

0027 1858 66 (Mar. 20, 2019) – Claimant could begin training after her benefit year expired, because a Board decision reversing her disqualification from receiving regular unemployment benefits was issued only a month before the expiration date. The claimant established that she needs this graduate-level certificate in public health training to update her skills and education in order to obtain suitable work. During the semester that the claimant is enrolled full-time, she is eligible for Section 30 benefits.

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Issue ID: 0027 1858 66

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) denying an extension of the claimant's unemployment benefits while she participated in a training program. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant separated from employment in 2017 and filed a claim for unemployment benefits, effective July 7, 2017. Although initially denied, she was ultimately found eligible for regular unemployment benefits following an appeal to the Board of Review, and received payment for her benefits on June 1, 2018. Subsequently, the claimant filed an application with the DUA for an extension of benefits while attending a training program pursuant to G.L. c. 151A, § 30(c) (Section 30 benefits), which the agency denied on October 19, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant, the review examiner affirmed the agency's determination and denied the extension of benefits in a decision rendered on December 5, 2018. We accepted the claimant's application for review.

Section 30 benefits were denied because the review examiner determined that the claimant did not begin her training program until after her benefit year had expired and because she was not enrolled in training full-time. Thus, the review examiner concluded that she was not eligible under G.L. c. 151A, § 30(c). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to obtain further evidence about whether the claimant needs this training program to obtain suitable employment and about whether the claimant is enrolled full-time after the fall 2018 semester. The claimant attended the remand hearing, and, thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant is ineligible for Section 30 benefits, is supported by substantial and credible evidence and is free from error of law, in light of the fact that the claimant was statutorily permitted to enroll in training after her benefit year expired, she needs this training to obtain suitable employment, and she is enrolled full-time during the spring 2019 semester.

Findings of Fact

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

1. The claimant's prior education included:
 - a. Studying nursing at Berkshire Community College;
 - b. Obtaining a Bachelor of Science in Biology from Massachusetts Institute of Technology in 1990; and
 - c. Obtaining a Master's ABT in Biomedical Sciences in 2007.
2. From 1987 to 1990, the claimant worked as a student researcher at Massachusetts Institute of Technology's department of biology.
3. In 1990, the claimant worked as a research technician at [Employer A].
4. In 1991, the claimant worked as a physics teacher at [Town A] High School.
5. The claimant did not work outside of the home between 1991 and 2004 because she had children and stayed home to care for them.
6. From 2004 until 2007, the claimant worked as a research assistant at [Employer B].
7. In 2010, at the age of 12, the claimant's daughter was diagnosed with multiple tick borne illnesses.
8. The claimant remained away from the workforce from around 2010 until 2015 to care for her daughter who was unable to attend school on a regular basis due to her illnesses.
9. From 2015 until 2017, the claimant worked a certified nursing assistant, earning \$11.00 an hour.
10. The claimant filed a claim for unemployment benefits effective July 7, 2017. The claimant's benefits year end date (BYE) was July 7, 2018.
11. At the time the claimant filed her unemployment claim, she was permanently separated from employment.

12. On an unknown date at the end of May 2018, the claimant called the Board of Review for a status update of her pending hearing decision. During the phone call, a Board of Review staff member notified the claimant of the Department of Unemployment Assistance (DUA) Training Opportunities Program (TOP).
13. The staff member notified the claimant that if her appeal was overturned in her favor, she would have 20 weeks to apply to attend school with TOP and receive Section 30 benefits. The staff member mailed the claimant a TOP application.
14. On June 1, 2018, the Department of Unemployment Assistance (DUA) issued the claimant her first unemployment benefits check for the weeks ending July 22, 2017 [through] February 20, 2018.
15. The claimant's benefits payment issued on June 1, 2018 was the result of a disqualification being overturned by the Board of Review after hearing.
16. The 20th week after June 1, 2018 was the week ending October 20, 2018.
17. On July 8, 2018, the claimant's unemployment claim expired.
18. While conducting her work search, the claimant believed the employers she contacted were hiring employees that had recently graduated from [sic] university. The claimant believed employers looked for employees with more recent research experience than she had.
19. The claimant believed she required additional schooling to update her skills, knowledge and background to what employers looked for.
20. On August 7, 2018, the claimant called the TOP unit after she received her overturned appeal. During the phone call, the claimant was notified by a female representative (the Representative) that she could apply with TOP, that her application would be reviewed, but if she began school after her BYE, it could pose a problem.
21. The claimant did not speak with the Representatives about whether she needed new skills to obtain employment, whether she was unlikely to obtain suitable employment based on her most recently utilized skills or whether she needed training for marketable skills in a demand occupation in a labor market in which she resided.
22. In August 2018, the claimant decided she was going to attend the Certificate in Public Health Fundamentals and Principals Program (the Program) at the State University of New York at Albany (SUNY A) School of Public Health.
23. The Program was a one-year, online program.

24. On September 4, 2018, and September 5, 2018, the claimant spoke with two male representatives from the TOP unit. During the phone calls, the representatives told the claimant she had almost no chance of being approved for Section 30 benefits because her BYE had passed, and she did not have an active unemployment claim.
25. The claimant did not speak with the two male representatives about whether she needed new skills to obtain employment, whether she was unlikely to obtain suitable employment based on her most recently utilized skills or whether she needed training for marketable skills in a demand occupation in a labor market in which she resided.
26. The claimant decided to attend the Program part-time, taking three (3) six (6) credit semesters, instead of full-time, because of her financial situation and the information she received from the male representatives that she had almost no chance of being approved for Section 30 benefits.
27. On September 19, 2018, SUNY A's assistant dean for admissions and students' affairs (the Dean) completed the claimant's TOP's application indicating the Program started August 27, 2018 and completed on August 27, 2019. The Dean indicated the claimant needed eighteen (18) credit to complete the Program and would attend the fall 2018 semester, from August 27, 2018 through December 18, 2018; the spring 2019 semester, from January 23, 2019 through May 16, 2019; and the summer 2019 [sic], from May 28, 2019 through August 16, 2019. The Dean indicated the claimant was completing six (6) credits per semester and attending the Program part-time, less than nine (9) credits per semester.
28. The claimant sent the TOP application to the DUA in an envelope post marked on September 21, 2018.
29. On October 10, 2018, the DUA issued the claimant a Notice of Disqualification (Notice) denying her TOP application because she was not attending the Program full-time.
30. As of the hearing date, February 15, 2019, the claimant was enrolled full time in the spring 2019 semester. It began on January 23, 2019 and ends on May 16, 2019. The claimant takes three (3), three (3) credit courses for a total of nine (9) credits.
31. SUNY A considers the Program full-time at nine (9) credits because it is an intensive graduate program.
32. During the spring 2019 semester, the claimant is required to participate in at least twenty (20) hours per week of supervised online classroom instruction.

33. The claimant is not required to fulfill any internship or practicum requirements for the Program.
34. Upon completion of the spring 2019 semester, the claimant will have one (1), three (3) credit course remaining. The claimant intends to complete the one remaining course in summer 2019, from May 28, 2019 through August 16, 2019.
35. The claimant searched for work between 2017 and 2019 in public health and as a researcher based on her previous work experience and education.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except to note that we believe the portion of Consolidated Findings ## 12 and 13 which provides that it was a staff person at the Board of Review with whom the claimant spoke in May, 2018, is inaccurate.¹ However, this portion of the finding is not material to our decision. In adopting the remaining consolidated findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not eligible for any Section 30 benefits.

G.L. c. 151A, § 30(c), provides in pertinent part, as follows:

If in the opinion of the commissioner, it is necessary for an unemployed individual to obtain further industrial or vocational training to realize appropriate employment, the total benefits which such individual may receive shall be extended . . . if such individual is attending an industrial or vocational retraining course approved by the commissioner; provided, that such additional benefits shall be paid to the individual only when attending such course and only if such individual has exhausted all rights to . . . benefits under this chapter . . . provided, further, that such extension shall be available only to individuals who have applied . . . no later than the twentieth week of a . . . claim but the commissioner shall specify by regulation the circumstances in which the 20-week application period shall be tolled and the circumstances under which the application period may be waived for good cause . . . provided further, that *if the claim for regular benefits was denied and the reversal of said denial did not occur until after the thirty-first week of the claimant's benefit year, the claimant shall not be barred from applying for and commencing training, even if the benefit year has expired, so long as the claimant applies for training within 21 weeks of the notice of reversal and commences training with the first available program . . .*

(Emphasis added.)

¹ It is more likely that the claimant spoke to a staff person from a different department within DUA.

The review examiner correctly ruled that the claimant's September 21, 2018, Section 30 application was timely, because the 20-week application period is tolled until the regular unemployment benefit claim is approved and DUA begins paying benefits. *See* BOR Decision 0022 2673 94 (Jan. 31, 2018). Thus, the clock did not start until the claimant's first regular unemployment payment on June 1, 2018, and her application was submitted before the 20th compensable week deadline of October 20, 2018. *See* Consolidated Findings ## 14 and 16.

However, we do not agree with the review examiner's conclusion that the claimant was ineligible for Section 30 benefits because her August 27, 2018, training program started after July 8, 2018, the date her benefit year had expired. *See* Consolidated Findings ## 17 and 27. In 2015, the Legislature added language to G.L. c. 151A, § 30(c), which states, "if the claim for regular benefits was denied and the reversal of said denial did not occur until after the thirty-first week of the claimant's benefit year, the claimant shall not be barred from applying for and commencing training, *even if the benefit year has expired*, so long as the claimant applies for training within 21 weeks of the notice of reversal and commences training with the first available program . . ." (Emphasis added.) Here, the Board decision reversing her regular unemployment benefits denial occurred on May 31, 2018, well after the 31st week of her benefit year. The claimant applied for training within 21 weeks, and then she promptly began training in August. Thus, starting the training program after the expiration of her benefit year is not a basis for denying the claimant Section 30 benefits.

The more problematic part of the claimant's application is that it showed her enrolled in no more than six credits in each semester. In order to meet the criteria under the DUA regulations for a training program's approval, the training program must be full-time. Specifically, 430 CMR 9.05(2), states, in pertinent part, that the program must:

(b) Be a full-time course, providing a minimum of at least 20 hours of supervised classroom training per week; provided, however, that:

1. if the program is offered by a community college, college, or university, this requirement shall be met if the program provides a minimum of 12 credits each semester *or the equivalent*; and provided further that:
2. if the program is offered as part practicum or internship and part classroom hours, the program will be approved only for the time needed to complete state or federal certification or licensing requirements, or the time deemed necessary by the Director to allow the claimant to become employable in the occupation for which the training has been provided

(Emphasis added.)

The claimant is taking courses through a university. Because her enrollment at six credits per semester is fewer than the 12 credit minimum under 430 CMR 9.05(2)(b)(1), the review examiner concluded that her training program could not be approved. The Massachusetts Appeals Court noted that the regulation's 12-credit hour provision was intended to allow the agency to approve a college course of study that, "although valuable and rigorous, would be

unlikely to meet the generally applicable twenty-hour requirement. The credit-hour proviso thus provides for an alternative, not an exclusive, basis for approval of courses provided by colleges, universities, and community colleges.” Figueroa v. Dir. of Department of Labor and Workforce Development, 54 Mass. App. Ct. 64, 68 n. 7, 72 (2002) (remanded to consider whether the claimant’s weekly computer lab hours in combination with the nine classroom credit hours constituted a minimum of 20 hours of supervised training per week). Thus, 430 CMR 9.05(2)(b) is to be viewed in its entirety, and we may consider whether this claimant’s college credit course of study meets the minimum 20 hours per week criterion.

After remand, the consolidated findings show that during the spring 2019 semester, the claimant is enrolled in nine credits. Remand Exhibits 6 and 7 include a letter from the SUNY Albany School of Public Health and a training program brochure, which confirm that nine credits is considered full-time in this graduate-level certificate program, and that the claimant will be required to participate in at least 20 hours of supervised online classroom instruction during the spring 2019 semester. *See* Consolidated Finding # 30, and Remand Exhibits 6 and 7.² In light of this evidence, we are satisfied that, during the spring 2019 semester, the claimant meets the full-time training requirement.

The claimant urges the Board to award Section 30 benefits during the fall 2018 semester even though she took only six credits. She argues that she enrolled in only six credits because DUA representatives misled her to believe that she would not be eligible for Section 30 benefits and, due to her financial situation, she could not afford to enroll in more credits. In the current regulations, the only exception made for a DUA misrepresentation is where that caused a claimant to miss the application deadline. *See* 430 CMR 9.06(3)(c). There is no similar exception included under the full-time training requirement. *See* 430 CMR 9.05(2)(b). Nor are we aware of any cases making an exception to the full-time enrollment requirement due to an individual not having the money to go full-time. Therefore, the only semester of training which may be approved is the spring semester, when she was enrolled full-time.

However, before the claimant may be eligible to participate in the Section 30 program for *any* semester, she must also establish that she is unlikely to obtain suitable employment based on her most recently utilized skills and is in need of training to become re-employed. 430 CMR 9.04(1). Apparently, discussions with the DUA representatives in the TOP unit never got this far. This was because each of them told the claimant that she would not qualify for the program since she was pursuing training after her benefit year. *See* Consolidated Findings ## 20, 21, 24, and 25.

During the remand hearing, the claimant explained why this training program is necessary for her to become re-employed. Although the claimant has a Bachelors in Science in Biology and a Masters degree in Biomedical Science, she earned these degrees in 1990 and 2007, respectively. Consolidated Finding # 1. She worked in this field briefly while a student and for only a few years from 1990–1991 and from 2004–2007. Consolidated Findings ## 2–6. The findings further reveal that the claimant removed herself from the workforce for 13 years while she raised

² While not explicitly incorporated into the review examiner’s findings, Remand Exhibits 6 and 7 are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

young children, and again after her teenage daughter got very ill, from 2010 until the claimant picked up certified nursing assistant work at \$11.00 per hour from 2015–2017. Consolidated Findings ## 5, and 7–9. After separating in 2017, the claimant tried to find a job commensurate with her prior work experience and education in research labs or public health but was unsuccessful. Consolidated Finding # 35. The review examiner found that the claimant believed prospective employers wanted to fill these positions with recent college graduates or individuals with more recent research experience. Consolidated Finding # 18. This belief is supported by more detailed testimony in which the claimant states that job listings sought candidates with skills in data analysis, research design, epidemiology, or toxicology, and she did not quite have the background they needed.³

The claimant's training program through SUNY Albany, a Certificate in Public Health Fundamentals and Principles, provides many of these sought after skills. Although not in the findings, the program's brochure and the claimant's transcript show that she is taking courses in statistics and epidemiology in this training program. *See* Remand Exhibits 6 and 8. The training program description in Remand Exhibit 6 states that these courses provide a core set of skills needed for public health professionals and, as the claimant testified, they will give her the skills, knowledge, and background to match what employers today are looking for. *See* Consolidated Finding # 19.

We, therefore, conclude as a matter of law that, given the late date of the appeal decision reversing the denial of regular unemployment benefits, G.L. c. 151A, § 30(c), allows the claimant to commence her training after her benefit year expired. We further conclude that the claimant's training program during the spring semester 2019 meets the requirements for Section 30 training approval pursuant to 430 CMR 9.05(2)(b), because, during this semester, she is enrolled full-time. Additionally, we conclude that the claimant needs this training program in order to obtain suitable employment, as required under 430 CMR 9.04(1).

³ This portion of the claimant's testimony is also part of the unchallenged evidence presented during the hearing.

The portion of the review examiner's decision that denied all Section 30 benefits is reversed. The claimant is entitled to Section 30 benefits during the spring 2019 semester, from the week beginning January 20, 2019, through May 18, 2019, if otherwise eligible. The claimant is not entitled to Section 30 benefits for any period within the fall 2018 or summer 2019 school terms.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 20, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

AB/rh