0017 7900 96 (Oct. 19, 2016) – Claimant had good cause attributable to the employer to quit, because the on-call job given to him after returning from a workers' compensation leave did not provide any hours for several weeks. The position was unsuitable.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0017 7900 96

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 unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from his position with the employer on December 17, 2015. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 18, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 18, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified, under G.L. c. 151A, § 25(e) and (e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, and the employer's written argument.

The issue before the Board is whether the review examiner's conclusion that the claimant quit his job without good cause attributable to the employer is supported by substantial and credible evidence and is free from error of law, where the claimant resigned from an on-call position that had produced very little income for him, which he had accepted only after being removed from his full-time job.

Findings of Fact

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

1. On January 1, 2015, the employer, a government location security provider, won the contract for the client company ("the Client") which the claimant had been assigned to work full time as a security guard for 24 years.

2. The claimant remained employed for the employer at the Client as a security guard from January 1, 2015 until December 17, 2015.

3. The employer was required to staff two full time security guards and one relief security guard for the Client.

4. The relief security guard worked on call, as needed to fill in for the full time security guards if they scheduled time off or called out sick. The relief security guard was not guaranteed hours.

5. The Client was the only client the employer maintained in Massachusetts.

6. The claimant's immediate supervisor was the program manager ("the Manager").

7. At the time the employer acquired the Client's contract, the Client changed the requirements for security guards and required them to be armed when previously they were unarmed. The security guards were required to attend approximately 119 hours of training per government regulations and an additional 36 hours of training for the employer. The training hours included mandatory firearms training.

8. The employer subcontracted the trainings based on the employer's needs, the Client's needs and on the number of employees who needed to attend trainings.

9. The deadline for the security guards to complete the newly required training for the Client was July 28, 2015.

10. Between January 1, 2015 and April 7, 2015, the claimant completed all but approximately 16 to 20 hours of the required training. The claimant had not completed the mandatory firearms trainings.

11. On April 7, 2015, the claimant began a worker's compensation leave of absence because he injured his rotator cuff at work.

12. In July 2015, the claimant's physician released him to return to work with a light duty restriction.

13. In July 2015, the employer did not have light duty work available for the claimant because the job required the security guards to be armed.

14. After July 2015, the claimant remained on a worker's compensation leave of absence.

15. On July 28, 2015, the claimant had not completed the mandatory training by the deadline because he was on a worker's compensation leave of absence.

16. On an unknown date, the employer replaced the claimant at the Client to meet the Client's business needs.

17. On October 8, 2015, the claimant exhausted his worker's compensation benefits.

18. On October 15, 2015, the claimant was released by his physician to return to work without restrictions. The claimant contacted the Manager and notified him he was released to return to work without restrictions. The Manager told the claimant he would need to pass a physical exam mandated by the Client to return to work.

19. On October 16, 2015, the claimant took and passed the physical exam mandated by the Client to return to work.

20. On October 16, 2015, the employer did not have a full time position available for the claimant because the claimant had not completed the training required by the client and because the employer had filled the claimant's position to meet the Client's needs.

21. On an unknown date, the Manager contacted the Client and requested the claimant be able to return to work as a relief security guard because the Client did not have a full time security guard position available and because the claimant had not completed the mandatory training. The Manager requested the mandatory training waived until the claimant was able to complete the training. The Client agreed and allowed the claimant to return to work as a relief security guard and waived to the mandatory training until the claimant was able to complete the training.

22. The Manager believed the employer would have work for the claimant with the Client as a relief security guard because he believed the full time guards would request time off during the upcoming holidays.

23. On or about October 29, 2015, the Manager called the claimant and offered the claimant the relief security guard position and he told the claimant he expected the full time security guards to request time off during the holidays. The claimant told the Manager he needed a full time position and would think about it. The Manager told the claimant he could not file for unemployment benefits if he did not take the relief [] security guard position because he had offered the claimant a job.

24. On or about October 30, 2015, the claimant called the Manager and told him he accepted the relief security guard position. The claimant accepted the position knowing it was on call, as needed and he was not guaranteed hours. The claimant accepted the relief security guard position because the Manager told him he could not collect unemployment benefits.

25. Between October 30, 2015 and early December 2015, the Manager did not offer the claimant any hours because the employer did not have any hours available for the claimant.

26. On December 1, 2015, the Manager notified the claimant of an upcoming training session the claimant needed to attend to complete his mandatory training scheduled for December 12, 2015 and December 13, 2015. The claimant told the Manager he would attend the training session.

27. On an unknown date in early December 2015, the Manager called the claimant and offered him two weeks of work for the Client beginning on December 24, 2015. The claimant accepted the two weeks of work beginning on December 24, 2015.

28. On an unknown date after December 1, 2015, the claimant applied and interviewed for a position at an unrelated employer ("the Unrelated Employer").

29. On December 12, 2015 and December 13, 2015, the claimant did not attend the required trainings because he was waiting to hear from the Unrelated Employer if he received the positon.

30. On an unknown date, the Unrelated Employer told the claimant he did not receive the position.

31. On December 17, 2015, the claimant sent the Manager an email stating he quit effective immediately because he had not worked in the relief security guard position and had not been paid since October 8, 2015.

32. On December 17, 2015, [the claimant] quit his employment to look for a full time job because he had not worked for the employer as a relief security guard and had not received any form of payment since October 8, 2015.

Ruling of the Board

In accordance with our statutory obligation, we review 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, as discussed more fully below, we

conclude, contrary to the review examiner, that the claimant had good cause attributable to the employer for quitting the on-call position.

Because the claimant quit his job, his qualification for benefits is governed by the following portions of G. L. c. 151A, § 25(e):

> [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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Pursuant to the express language of the above provision, the claimant bears the burden of establishing that he left his job either for good cause attributable to the employer or for urgent, compelling, and necessitous reasons. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985).

In this case, the claimant does not assert that external pressures of some kind necessitated his departure from the job, within the meaning of the "urgent, compelling, and necessitous" prong of the foregoing provision. Rather, the claimant's contention is that the on-call position he had accepted after losing his full time job with the instant employer resulted in inadequate hours and compensation. Essentially, the claimant argues that the hours and pay in the new position was unsuitable for him, given his background and experience, which, if established, would constitute good cause attributable to the employer for voluntarily quitting his job. "Leaving employment because it is or becomes unsuitable is, under the case law, incorporated in the determination of 'good cause.'" Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 n. 3 (1981)." Baker v. Dir. of Division of Unemployment Assistance, No. 12-P-1141, 2013 WL 3329009 (Mass. App. Ct. July 3, 2003), *summary decision pursuant to rule 1:28*.

In this case, we have little trouble concluding that the claimant reasonably believed that the on-call position was unsuitable. For 24 years, the claimant had been working at the same government security post in a full time capacity, nearly all of that time as an employee of a different contractor than the instant employer. When the instant employer obtained the security contract in January 2015, it retained the claimant in his position. The new employer had only one client in Massachusetts, which required two full time security guards and one relief security guard. At the time the instant employer assumed the contract, the client added a requirement that the guards be armed, which in turn required about 155 hours of new training. By the time the claimant suffered a work-related injury on April 7, 2015, he had completed all but approximately 16 to 20 hours of the required training. While on workers' compensation leave, the claimant was unable to complete the remaining hours of the required training. He was cleared for light duty in July, 2015, but the employer did not have such work available. The claimant was cleared for work without restrictions on October 15 and, on October 16, passed a physical exam mandated for a return to his position. However, at that point the employer told the claimant that it had

already filled his full time position.[1] On October 29, the employer offered the claimant the relief security guard position, an on-call position with no guaranteed hours, which had previously been unfilled. Although the claimant expressed reluctance to accept an on-call position without steady hours, he accepted the offer on October 30, based upon the employer's misinformation that the claimant could not collect unemployment compensation if he refused the job. Thereafter, the employer offered the claimant no hours at all, until, in early December, it offered the claimant two weeks of work beginning on December 24. On December 17, the claimant resigned from the job, because he had not been offered any hours or anticipated any compensation for nearly two months.

Contrary to what the employer told the claimant, it is clear that the claimant, who had spent many years as a full time employee with a steady income, would likely have qualified for unemployment benefits if he had simply refused the on-call position when it was first offered. Section 1110(B) of the DUA's Service Representatives' Handbook states categorically that "Part-time work, odd jobs, and temporary work of brief duration are not considered suitable work," assuming, as here, that the claimant's prior work history is as a full time employee with steady hours. *See also* Graves, *supra* (where a claimant loses his regular job because of a reduction in available work and refuses a job from the same employer at a substantial decline in wages, the claimant has good cause for quitting); North Shore AIDS Health Project, Inc. v. Rushton, No. 04-P-503, 2005 WL 3303901 (Mass. App. Ct. Dec. 6, 2005), *summary decision pursuant to Rule 1:28* (claimant eligible for benefits where she quit after the employer reduced her wages and benefits by approximately 16%). An abundance of Board decisions follows that principle. *See*, *e.g.*, Board of Review Decision BR-110763 (March 28, 2010) (claimant resigned for good cause attributable to the employer after the employer cut her hours by half); Board of Review Decision 0012 6408 00 (October 8, 2014) (the claimant had good cause for quitting, after the employer effective reduced his wages by 17%); Board of Review Decision 0015 4785 96 (November 23, 2015) (the claimant was eligible for benefits, where, after his position was eliminated, he refused two alternative jobs, both of which were accompanied by working conditions significantly detrimental in comparison with his former job).[2] Accordingly, the claimant would have been eligible for benefits if he had simply declined the on-call position.

Instead of declining the position, the claimant accepted it and spent the next ten or eleven weeks without any work or compensation. Even though the claimant was offered two weeks during the upcoming holiday season, it had become clear by mid-December that the position would not afford him anything near the hours and income that matched his skills and prior work experience. In other words, the on-call job was unsuitable. The claimant was already looking for full time employment (Findings ## 28 and 29) and decided to quit the on-call position. It is well-

[1] Finding of Fact # 20 states that "the employer did not have a full time position available for the claimant because the claimant had not completed the training required by the Client and because the employer had filled the claimant's position to meet the Client's needs." To the extent this finding implies that the employer would have been able to give the claimant a position if he had completed his training, it is not accurate. The employer had only two full-time security guard positions in Massachusetts, both with the same client. Nothing in the record suggests that the employer would have removed the claimant's replacement employee in order to put the claimant back into that job, if the claimant had finished his training. The issue is not material to the outcome of this case, however, as the claimant's inability to finish his training was not his fault, but a result of his work-related injury.

[2] Board of Review Decisions 0012 6408 00 and 0015 4785 96 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

established that a claimant will not be disqualified from benefits if he accepts a job that turns out to be objectively unsuitable after a reasonable trial period. Jacobsen v. Dir. of Division of Employment Security, 383 Mass. 879 (1981) (rescript opinion). This is exactly what occurred here.

We, therefore, conclude as a matter of law that the claimant quit his on-call job because it was substantially less remunerative than the full time position he had previously held with the employer, which constitutes good cause attributable to the employer, within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning ending December 13, 2015, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 19, 2016

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

JN/rh