

0011 9491 62 (Feb. 19, 2015) – A claimant who attends school full-time is not *per se* disqualified under the availability requirement of G.L. c. 151A, § 24(b). Where the claimant attended school during the day, but was available and actively seeking work during a second or third shift, he was not disqualified.

Board of Review
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Issue ID: 0011 9491 62
Claimant ID: 1021672

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny benefits beginning January 13, 2013. Benefits were denied on the ground that the claimant was not available for full-time work and not actively searching for work, pursuant to G.L. c. 151A, § 24(b).

The claimant had filed a claim for unemployment benefits, which was initially approved. However, in a determination issued by the agency on November 21, 2013, the agency concluded that since the claimant was attending school full-time, he was not available for work, as required under G.L. c. 151A, § 24(b). As a result of that determination, the claimant was found to be overpaid over \$20,000.00. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on May 27, 2014. In his decision, the review examiner concluded that the claimant did not meet the availability requirement of the law, because he was attending school full-time and had no history of working part-time and going to school full-time, and also that it was not credible that the claimant was actively seeking work. The claimant sought review by the Board, which affirmed the disqualification in a decision rendered on June 30, 2014, but solely on the ground that the claimant was not available for full-time work. The claimant then appealed to the District Court, pursuant to G.L. c. 151A, § 42. While the matter was pending in the District Court, the Board revoked its decision and remanded the case to the review examiner to take additional evidence, specifically as to whether the claimant was still available for full-time work while he attended his school program. The review examiner conducted a hearing and, thereafter, issued his consolidated findings of fact.

The issue before the Board is whether the review examiner's conclusion that the claimant is disqualified, under G.L. c. 151A, § 24(b) beginning January 13, 2013 is supported by substantial and credible evidence and free from error of law, where: (1) the claimant has submitted a detailed work search log; (2) there is nothing in the record to indicate that the claimant was not

capable of working from January to August of 2013; and (3) the claimant was still available to work 2nd and 3rd shift jobs even while he attended classes.

Findings of Fact

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

1. The claimant applied for benefits on August 1, 2012, after separation from a full-time position with the United States Navy.
2. The claimant was determined to have a benefit year beginning on July 29, 2012, and a weekly benefit rate of \$675.00.
3. On January 15, 2013, the claimant began a full-time bachelor's degree program at Fitchburg State University. He remained in the full-time program throughout the year, and is currently continuing on in the program.
4. During the spring semester of 2013, from January to May, the claimant was enrolled in five-three credit courses. His courses were on Monday through Friday. It is not known exactly what times the courses were but they began as early as 8 am and ended as late as 2 pm.
5. The claimant was available to work from 3 pm to 11 pm, or 11 pm to 7 am, during the spring semester.
6. There were two summer sessions: May through June, and June through August. The claimant took three on-line courses during the May through June session. He took two on-line courses during the June through August session. The classes had no set class times.
7. The claimant was available to work anytime during the summer sessions because he had no set class time.
8. The claimant has work experience as an information coordinator. He also has military experience. He looked for work in information coordination, security, general labor and customer service. He applied for both full and part-time work.
9. The claimant attended workshops at the Career Center and met with the veteran's job counselor.
10. The claimant engaged in between three and five work related activities on three separate days each week.
11. The record includes copies of the claimant's Worksearch Activity Log. Although his worksearch occurred over one year ago the claimant was able to

recall specific details of his worksearch. Therefore the claimant's testimony, supported by the worksearch records, is accepted as credible.

12. In September, 2013, the claimant applied for Section 30 benefits. He was denied because he was not able to establish he could complete the program within two years.
13. The claimant did not reapply for Section 30 benefits.
14. Prior to returning to school the claimant had participated in a part-time High School diploma program in 1998 and 1999. The program was Tuesday, Wednesday and Thursday from 6 pm to 9 pm.
15. The claimant received benefits in the amount of \$20,176.00 during the 33 weeks ending January 19, 2013, through August 24, 2013.
16. On November 21, 2013 the DUA issued the claimant a redetermination denying him benefits under Section 24(b) of the Law for the week ending January 19, 2013 and subsequent [weeks]. He was found to be overpaid in the amount of \$20,176.00 for the 33 weeks ending January 19, 2013, through August 24, 2013, in accordance with Section 71 of the law.
17. The claimant's appeal is from this redetermination.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact, except for the references to a "redetermination" in Findings of Fact # 16 and # 17.¹ As discussed more fully below, we reject the review examiner's legal conclusion that the claimant has not met the requirements of G.L. c. 151A, § 24(b).

G.L. c. 151A, § 24(b), provides, in pertinent part, as follows:

An individual, in order to be eligible for benefits under this chapter, shall . . . (b)
Be capable of, available, and actively seeking work in his usual occupation or any
other occupation for which he is reasonably fitted

The claimant has the burden to show that he meets each requirement of this statute. There is nothing in the record which indicates that the claimant was not capable of working beginning in January, 2013. We also reaffirm our initial conclusion from our June 30, 2014, decision that the claimant has been actively searching for work, even while he was attending school full-time.

¹ As we noted in our first decision, issued on June 30, 2014, the determination in this case is called a "Notice of Disqualification." G.L. c. 151A, § 71, is not cited by the agency, and it was error for the review examiner to make a finding that the claimant was overpaid pursuant to that section of law.

The claimant's work search log is in the record, and it is quite detailed. Indeed, the review examiner has now found that the claimant was actively looking for work during the time period at issue. *See* Findings of Fact # 10 and # 11.

The issue to be addressed is whether the claimant was available for work as of January 13, 2013. The review examiner originally found that since the claimant does not have a history of working full-time and going to school full-time, he was not available for full-time work. Although a history of working full-time while attending school full-time can be an indication that a person could meet the requirements of G.L. c. 151A, § 24(b), even while in school, we do not think that this is the only way that a person can meet the burden. As we have previously held, attending school full-time does not result in a *per se* disqualification or in a presumption that a person cannot be available for full-time work. *See* BR-106530 (June, 2008)². Each case must be considered individually.

Here, the review examiner found that, although the claimant was attending school during the day in the spring of 2013, he was available to work second or third shift. In the summer of 2013, he was even more available since he was not required to physically attend classes (his classes were all online). The types of work he was searching for, including security, labor, and customer service jobs, can plausibly be available during the hours that he could work. In light of his availability, we conclude that the claimant has met the requirements of G.L. c. 151A, § 24(b).

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits was not free from error of law, because the claimant has shown through substantial and credible evidence that he was capable of, available for, and actively seeking work beginning January 13, 2013, despite attending school full-time at that time.

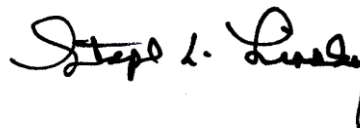
² BR-106530 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning January 13, 2013, and for subsequent weeks if otherwise eligible. The claimant is not overpaid any benefits.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 19, 2015



Paul T. Fitzgerald, Esq.
Chairman



Stephen M. Linsky, Esq.
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

SF/rh