COMMONWEALTH OF MASSACHUSETTS

ESSEX,ss.

TRIAL COURT OF MASSACHUSETTS
DISTRICT COURT DEPARTMENT
LAWRENCE DIVISION
DOCKET NO.: 2218 CV 0532

WILLIAM FAHEY,
Plaintiff
v.

DIRECTOR OF THE DIVISION OF
UNEMPLOYMENT ASSISTANCE and
TOWN OF ANDOVER,
Defendants

COURT'S DECISION ON PLAINTIFF'S PETITION FOR JUDICIAL REVIEW OF THE DECISION OF BOARD OF REVIEW, DIVISION OF UNEMPLOYMENT ASSISTANCE, DATED JULY 18, 2022

Preliminary

This matter was the subject of a hearing at the Lawrence District Court on Plaintiff William Fahey's petition for judicial review of the Decision of Board of Review (the Board) of the Division of Unemployment Assistance (the Division) in the matter between the Plaintiff and Defendants (the Division and Town of Andover) on September 29, 2023. The Plaintiff's initial claim for unemployment compensation benefits was filed with the Division on May 30, 2021 and was denied on September 29, 2021. Plaintiff appealed the determination to a hearing at the Division that took place on November 5, 2021 and January 5, 2022. After hearing, review examiner Joan Berube ruled that the Plaintiff engaged in deliberate misconduct in willful disregard of Defendant Town of Andover's interest, upholding the initial determination by the Division. Plaintiff appealed the review examiner's determination to the Division's Board of Review which, in a written decision dated July 18, 2022, affirmed the review examiner's

findings. Plaintiff appealed the Board's determination to this Court for further review pursuant to G.L. c. 151A, §40.

Facts

The following is a summary of the review examiner's findings of fact as accepted and adopted by the Board. Plaintiff William Fahey worked for the Town of Andover as the Director of Youth Services (AYS) since 1994. His job description was to "recommend and develop strategies and plans for the provision of recreational, educational and cultural programs for youngsters between the ages of 11-19 that are consistent with quality financial objectives; oversee the administration of all such programs and the implementation of related special projects and new ventures; oversee management and coordination of you based recreational, educational and cultural programs." Plaintiff had 5 full time employees who reported to him as well as part time employees and volunteers. Among the employees were social workers. Those who worked for the Plaintiff were responsible for running the AYS programs for the programs' participants. Plaintiff's job was that of a director and supervisor; he was not to act as a counselor. His essential job functions included "hir[ing], supervis[ing] and evaluat[ing] intermittent and seasonal summer program staff[,]" and "[i]n concert with [Andover] and School resources, [to] act as a resource for troubled youths requiring intervention." Any participant who required professional counseling services was directed by the AYS social workers to other resources such as therapists and psychologists.

The Town of Andover issued Plaintiff a cell phone and laptop computer to be used in conjunction with his work as Youth Services Director. Andover maintains an employee handbook that establishes guidelines for the use of the employer's electronic devices, internet and email services. The policy reads in relevant part: "The Town of Andover provides e-mail and/or Internet access to employees who are connected to the municipal network server located

at the Town Offices and, additionally to various employees in other Town buildings. The purpose of providing these services to employees is to improve communication between departments and to provide the means to communicate and obtain information via the Internet. These services shall be used to improve the efficiency and effectiveness of municipal operations. Personal and other unauthorized use of the Town's e-mail and Internet is strictly prohibited." The policy also included the following standard: "All communications should be stated in a professional manner; under no circumstances may employees create, send or retrieve sexually or otherwise offensive, derogatory or harassing messages to employees or others by e-mail or the Internet...Violations of such standards may result in disciplinary action up to and including discharge." It was clear from the record, and the review examiner found, that Plaintiff used his Town issued phone for work and personal business, storing personal photographs, contact information and text messages during the course of his employment.

Andover issued an employee handbook with a summary of the policies, benefits, and conduct expectations. The review examiner outlined Andover's relevant policies concerning sexual harassment in paragraph 79 of her decision and those are not reproduced here. The Board also reviewed Andover's policies relative to town employee conduct in detail in the Decision (pp. 2-3). Plaintiff received a copy of the handbook and was aware of Andover's policies noted above.

In April 2021, the Town of Andover hired a third party to investigate allegations that Plaintiff had engaged in a sexually inappropriate behavior with a woman (hereinafter referred to as "X," as the Board did in its Decision) who participated in the AYS program beginning in December 2011 when she was a 17-year-old junior in high school. Investigator Regina Ryan filed her findings with Andover in a written report dated April 5, 2021 (hereinafter the Report). The Report detailed the relationship between Plaintiff and X. The girl began visiting the AYS

youth center a few times a week to do homework. In August 2012, Plaintiff hired her to work part-time at AYS and she worked through February 2013. Upon graduating high school as an 18-year-old in 2013, she left the AYS program, but stayed in touch with Plaintiff through texting and regular visits to AYS youth center. The investigator interviewed X, the Plaintiff, and other witnesses, as well as reviewed digital communications between the X and Plaintiff. Due to the lack of corroborating evidence and inconsistencies in the woman's account of the alleged sexual misconduct, investigator did not credit the woman's allegations on this issue. During her investigation, however, Ryan discovered other behavior that violated the employer's policies. For example, the investigator found that Plaintiff often crossed boundaries by hugging program participants and telling them that he loved them.

As to his relationship with X, Ryan reported that X moved to California after she graduated high school. Sometime in 2016, a town resident who knows the woman visited Plaintiff and shared with him that X was involved in pornography. Using a town issued computer, they searched online and found a pornographic video containing images of her. Plaintiff then visited X's mother at her home to tell her what he knew. She denied the rumors about her daughter, whereupon Plaintiff provided her with her daughter's stage name and he helped her search and discover the pornographic material. Plaintiff continued to be involved with X and communicated regularly with her on his employer's cell phone which were discovered during the investigation. X returned to Andover for a visit on April 18, 2019 and she visited with Plaintiff that evening at the youth center. She was alone with Plaintiff at the youth center from about 9:00 p.m. to sometime after midnight, at which time he drove her home in his personal vehicle. The investigator found text messages after this meeting in which Plaintiff said that he loved her and that she was beautiful. They continued with text exchanges in the following weeks and months in which the woman revealed that she was involved in the pornography business and

that she was very upset at some of the choices she made. Plaintiff communicated with her, offering her advice about how to deal with her trauma. Among other communications, Plaintiff wrote to X about her emotional pain that "stays in place and festers inside [her] mind and heart...[which] [m]akes [her] hate [herself] and [her] life." He further offered that the trauma "is like a compass it can lead you to a different existence if only you learn to use your compass. If you expect to find peace in your heart and joy in your life then you must learn to use your compass...So what if you did porn? It's just a reaction to your pain...I pray for change for your but you must be the catalyst to the desire to change and take specific actions. Your struggle and pain are actually your foundation to living a good life. It gives you wisdom and the ability to see what is truly important in this world. What will motivate you to abandon this life from a different one?" In a subsequent unsolicited message, the claimant wrote: "what's going on? What's up in your world and can you feel the ground? Love you always..." The review examiner reviewed other text communications that were very personal and demonstrated the Plaintiff's efforts to counsel X as she dealt with her trauma and emotional distress. The social workers and staff workers from the AYS program neither counseled X nor or were they ever introduced to her.

On April 7, 2021, the Town Manager of Andover informed Plaintiff that as a result of what was discovered through the investigation, he was dismissed from his job. In relevant part, Mr. Flanagan advised Plaintiff that he "repeatedly transgressed appropriate professional boundaries with program participants and their families."

Discussion.

The standard of judicial review of the Board's decision is governed by G. L. c. 30A, §14(7). The court gives "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it," Athol Daily News v. Board of Review of the Div. Of Employment & Training, 439 Mass. 171, 174

(2003), quoting from §14(7). If the Division's findings are supported by evidence that a "reasonable mind might accept as adequate to support a conclusion," the hearing officer's decision will not be disturbed. Raytheon Company v. Director of the Div. Of Employment Security, 364 Mass. 593, 595 (1974). The responsibility for determining the credibility and weight of testimony rests with the hearing officer. Cantres v. Director of the Division of Employment Secretary, 62 Mass. App. Ct. 579, 582 (2004). This Court does "not make a *de novo* determination of the facts or draw different inferences from the facts found by the agency." Peterborough Oil Co. v. Department of Environmental Protection, 474 Mass. 443, 448-449 (2026). This Court is without authority to substitute the review examiner's "choice between two conflicting views even though the Court might justifiably have made a different choice had the matter been before [it] in the first instance." Hanover Insurance Company v. Commissioner of Insurance, 443 Mass. 47, 50 (2004).

The hearing officer found the Plaintiff to be ineligible for benefits under M.G.L. c. 151A, § 25(e)(2). This Section provides in relevant part: "[no benefits shall be paid to an individual under this chapter]...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 willful 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...." Deliberate misconduct is defined as intentional conduct or inaction which the employee knew was contrary to the employer's interest. Goodridge v. Director of the Division of Employment Security, 375 Mass. 434, 436 (1978).

Plaintiff was hired to run recreational, educational, and cultural programs for youngsters between the ages of 11-19. The Ryan report showed inappropriate conduct on the part of the

Plaintiff that is supported in the hearing record. The report demonstrated that Plaintiff had crossed professional boundaries, that he had given unlicensed counseling advice, downloaded pornography and showed it to families, sent inappropriate text messages and hugged and expressed love to program participants. The review examiner concluded that the Plaintiff violated the employer's expectations in three regards: he violated the employer's sexual harassment policy with his interactions involving a 24-year-old woman who had been a former program participant; he violated the employer's internet and email use policy by using his employer issued cell phone for personal business; and he violated the employer's public relations policy by failing to maintain a professional manner at all times. The employer's polices are set forth in the review examiner's findings of fact, numbers 4 through 7.

Although there is no evidence that the employer discharged other employees for engaging in similar behavior, the review examiner found that the employer met its burden of demonstrating that the Plaintiff engaged in deliberate misconduct in willful disregard of the employer's interest. The Board found that Plaintiff's behavior toward X, "however troubling," did not rise to a violation of the employer's sexual harassment policy. The Board members did find, however, that Plaintiff violated the email and internet use policy which prohibited personal use of the employer's internet and the employer's public relations policy, particularly the policy that requires employees to always maintain a professional manner. The Board found, and the record supports, that Plaintiff's use of the employer-issued cell phone for personal texts with X violated the employer's cell phone use policy. The Board considered whether Plaintiff's actions were accidental and/or isolated in nature, but the record does not support such a finding. The review examiner properly considered the Plaintiff's behavior with program participants and X in context and over time. Having done so, the Board found that Plaintiff's actions were "difficult to view in isolation, because in this case, prior to sending [text messages to X], the [Plaintiff] had

viewed this woman acting in a pornographic video, and subsequently met with her alone for two hours at night (on the employer's premises) and drove her home in his car. Together, these facts demonstrate that [Plaintiff] was no longer acting in a professional manner. They present substantial evidence that [Plaintiff's] behavior crossed the line, and we can reasonably infer that he had developed a personal or romantic interest in [X]." The Board further noted that it was difficult "to fathom why [Plaintiff] took it upon himself to view the pornographic video with a male resident, share it with this woman's mother, or how that furthered the employer's interest to provide "recreation, educational, and cultural programs for youngsters between the ages of 11-19.'" As noted above, social workers were available to assist in a crisis situation such as this, but no referral was ever made by Plaintiff. The Board properly credited the review examiner's findings that Plaintiff's "viewing the [pornographic] video with both the male resident and [X's] mother was unprofessional and contrary to how the employer expected its employees to interact with the public."

Plaintiff's other claims on appeal are without merit as discussed by the Board in page 8 of its decision. The review examiner properly considered the findings of the Ryan report in making her findings pursuant to the State Administrative Procedure Act M.G.L. ch. 30A, § 11(4), and to do so did not amount to a due process violation. If, as Plaintiff argued on appeal, he felt that it was necessary to question the investigator directly, he could have asked for further time to summons the investigator to testify. See 801 CMR 1.02(10(i). Plaintiff's contention that he was not properly apprised of the issues for the review examiner's consideration are also non-meritorious. He was made aware of the issues that would be heard during both the first hearing on November 4, 2021 and certainly by the second hearing on January 5, 2022. Notice to the Plaintiff alerted him to the issue of whether there was "substantial and credible evidence tha the claimant left work for deliberate misconduct in wilful disregard of the employing unit's interest"

pursuant to M.G.L. c. 151A, §25(3)(2). Moreover, at the hearings, the reasons why Andover dismissed Fahey from his job were stated on the record during Human Resources Director Jessica Porter's testimony, as well as when the examiner and the parties discussed the Ryan Report. It was clear from the record what the basis for termination was and Plaintiff neither asked for a continuance nor indicate that he was unclear about the reasons why Andover dismissed Plaintiff.

Conclusion.

The Board's findings may not be set aside provided that they are supported by evidence that a "reasonable mind might accept as adequate to support a conclusion." Raytheon Company v. Director of the Div. Of Employment Security, *supra*. The determination as to whether the findings are supported by substantial evidence is to be made "upon consideration of the entire record." M.G.L. c. 30A, §14(7). After reviewing the record, the Court concurs with the Board's analysis and finds that its Decision was supported by substantial evidence and will not disturb its ruling. Accordingly, the Decision of the Board of Review is affirmed and the Plaintiff's petition is dismissed.

M A Sullivan J

Mark A. Sullivan
Justice, District Court

Dated: November 13, 2023