

The claimant was discharged because he left academy grounds without permission and, as a result, was absent from roll call. He chose to leave because he had mistakenly left an AED at another location. However, this mistake did not require him to then leave without permission and miss roll call, contrary to the employer's expectations. Held he engaged in deliberate misconduct in wilful disregard of the employer's expectation pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0075 6099 50

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from his position with the employer on February 25, 2022. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 7, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on June 3, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party 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 claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest because he did not fully understand his decision to leave academy grounds without permission would lead to his termination, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full-time for the employer, a city, as a police recruit, beginning January 10, 2022. The claimant was paid \$28.64 per hour.
2. The employer's STUDENT OFFICER GUIDE, states, in part:

J. 3.10 - Recruit Training: Personal Accountability/Discipline

(1) Standards of Conduct. Recruit training is a structured training environment requiring the highest standards of conduct and respect for authority. Recognition of the authority of superiors is expected at all times. A student officer is expected to show respect for, and obey the lawful orders of the academy director, program administration, staff instructors, nonstaff instructors, and any other officials or staff of the academy, training program or the Committee, including administrative and support personnel. Failure to do so may result in disciplinary sanctions, up to and including dismissal for disciplinary reasons.

(2) Purpose. The primary purpose of the disciplinary system is to maintain order and discipline among student officers. It prepares student officers to work within a system of policies, procedures, rules and regulations, thus helping to develop the self-discipline necessary to function effectively as a police officer in a position of public trust. It is a surrogate for the progressive disciplinary systems found in police departments, but it is designed to be instructional and corrective. Its application teaches personal accountability, encouraging student officers to place a high sense of duty above self-interest, and to accept full responsibility for actions or inactions.

K. 3.11 – Police Academy Offenses; Corrective Action and Dismissals

(1) Classes of Offenses for Police Academies. Academy offenses are set forth in the Abstract of Delinquencies section of the Committee's subregulatory policies and procedures, and may be supplemented by academy-specific subregulatory policies, procedures, rules and regulations approved pursuant to 550 CMR 3.05(1). Academy offenses have been categorized into three offenses, determined by the seriousness of the offense, as follows:

(a) Class I. Commission of a Class I offense shall result in dismissal from the academy for disciplinary reasons, pursuant to 550 CMR 3.11(3).

(b) Class II. Commission of a Class II offense shall, at a minimum, result in the issuance of a written disciplinary warning to the student officer.

(c) Class III. Commission of a Class III offense shall, at a minimum, result in a student officer preparing a To-From memorandum to the academy

director or a staff instructor in which the student acknowledges the breach and relates the subject of the breach to police service.

(2) Police Academy Levels of Corrective Action. In keeping with the concept of progressive discipline, corrective action shall be consistent with, and appropriate for, the student officer's conduct that resulted in the breach, and any other history of misconduct while at the academy. The following levels of escalating corrective action shall be utilized:

(a) To-From Memorandum. The student officer shall write a To-from Memorandum for all offenses. This level of corrective action, by itself, shall not be considered disciplinary.

(b) Admonishment and Counseling. Commission of any Class III offense for which there is no reasonable explanation, in the discretion of the academy director or a staff instructor, shall result in admonishment and counseling. An Action Notice setting forth the offense(s) violated, the action taken, and the potential consequences of additional violations shall be completed by the academy director or applicable staff instructor and distributed in accordance with the directions on the form.

(c) Oral Disciplinary Warning. Commission of any Class III offense after admonishment and counseling shall result in an oral disciplinary warning being issued to the student officer by the academy director or a staff instructor. An Action Notice setting forth the offense(s) violated, the action taken, and the potential consequences of additional violations shall be completed by the academy director or applicable staff instructor and distributed in accordance with the directions of the form.

(d) Written Disciplinary Warning. Commission of any Class II offense, or commission of any Class III offense after an oral disciplinary warning, shall result in a written disciplinary warning being issued to the student officer. Only the academy director may issue a written disciplinary warning. An Action Notice setting forth the offense(s) violated, the action taken, and the potential consequences of additional violations shall be completed by the academy director and distributed in accordance with the directions of the form.

(3) Police Academy Dismissal for Disciplinary Reasons. A student officer who commits any of the following shall, if the circumstances warrant, be dismissed for disciplinary reasons:

(a) Commission of a Class I offense; or

(b) After receiving a written disciplinary warning, commission of a Class II or offense;

or

(c) After receiving a written disciplinary warning, commission of any three additional Class III offenses, or commission of any two additional Class III offenses that are the same. If the academy director determines that the circumstances do not warrant dismissal, then a written disciplinary warning must issue. An Action Notice setting forth the offense(s) violated, the action taken, and the potential consequences of additional violations shall be completed by the academy director and distributed in accordance with the directions on the form.

2. Procedures

The following offenses included within this Abstract of Delinquencies shall be administered in accordance with the provisions 550 CMR 3.10:

a) Police Academy Offenses

(1) Class I Offenses involve unethical conduct, unprofessional conduct and safety.

(a) Absence, unexcused: Any student officer absence not authorized by the academy pursuant 550 CMR 3.08 shall be an unexcused absence.

(e) Conduct, unbecoming: A student officer shall not engage in activity or behavior that reflects discredit on the student officer, his or her class, the police academy, or the employing or sponsoring department.

(i) Dishonesty: A student officer, when asked a question, shall respond in a forthright and honest manner and shall answer with the truth, the whole truth, and nothing but the truth. Dishonesty includes lying, deception, attempts to mislead, and omitting informal.

(l) Insubordination: A student officer shall not intentionally disobey any lawful order, including an order relayed by another student officer.

(3) Class III Offenses less-significantly interfere with the training environment.

(a) Areas, off limits. A student officer shall not enter areas designated “off limits” by the academy director or staff.

(c) Chain of Command, failure to adhere: A student officer shall adhere to the chain of command as established by the academy director.

(g) Inspection, failure to be prepared: A student officer shall be prepared for inspection of his or her personal appearance, uniform, and equipment at all times while attending the academy.

(h) Late to class, field exercise, or formation: A student officer shall not arrive after the designated start time of any class, field exercise, or formation.

3. The **[EMPLOYER] STUDENT OFFICER Rules and Regulations**, states. In part:

3.1 ATTENDANCE. Student officers cannot be absent more than 5% of the training time (5) days. Excessive absenteeism may result in dismissal from the academy. All planned absences must be preapproved by the Academy Director or the Academy Staff. The student officer must submit a To/From requesting permission to be absent from the academy stating the reason for the absence and the planned duration of said absence. In an emergency situation necessitating that the student officer be absent, the student officer must notify the following individuals as soon as possible:

- The Staff Instructor
- Student Officer's Squad Leader

Violation of these reporting requirements shall be treated as a disciplinary infraction. (Class III Offense)

4. Upon a total of three (3) of the same Class III violations it is left to the discretion of the Academy Director or Acting Authority whether to discharge the recruit.
5. Upon a total of any six (6) Class III violations it is left to the discretion of the Acting Director or Acting Authority whether to discharge the recruit. In the event a recruit is not discharged upon a total of any six (6) Class III violations a 7th violation results in immediate termination.
6. Neither the **STUDENT OFFICER GUIDE** nor the **[EMPLOYER] STUDENT OFFICER Rules and Regulations** contain the disciplinary provisions set forth in Paragraphs 4 and 5 above.
7. The absence, unexcused policy is a measure to ensure recruits report as scheduled.
8. The conduct, unbecoming policy is a measure to ensure recruits perform to the highest level to gain the public's trust.
9. The dishonesty policy is a measure to ensure recruits are truthful and not a detriment to the public.

10. The insubordination policy is a measure to ensure order and to prevent situations from escalating.
11. The areas, off limits policy is a measure to ensure others authorized to be in the off limits area not disturbed or interrupted.
12. The chain of command, failure to adhere policy is a measure to ensure everyone reports to their superior which results in the department functioning properly.
13. The inspection, failure to be prepared policy is a measure to ensure recruits are ready and in position to be of use to citizens.
14. On January 11, 2022, the claimant was issued the **STUDENT OFFICER GUIDE** and **[EMPLOYER] STUDENT OFFICER Rules and Regulations**.
15. The employer reviewed the **STUDENT OFFICER GUIDE** and **[EMPLOYER] STUDENT OFFICER Rules and Regulations** with the recruits, including the claimant, in academy classes.
16. It was the employer's expectation police recruits do not have unexcused absences; do not improperly conduct themselves; are honest; are not insubordinate; do not enter off limit areas; follow the chain of command; and be prepared for inspection.
17. The claimant did not need to be told [sic] employer expected him not to have unexcused absences; not to improperly conduct himself; to be honest; not to be insubordinate; not to enter off limit areas; to follow the chain of command; and to be prepared for inspection.
18. On January 17, 2022, the claimant committed a Class III Offense: Late to class, field exercise, or formation for being late for roll call.
19. On January 28, 2022, the claimant committed a Class III Offense: Inspection, failure to be prepared for allowing his hair to grow too long.
20. On February 1, 2022, the claimant committed a Class III Offense for falling asleep in class.
21. The claimant's recruit class began with 45 candidates.
22. On February 4, 2022, the recruit class consisted of 42 candidates.
23. There was one (1) Recruit Guide and four (4) Recruit Squad Leaders.
24. Different recruits were periodically appointed as a Recruit Guide or a Recruit Squad Leader.

25. The recruit class conducted physical training off site from the academy at a college (Facility A).
26. At the conclusion of the physical training, the recruits drive back to the academy where the Recruit Guide opens the gate to allow the recruits entrance into the academy parking lot.
27. Without the Recruit Guide opening the gate with the identification card, a recruit would not be able to enter the academy parking lot and would have to use the call button at the gate entrance to request entrance into the academy parking lot.
28. The procedure once inside the academy parking lot was to park in the recruit's assigned space and wait for the Staff Instructor to call the recruits into formation and be counted before entering the academy.
29. Recruits then go to the locker room, shower, and report for class.
30. Cell phones were not allowed in the academy.
31. Recruits, on their own, and not part of the police academy training program, downloaded on their cell phones and used an application called "WhatsApp" to communicate while waiting for the Staff Instructor to call the recruits into formation.
32. The employer had no involvement with the "WhatsApp" application.
33. The Recruit Guide possessed a blank (no photo) identification badge which controlled the opening and closing of the gate into the academy and a door to the academy.
34. On February 4, 2022, police recruits were scheduled to conduct physical training exercises at Facility A beginning at 5:45 a.m.
35. On February 3, 2022, the claimant was assigned the task of transporting on February 4, 2022, a hand held defibrillator called an "AED" device to Facility A and at the completion of the physical training to transport the "AED" device back to the police academy.
36. The "AED" was valued at about \$2,000.00.
37. On February 4, 2022, the claimant transported the "AED" to Facility A.
38. On February 4, 2022, due to a "different formation" the recruits were not in the same area and the "AED" was set "to the side" and not placed in the usual area.

39. At the completion of the physical training, the claimant left Facility A without the “AED.”
40. When the claimant was entering the academy parking lot, he realized he forgot the “AED” device at Facility A.
41. The claimant, while parked in his assigned space awaiting instruction to enter the police academy, asked on “Whatsup” if anyone had brought back the “AED.”
42. The recruits who responded indicated they had not.
43. The claimant did not receive a direct response from the Squad Leader to his “Whatsup” inquiry.
44. The claimant then left his vehicle and went to the Recruit Guide and told the Recruit Guide he forgot the “AED” at Facility A and he needed to go back and get it.
45. The claimant asked for the identification badge so he would be able to open the gate and enter the academy parking lot.
46. The Recruit Guide gave the claimant the identification badge.
47. The Recruit Guide was not authorized to give the claimant the identification badge.
48. The claimant did not directly inform the Student Officer’s Squad Leader or Staff Instructor about what happened or that he was leaving the academy and would be late/absent for formation and entry into the academy.
49. The claimant believed the employer would know he was absent because of the count taken when entering the academy.
50. The claimant left the academy and returned to Facility A.
51. The claimant entered Facility A. The “AED” device was not present.
52. The claimant returned to Facility A and used the indemnification [sic] badge to open the gate to the parking lot.
53. The claimant used the identification badge to enter the academy.
54. The claimant, at the time he entered the academy, was in an area he was not authorized to be in (off limits).
55. The claimant proceeded toward the locker room.

56. As the claimant passed the offices, he was stopped by a sergeant (Sergeant A).
57. The claimant told Sergeant A what happened.
58. Sergeant A instructed the claimant to shower.
59. Before the recruits were called into formation, the claimant was called into a room and was asked to write a "To-From" of the incident.
60. The claimant was escorted off the property.
61. On February 25, 2022, the claimant was asked to return his equipment.
62. On February 25, 2022, the claimant was issued a Separation Notice dated February 24, 2022, discharging the claimant due to the following violations:
 1. Failing to be Prepared for Inspection (Class III)
 2. Unexcused Absence (Class I)
 3. Conduct Unbecoming (Class 1).
 4. Dishonesty (Class I)
 5. Insubordination (Class I)
 6. Failure to Adhere to Chain of Command (Class III)
 7. Areas, Off Limits (Class III)
63. The claimant incurred his 4th, 5th, and 6th Class III violations due to the February 22, 2022 incident (Failing to be Prepared for Inspection / Failure to Adhere to Chain of Command / Areas Of Limits).
64. The employer determined the claimant's conduct constituted four (4) Class I violations (Unexcused Absence/ Conduct Unbecoming/ Dishonesty/ Insubordination).
65. The claimant was terminated due to the "totality of the circumstances".
66. The claimant in his mind thought he was doing the right thing by retrieving the "AED" when he left the academy.
67. The claimant thought he would "get in trouble" for leaving the "AED" at Facility A, for leaving the academy to retrieve the "AED", and for being late for class, but not terminated.
68. The Recruit Guide was disciplined for giving the claimant the identification badge.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's 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 claimant is entitled to benefits.

Because the claimant was discharged from his employment, his eligibility for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence

“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The findings of fact indicate that, in most situations, the employer retains discretion over issuing offenses and determining whether to discharge an employee based on the offenses that he or she committed. *See* Findings of Fact ## 2, 4, and 5. As the employer did not provide any evidence that all other recruits who committed the same offenses as the claimant were discharged, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. We, therefore, consider only whether the employer has met its burden to show the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

To meet its burden, the employer must first show that the claimant engaged in the misconduct for which he was discharged. As the claimant conceded that he left the academy grounds without permission on February 22, 2023, and knew that he would not be present for roll call because of this decision, there is no question that he engaged in the misconduct for which he was discharged. *See* Findings of Fact ## 44–54, and 62–65. We further believe that it is self-evident from the claimant's testimony that his decision to leave the academy without permission was deliberate.

However, the Supreme Judicial Court (SJC) has stated, “Deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer's interest. In order to determine whether an employee's actions were in wilful disregard of the employer's interest, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior.” Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state of mind, we must “take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The claimant testified that he understood that his decision to leave the academy and his absence from roll call were both contrary to the employer's expectations about his conduct. Finding of Fact # 67. Despite this concession, the review examiner concluded that the claimant did not have the requisite state of mind for deliberate misconduct in wilful disregard of the employer's interest, because the employer did not explicitly inform the claimant that these offenses would lead to his termination. Such analysis is a misapplication of G.L. c. 151A, § 25(e)(2). This section does not require that an employer show a claimant understood that he would be fired for engaging in misconduct. As the SJC has explained, the "purpose of Section 25(e)(2) . . . is to deny benefits to a claimant who has brought about his own unemployment through intentional disregard of standards of behavior which his employer has a right to expect." Garfield, 377 Mass. at 97. In other words, a claimant will not be entitled to benefits if he is discharged for deliberately acting in a way that he knows is contrary to the employer's expectations.

As discussed above, the claimant understood that he was not allowed to exit his car until instructed, that he was not allowed to leave the academy without permission, and that he was expected to be present and prepared for roll call. *See* Findings of Fact ## 16, 17, 28, and 48. Therefore, the claimant's testimony confirms that he understood his decision to leave the academy grounds was contrary to the employer's expectations.

The purpose of these expectations is to ensure that recruits will complete all training necessary to be reliable, trustworthy, and effective law enforcement officers when they graduate from the police academy. Findings of Fact ## 7-13, and 16. Accordingly, we believe that the employer's expectations in this regard are facially reasonable.

Finally, we must consider whether the record contained sufficient evidence to conclude that mitigating circumstances prevented the claimant from adhering to the employer's expectations. Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See Shepherd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987). While the claimant inadvertently left the AED at Facility A, his belief that he would be disciplined for that mistake does not mitigate his subsequent actions that were contrary to the employer's expectations. *See* Consolidated Finding # 67. Absent any evidence that the claimant's mistake in forgetting the AED prevented him from remaining in his car on academy grounds until being called into formation, we believe that the claimant's actions on February 22, 2022, were done in wilful disregard of the employer's expectations.

We, therefore, conclude as a matter of law that the claimant's discharge was attributable to deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week of February 20, 2022, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 18, 2023



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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