Contrary to the review examiner's credibility assessment, the employer consistently maintained that it did not receive a timely email notice that it had a determination in its UI Online inbox. Because the employer did not receive this email, it did not receive sufficient notice of the determination within the meaning of the Due Process Clause. The employer filed an appeal immediately upon learning about the determination, and therefore articulated good cause for failing to file a timely appeal pursuant to G.L. c. 151A, § 39(b).

Board of Review
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Issue ID: 0073 6252 86

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 in connection with a determination to award benefits, dated October 8, 2021. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

On October 8, 2021, the DUA issued to the employer a Notice of Approval stating that the claimant was eligible for benefits because she was hired to work a part-time schedule and was accepting all available work from the employer. The employer appealed the determination on October 28, 2021, 20 days after the Notice was issued. On June 15, 2022, the DUA issued a Notice of Disqualification, stating that the employer did not have good cause for submitting his appeal after the statutory deadline. Following a hearing on the merits attended by the employer, the review examiner affirmed the agency's initial determination a decision rendered on August 3, 2022. We accepted the employer's application for review.

The appeal was dismissed after the review examiner determined that the claimant had not shown good cause for the late appeal pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.14. 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 additional evidence about the circumstances surrounding the employer's late appeal. The employer 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 employer did not articulate good cause for failing to file a timely appeal where it timely received the October 8, 2021, determination but was not closely monitoring its inbox, 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 employer chose to receive correspondence from the Department of Unemployment Assistance (DUA) electronically.

2. On 10/8/21, a Notice of Approval (the Notice) was placed in the employer's UI Online Inbox. On that same day, an email notification was sent to the employer's email on file.

3. On 10/8/21, the employer received the Notice when it was properly placed in its UI Online Inbox.

4. On 10/8/21, the employer received an email notification from the DUA informing it that it had correspondence in its UI Online Inbox.

5. The employer's email address has not changed for many years and the employer's correct email address is on file with DUA. There had never been problems with the employer receiving emails from DUA. The employer's president (president) is not aware of any problems the employer has encountered receiving emails from any other sender.

6. The president checks the employer's UI Online Inbox weekly and does not rely on email notifications regarding correspondence from DUA. The president is the only person who checks the employer's email.

7. The president contracted COVID-19 on 10/3/21. He worked while he was sick.

8. The employer filed its appeal on 10/28/22, 20 days after the Notice was issued.

9. The reason for why the employer did not timely submit an appeal to the Notice is unknown.

10. On 6/15/22, Notice of Disqualification on the employer's late appeal was placed in the employer's UI Online Inbox.

11. The employer appealed that Notice on 6/16/22.

Credibility Assessment:

The president's testimony at the remand hearing was inconsistent, in conflict with the documents in the record and not credible. He testified that he received the email late but could not remember the date he received it. When asked if he still had the email, he scrolled through his inbox looking for it and stated that it was not there. He subsequently testified that he never got the email at all. Based on the inconsistent testimony, it is concluded the employer received the email on 10/8/21, the day DUA sent it.

> The president provided inconsistent answers to two Questionnaires that he signed under oath. On one questionnaire, he stated that he received the email notification on 10/24/22 and that there may have been a problem with the email server causing a delay. On the other questionnaire he stated that he received the email notification on 10/28/22 and he checked the box on the Questionnaire indicating that the Notice was not sent to the correct address. When asked about this at the hearing, the employer stated that he checked this box because he thought that may possibly have happened. The email notification was not sent to any physical address. The Notice was not sent to any physical address since the employer chose electronic service.
>
> The president stated that he checks his UI Inbox weekly and does not rely on email notifications from DUA. He then testified that he just happened to check his UI account and saw the Notice. The Notice was in his Inbox for more than two weeks before he saw it.

<u>Ruling of the Board</u>

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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject Consolidated Finding # 4 as inconsistent with the evidence in the record. We also reject the portion of Consolidated Finding # 6 that indicates the employer's president checks the UI Online inbox on a weekly basis as it is also inconsistent with the record. In adopting the remaining findings, we deem 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 did not articulate good cause for failing to file a timely appeal.

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 . . . (Emphasis added.)

Also relevant in this case is the DUA regulation, 430 CMR 4.14, which provides, in relevant part, as follows:

> The Commissioner may extend the ten day filing period where a party establishes to the satisfaction of the Commissioner or authorized representative that circumstances beyond his or her control prevented the filing of a request for a hearing within the prescribed ten day filing period . . . Examples of good cause for a failure to file a timely request for a hearing include, but are not limited to, the

> following: (12) Any . . . circumstances beyond a party's control which prevented the filing of a timely appeal. . . .

The employer submitted his request for a hearing 20 days after the Notice of Disqualification was issued by the DUA. G.L. c. 151A, § 39(b), allows for submission of an appeal within 30 days after the Notice was issued, if the party had good cause. As set forth under 430 CMR 4.14(12), any circumstances beyond a party's control may constitute good cause for failure to file a timely appeal. In this case, we consider whether circumstances beyond the claimant's control existed within the meaning of 430 CMR 4.14(12).

Following remand, the review examiner rejected as not credible the president's testimony that he did not receive an email from the DUA notifying him that he had received the October 8th determination. She based this assessment on apparent inconsistencies in the employer's fact-finding questionnaires and president's testimony that he was unaware of any other issues with his work email. 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). Based upon the record before us, we cannot accept the review examiner's credibility assessment.

The president did not mention the notification email in the initial fact-finding questionnaire, which was admitted into evidence as Exhibit 2. He reported only that he did not see the October 8th determination until October 28, 2021.[1] A cursory review of the follow-up questionnaire, which was admitted into evidence as Exhibit 1, shows that the DUA made an error in drafting the questionnaire by referencing October 24, 2021, instead of October 28, 2021, as the date he reported receiving it. As this follow-up questionnaire was issued more than seven months after the initial fact-finding, the president likely did not identify the DUA's mistake.[2] We do not believe that his inadvertent reliance on a DUA error is substantial evidence detracting from the veracity of his testimony.

Throughout both hearings, the employer's president consistently asserted that he had no record of receiving any email correspondence from the DUA on October 8, 2021. He confirmed this during the remand hearing when he conducted another search of his work email account at the direction of the review examiner. While the president indicated that he was not aware of any other issues with his work email account, he likely would not have knowledge of emails he did not receive. It is unrealistic to expect him to prove a negative, and it is unfair to penalize him for not being able to do so. Accordingly, in the absence of any substantial evidence detracting from the president's

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[1] Exhibit 2, as well as the claimant's testimony cited below, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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).

[2] Exhibit 1 is also part of the unchallenged evidence introduced at the hearing and placed into the record.

testimony that he did not receive an email from the DUA notifying him of the October 8, 2022, determination, we reject Finding of Fact # 4 as unreasonable in relation to the evidence presented.

The Due Process Clause of the Fourteenth Amendment prohibits the States from depriving any person of property without "notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (further citations omitted). The employer selected electronic correspondence as its communication preference but did not receive an email from the DUA informing it that important documents had been placed into its UI online inbox. Therefore, the employer did not receive the requisite notice necessary to file a timely appeal. *See* Board of Review Decision 0055 8011 26 (Mar. 29, 2021).

Finally, a review of the employer's UI Online inbox validates the president's testimony that he does regularly check his UI Online inbox but was not doing so during the period between September 29, 2022, and October 28, 2022. The president did testify that he would generally check his UI Online inbox each week, however, he explained that he believed that he was less diligent in checking his inbox at the beginning of October. He attributed this lack of diligence to the fact that he was recovering from COVID-19 during that period, a circumstance over which he had little or no control. *See* Consolidated Finding # 7. While we agree that parties are obligated to make all reasonable efforts to monitor their UI inbox, the law recognizes there are certain circumstances where reasonable diligence is impossible, or a lack of diligence is excusable. We believe his recovery from COVID-19 is one such instance.

Moreover, the employer promptly submitted its appeal upon learning that it was an interested party to a pending issue pertaining to one of its employees' eligibility for benefits. Under these circumstances, the employer has shown good cause for filing a late appeal pursuant to 430 CMR 4.14(12).

We, therefore, conclude as a matter of law that the employer established good cause pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.14 for filing an appeal beyond the statutory appeal deadline.

The review examiner's decision is reversed. The employer is entitled to a hearing on the merits of Issue ID # 0068 0945 98.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 21, 2022

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
(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