked if a union representative could review his answers before he submits it.

48. The claimant's colleague copied the claimant's e-mail and sent it to an MTA representative.

49. On 9/17/20, DUA sent the claimant a Notice of Disqualification in Issue Identification Number 0052 3309 58-01. The Notice of Disqualification stated that the claimant was denied benefits effective 4/5/20 to 8/29/20, because he worked full-time during that time.

50. The claimant was overpaid for the weeks beginning 4/5/20 to 7/18/20 as a result of the above Notice of Disqualification.

Credibility Assessment:

The testimony the claimant provided regarding his failure to report full-time work and earnings from "[B]" when he requested benefits each week from 4/5/20 to 8/29/20, was not credible. He stated that he filed an unemployment insurance claim after his hours with "[C]" were reduced. He received the above "Guide" after he filed this claim and read the portions of the "Guide" he believed applied to him. He did not read the entire "Guide" and he did not fully understand the information in the "Guide". The "Guide" specifically states that claimants are required to report all wages and income, except Social Security Benefits, when they request benefits each week; and full-time work in any requested week is disqualifying. The "Guide" also states that the law provides penalties for failure to truthfully report income and employment. At the original hearing, the claimant stated that he spoke with DUA employee "[E]" via telephone about his claim. He stated that he informed "[E]" he was working full-time for employer "[B]" and "[E]" informed him he would be eligible for benefits despite working full-time, and "[E]" instructed the claimant to answer "No" to the first three questions he was asked when he requested benefits each week; thereby instructing the claimant not to report to DUA his full-time work and wages with "[B]". At the remand hearing, the claimant stated that he asked "[E]" for "[E]'s" e- mail address, and he e-mailed "[E]" first, because he was confused with what he read in the "Guide" and wanted clarification. When asked whether he had this initial e-mail sent to "[E]", the claimant stated that he provided all the e-mails he had between him and "[E]" and stated that he spoke with "[E]" over the phone before he received "[E]'s" 6/11/20 11:03 a.m. e-mail. The 6/11/20 11:03 a.m. e-mail from "[E]" appears to be a reply to a previous e- mail, as the body of the e-mail is solely an answer to a question. There is no greeting or introduction in the e- mail, to show that "[E]" initiated this contact, such as, "per our telephone conversation" or "to summarize our telephone conversation". The rest of the e-mails the claimant provided show similar responses from "[E]" in that the bodies of the e-mails sent from "[E]" address the claimant's questions, but the claimant provided the e-mails he sent to "[E]" with these questions, so it is clear what the claimant asked and what "[E]'s" response is. The claimant asked "[E]" how to report wages from his "employer" in an e-mail sent 6/12/20. The claimant did not specify which of his three employers he was speaking about. "[E]" correctly told him if he worked any hours, he was to report hours worked and wages earned. On 7/24/20, the claimant e-mailed "[E]" and reported that he was going to receive a

stipend in August for a class he was teaching at that time and asked how to report those wages. "[E]" correctly advised the claimant to take the total amount of wages paid for that class and divide it over the five weeks and report partial amounts each week. When asked why the claimant would report these wages from "[B]" for the summer course, and not report previous earnings with "[B]", the claimant stated that the summer course was 'optional' and 'irregular'. The principle that full-time work and earnings over the benefit rate plus earnings exclusion is disqualifying is fundamental to unemployment insurance eligibility in Massachusetts. "[E]" provided the correct advice and correct information about how the claimant should maintain his claim in all of the e-mails sent after 6/12/20. It does not make sense for "[E]" to instruct the claimant not to report his full-time work and full-time wages with "[B]". It also does not make sense for "[E]" to subsequently instruct the claimant to report wages from "[B]" and his "employer" as he did in the 6/12/20 and 7/24/20 e-mails. The claimant received pay from "[B]" in addition to his usual 75 hours of pay in four paystubs, from pay periods 7/5/20 to 7/18/20; 7/19/20 to 8/1/20; 8/2/20 to 8/15/20; and 8/16/20 to 8/29/20. The claimant did not follow "[E]'s" instructions to report his wages over the course of the five weeks of his summer class. He only reported wages from "[B]" for the week beginning 7/19/20 to 7/25/20. The claimant did not show that he sought another opinion from a DUA employee or manager to clarify how to maintain his claim after "[E]" allegedly provided him with conflicting information when "[E]" allegedly told him not to report full-time wages with "[B]" and later instructed him to report wages with "[B]" and his "employer". The claimant did not reach out to the MTA or "[B]" to ask how to maintain his claim; he asked for help regarding an identity verification issue, regarding requesting retroactive benefits, and with filling out a separation questionnaire. He had the opportunity to attend an unemployment benefits workshop sponsored by the MTA on 5/20/20, but he did not do so, despite his confusion regarding how to maintain his claim. He requested benefits for nine weeks before he spoke with "[E]" on 6/11/20 and failed to report his full-time work and wages from "[B]" during that time. He did not show that he asked any other DUA employees questions about how to maintain his claim on a weekly basis prior to 6/11/20 or that anyone from DUA advised him not to report this information during that time. The claimant informed his attorney in an e-mail on 3/17/21 that he attended the 5/20/20 workshop. At the remand hearing he stated that he only attended the 8/27/20 workshop. At the original hearing, the claimant stated that he reported his earnings to DUA. He referred to his submission of wage information on 4/13/20. The wage information he submitted was for the time-period beginning 1/1/19 to 3/31/20, which is not during his benefit year. The claimant stated that he assumed DUA knew he was working for "[B]" because he reported that he was 'still working' for "[B]" in his application for unemployment insurance benefits. He did not explain, however, how DUA would know how many hours he worked each week for "[B]" or what his weekly gross earnings were with "[B]" if he did not report them to DUA each week.

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. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant gave information that he reasonably should have known was inaccurate when certifying for benefits.

The review examiner issued her decision pursuant to the following provisions under G.L. c. 151A, § 69:

> (a) The department may recover . . . any amounts paid to an individual through error . . . If any individual fails to pay when due any amount paid to said individual because of such individual's *failure knowingly to furnish accurate information concerning any material fact*, including amounts of remuneration received, as provided in subsection (c) of section twenty-four, such overdue amounts shall carry interest at a per annum rate provided by subsection (a) of section fifteen from the due date until paid. The total amount of interest assessed shall not exceed fifty percent of the total amount due.
>
> . . .
>
> (e) At the time the department determines that an erroneous payment from the Unemployment Compensation Fund was made to an individual due to the *individual's misrepresentation of a material fact or failure to disclose a material fact that the individual knew, or reasonably should have known, was material*, the individual shall be assessed a penalty equal to 15 per cent of the amount of the erroneous payment. . . .

(Emphasis added.)

The DUA regulations at 430 CMR 4.23, define the phrase "failure knowingly to furnish accurate information" in G.L. c. 151A, § 69(a), to mean that the overpayment resulted from information which the individual knew, or should have known, to be incorrect, or a failure to furnish information which he knew, or should have known, to be material.

At both hearings, the claimant testified that he had received inaccurate instructions on how to report his wages by a DUA service representative. The review examiner conducted a thorough review of the record, including correspondence between the claimant and the DUA representative, and issued a detailed credibility assessment rejecting the claimant's testimony as not credible. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is

'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted).

As the review examiner noted in her credibility assessment, the email chain appears to omit correspondence between the claimant and the DUA representative prior to June 11, 2020. Moreover, the emails submitted into evidence confirm that the claimant failed to accurately report wages he received for teaching a five-week course even though the DUA representative had correctly instructed him to report these wages every week he chose to certify for benefits. Consolidated Findings ## 36–39. In light of these omissions, we see no reason to disturb the review examiner's credibility assessment on appeal.

We, therefore, conclude as a matter of law that the claimant knowingly failed to furnish accurate information to the DUA within the meaning of G.L. c. 151A, § 69(a), and that the overpayment was due to submissions and omissions which the claimant knew, or reasonably should have known, were misrepresentations of material fact within the meaning of G.L. c. 151A, § 69(e).

The review examiner's decision is affirmed. The claimant shall be subject to interest and penalties as stated in the September 17, 2020, determination.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - June 28, 2021**

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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 apply at: https://ui-cares-act.mass.gov/PUA/_/. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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.

LSW/rh