

Where the review examiner found that the claimant's timely hearing request of a disqualifying determination under G.L. c. 151A, § 25(e) was placed in the mail but never received by DUA, she properly concluded that the claimant had good cause pursuant to G.L. c. 151A, § 39(b), to resubmit another hearing request 22 days after the disqualifying determination. Held review examiner could not then deny the claimant a hearing on the merits because she had appealed a subsequent determination issued under G.L. c. 151A, § 39(b), after the filing deadline, as the claimant was not afforded adequate notice and an opportunity to be heard on this separate question.

**Board of Review
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Issue ID: 0078 0983 04

**ORDER TO RESCIND DENIAL OF APPLICATION
AND REVERSE**

Introduction and Procedural History of this Appeal

The Board of Review issued a decision on January 13, 2023, to deny the claimant's application for review of a hearing decision, dated November 22, 2022. Pursuant to G.L. c. 151A, § 71, the Department of Unemployment Assistance (DUA) has asked the Board to revoke its final decision. The request is hereby GRANTED.

The claimant filed a claim for benefits with the DUA, effective June 26, 2022. On July 28, 2022, the DUA issued a determination denying benefits pursuant to G.L. c. 151A, § 25(e)(1), based upon her separation from employment (Quit determination), which the claimant appealed. On August 26, 2022, the DUA issued a determination denying a hearing on the appealed Quit determination on the ground that the claimant had filed the hearing request after the statutory deadline without showing good cause (Late Appeal determination). The claimant then requested a hearing on the Late Appeal determination, but this was also filed after the statutory deadline. Following a hearing, attended by the claimant and her attorney, the review examiner affirmed the agency's Late Appeal determination in a decision rendered on November 22, 2022.

The review examiner concluded that, pursuant to G.L. c. 151A, § 39(b), and 430 CMR 4.14.–4.15, the claimant was not entitled to a hearing on the merits of the Quit determination, because, although she established good cause for submitting a late appeal of the Quit determination, she did not establish good cause to file a hearing request on the Late Appeal determination after the statutory deadline.

The issue before the Board is whether the review examiner's decision to deny the claimant a hearing on the merits of her Quit determination is supported by substantial and credible evidence and is free from error of law, even though she had demonstrated good cause for failing to timely appeal that determination.

Findings of Fact

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

1. The claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA) with an effective date of June 26, 2022.
2. The claimant chose to receive communications from the DUA electronically.
3. On July 28, 2022, the DUA issued a Notice of Disqualification to the claimant stating that the claimant was not entitled to benefits because she had left work under circumstances determined to be voluntary and without good cause attributable to the employing unit (the Quit Disqualification).
4. The claimant received the Quit Disqualification through the U.S mail on or around August 1, 2022.
5. The claimant completed the Appeal Request form and mailed it to the DUA on or around August 4, 2022, 7 days after the Quit Disqualification was issued.
6. The DUA did not receive the claimant's appeal of the Quit Disqualification that was sent through the mail.
7. The claimant allowed three weeks for her appeal to be received and processed by the DUA. After about three weeks, the claimant called the DUA to follow up.
8. The DUA agents the claimant spoke to when she called in told her that the appeal she had mailed in had not been received. One of the agents helped the claimant file an appeal over the phone.
9. On August 22, 2022, 22 days after the Notice of Disqualification was issued, the claimant filed an appeal of the Quit Disqualification through UI Online.
10. On August 26, 2022, the DUA issued a Notice of Disqualification to the claimant stating that she was not entitled to a hearing on the Quit Disqualification because the request for a hearing was filed within 11–30 days from the date of the determination and it was determined that the claimant's reasons for not filing within 10 days did not constitute good cause (the Late Appeal Disqualification).
11. The claimant received the Late Appeal Disqualification on August 26, 2022, when it was delivered to her UI Online Inbox in accordance with her communication preference.

12. On September 13, 2022, 18 days after the Late Appeal Disqualification was issued, the claimant filed an appeal of the Late Appeal Disqualification through UI Online.

Ruling of the Board

In accordance with our statutory obligation under G.L. c. 151A, § 41, we review the recorded testimony and evidence from the hearing, the claimant's appeal, 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 ultimate 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, for reasons discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not entitled to a hearing on the merits of the Quit determination.

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 a 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. . . .

Through regulations, the DUA has set forth circumstances that constitute good cause for submitting an appeal beyond the 10-day filing deadline. Pursuant to 430 CMR 4.13, the ten-day filing deadline may be extended if the appeal is filed within 30 days and the party can show good cause as set forth under 430 CMR 4.14. The DUA's regulation at 430 CMR 4.14 provides, in pertinent part:

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: . . .

(1) A delay by the United States Postal Service in delivering the Commissioner's determination; . . .

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

In this case, the review examiner found that the claimant mailed a hearing request for the Quit determination to the DUA seven days after it was issued. Finding of Fact # 5. She further found that the DUA never received that hearing request. Finding of Fact # 6. Since it was found to have

been mailed, we can reasonably attribute the fact that the DUA never received it to mishandling by the U.S. Postal Service or the DUA.¹

Thus, when she had to resubmit another hearing request on August 22, 2022, we agree that it was filed late for reasons beyond the claimant's control as meant under 430 CMR 4.15(12). *See* Finding of Fact # 6. Since the claimant demonstrated that her request for a hearing on the Quit determination was submitted 22 days after the determination date for reasons beyond her control, she has met the good cause standard under G.L. c. 151A, § 39(b), and she is entitled to a hearing on the merits.

Yet, the review examiner concluded that the claimant was not entitled to such a hearing due to submitting her Late Appeal determination hearing request 18 days after it was issued. In this case, we believe that it was improper for the review examiner to rule on the question of whether or not the claimant had good cause for appealing the August 26, 2022 Late Appeal determination after the statutory deadline.

The DUA did not issue a separate determination under G.L. c. 151A, § 39(b), to notify the claimant that she had also appealed the August 26, 2022 Late Appeal determination after the statutory deadline. The only DUA determination concerning lateness that had been issued to the claimant was the first Late Appeal Determination, which addressed the claimant's failure to timely appeal the Quit determination. Finding of Fact # 10; *see also* Exhibit 3.² Moreover, nothing in the Notice of Hearing suggested that the claimant would also have to address her failure to timely appeal the Late Appeal Determination.

We are not suggesting that a review examiner may never add a new legal issue during the hearing. But, in order to do so, the parties must be given adequate notice. The Due Process Clause of the Fourteenth Amendment prohibits the States from depriving any person of property without providing notice and an opportunity to be heard. Dusenbery v. United States, 534 U.S. 161, 167 (2002). Specifically, it requires "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).

Ordinarily, this due process concern is addressed with a combination of an explanation of the factual basis for denying or awarding benefits set forth in the determination and the hearing notice, which apprises the parties of the hearing date, time, and the section of law to be addressed at the hearing.³ In instances where review examiners realize that the facts warrant considering a new issue, they usually explicitly state so during the hearing and afford the parties an opportunity to

¹ The example under 430 CMR 4.14(1) indicates DUA's awareness that delivery problems can occur within the U.S. Postal Service.

² Exhibit 3 is that Notice of Disqualification, which refers only to the late hearing request of the Quit determination. While not explicitly incorporated into the review examiner's findings, the content of this exhibit is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

³ *See, e.g.*, Exhibit 7, the Quit determination, and Exhibits 9 and 10, the hearing notices sent to the claimant's attorney and to the claimant.

either continue the hearing for another date, so that they may prepare for the new issue, or waive the formal notice and proceed with a hearing on both issues.

This did not happen in the present case. During the hearing, the review examiner questioned the claimant about the reasons for her late filing the Late Appeal Determination without affording her an opportunity to continue the hearing or to waive notice, and then rendered a decision based upon the claimant's responses to those questions.⁴

We therefore conclude as a matter of law that the claimant is entitled to a hearing on the merits of the Quit determination, because she established good cause for filing a hearing request after the statutory deadline as permitted under G.L. c. 151A, § 39(b), and 430 CMR 4.13 and 4.14. We further conclude that it was an error of law to deny the claimant such hearing on the merits due to her late filing of the Late Appeal determination, because the agency did not provide the claimant with adequate notice and an opportunity to be heard on this separate question.

The review examiner's decision is reversed. The claimant is entitled to a hearing on the merits of the Quit determination (Issue ID # 0077 3868 17).

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 8, 2023



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

⁴ In fact, the claimant's attorney raised an objection during the hearing, arguing that this line of questioning was irrelevant to the issue before the review examiner, which was whether or not the claimant had good cause to file the Quit determination hearing request late.

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