

**Where the claimant resides beyond commuting distance for the subsidiary employer and is only available to work for the employer when he is visiting Maine, any offers of work from the employer are unsuitable. The claimant's previous voluntary reduction in hours and move to 'relief staff' with the instant employer in order to accept other full-time employment is non-disqualifying.**

**Board of Review  
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**Issue ID: 0018 3385 28**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by JoAnn Gangi, 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 filed a claim for unemployment benefits with the DUA, which was determined to be effective March 6, 2016. On May 7, 2016, the DUA approved the claimant for benefits in regards to the instant employer. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on June 8, 2016. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in total or partial unemployment and, thus, was disqualified, under G.L. c. 151A, §§ 29 and 1(r). 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 allow the claimant the opportunity to participate. Both parties attended the remand hearing via telephone, which was held over three dates. 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 conclusion that the claimant was not in partial or total unemployment for the weeks beginning March 6, 2016, because he voluntarily reduced his hours with the employer in December 2015, is supported by substantial and credible evidence and is free from error of law.

### **Findings of Fact**

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

1. The claimant worked 36 hours per week as a Direct Support Professional for the employer, a direct support provider, beginning 9/27/14. His rate of pay is \$9.75 per hour.
2. The employer is located in [Town A], Maine.
3. The claimant has not separated from employment with the instant employer.
4. The claimant requested a reduction in hours from the instant employer on or about 8/1/15, due to his school schedule. He started working approximately 32 hours per week as of 8/1/15.
5. The claimant started working 6 hours per week for a Massachusetts employer, "MM", beginning 10/3/15.
6. The claimant told his supervisor, Program Manager "A", that he was moving to Massachusetts and wanted to go to Relief status on or about 11/21/15. Program Manager "A" told the claimant to put this in writing and give two weeks' notice of this change. Program Manager "A" never received this written notice.
7. Employees with Relief status are required to work a minimum of eight hours per month for the instant employer. They are expected to tell the employer about their availability to work, and the employer offers them hours after full-time and part-time employees are scheduled.
8. Work with the instant employer was available to the claimant after he requested a reduction in hours to accommodate his school schedule and after he switched to relief status. The employer posted open Direct Support positions at the claimant's work location and other work locations in Maine between November, 2015, and June, 2016. Part-time and full-time positions were available.
9. On or about 12/5/15, the claimant spoke with Program Manager "A" about his move to Massachusetts. Program Manager "A" told the claimant that she was doing a schedule on Wednesday for the following week and asked about the claimant's availability.
10. The claimant indicated to Program Manager "A" that he was not sure which dates would be in Maine but he would contact her when he was available to work.
11. The claimant moved to Massachusetts on 12/7/15.

12. The claimant worked forty hours per week for another Massachusetts employer, "DF", beginning 12/7/15. He worked for "DF" on Fridays, Saturdays, and Sundays.
13. On 1/12/16, the claimant sent a text message to Program Manager "A" asking if there were any open shifts for 1/13/16. Program Manager "A" replied and told the claimant to Program Manager "B" to see if shifts were available at that program.
14. Program Manager "A" replied to the claimant again on 1/12/16 and asked if the claimant wanted a Saturday shift, as Program Manager "B" said the shift was open. The claimant did not reply. Program Manager "A" then sent a text message telling the claimant that Program Manager "B" found coverage for the shift. The claimant replied and said he had no signal at work.
15. On 1/13/16, Program Manager "A" sent a text message to the claimant asking if he could work overnights on 1/16/16 and 1/23/16. The claimant replied and indicated he was leaving Maine on 1/15/16.
16. The claimant sent a text message to Program Manager "A" on 1/14/16, indicating that he was covering a shift for a co-worker that day.
17. The claimant started attending [a] university in Massachusetts on 1/19/16. He had attended class full-time, Monday through Thursday during the Spring 2016 semester from 1/19/16 to 5/8/16.
18. On 2/10/16, Program Manager "A" sent the claimant a text message asking if he would be around during school vacation next week. The claimant replied on 2/11/16 and said he was not able to answer, and indicated he was in Maine that day. Program Manager "A" said she was all set, and later told the claimant there was an open 11 p.m. to 7 a.m. shift from 2/11/16 to 2/12/16. The claimant worked that shift.
19. On 2/13/16, Program Manager "A" sent the claimant a text message asking if he was still around to work an overnight that night, starting at 8 p.m. The claimant did not reply.
20. The claimant worked for "DF" until 3/3/16, when he was discharged from employment.
21. The claimant was available for full-time employment after 3/3/16.
22. The claimant worked shifts for the instant employer from Thursday 12/24/15 to Friday 12/25/15; and from Thursday 2/11/16 to Friday 2/12/16, while working full-time for "DF".

23. The claimant filed an unemployment insurance claim on 3/18/16 and obtained an effective date of his claim of 3/6/16. The base period for the claim is from 1/1/15 to 12/31/15. He requested benefits for the weeks beginning 3/6/16 to 7/2/16.
24. The claimant has three base period employers, including the instant employer. The claimant's base period wages from the instant employer are \$20,081.94. His base period wages from his Massachusetts employers are \$1,618.23 and \$445.20, respectively.
25. On 3/24/16, the claimant sent a text message to Program Manager "A" indicating that he was available to work that night. Program Manager "A" did not reply.
26. On 5/5/16, following the end of the Spring 2016 semester, the claimant told Program Manager "A" he was available for work that day, and 5/6/16. Program Manager "A" said there were no hours available and for him to contact the main office to see if he is cleared to pick up shifts. Program Manager "A" suggested this because the claimant worked no hours for the instant employer during March and April 2016.
27. On 5/15/16, an employee from the instant employer's main office told the claimant he was cleared to work. The claimant worked 12.25 hours from 5/16/16 to 5/17/16, and earned \$119.44.
28. On 5/16/16, Program Manager "A" e-mailed the claimant and asked if he was available to work in June. She attached a calendar showing that there were 5 p.m. to 9 p.m. shifts open for Monday, 8 a.m. to 1 p.m. shifts open for Tuesday, 3 p.m. to 9 p.m. shifts open for Wednesday, 8 a.m. to 1 p.m. shifts open for Thursday, 8 a.m. to 9 p.m. shifts open for Friday, and 8 a.m. to 9 p.m. shifts open for Saturday during June 2016. The claimant did not respond to the e-mail.
29. The claimant informed Program Manager "A" that he would be working in a lab in Massachusetts from 5/27/16 to 6/30/16. He worked 4 to 6 hours per day, five days per week in the lab.
30. On 5/23/16, Program Manager "A" sent a text message to the claimant offering him a 3 p.m. to 11 p.m. shift on Wednesday, 5/25/16. The claimant did not respond.
31. On 5/27/16, Program Manager "A" sent the claimant a text message offering him an 8 a.m. to 9 p.m. shift on Sunday, 5/29/16. The claimant responded and said he was not around that week.
32. On 6/30/16, the claimant sent a text message to Program Manager "A" indicating he was available Thursday, Friday, Saturday, and Sunday. He said

- he could fill in for a co-worker who was going to Minnesota. The Program Manager said, "Ok".
33. On 7/3/16, the claimant sent another text message to Program Manager "A" asking if he can work. He indicated he would be in Maine on 7/7/16. Program Manager "A" replied and said she filled the above co-worker's shifts before the claimant sent her text messages about this.
  34. The claimant worked 12 hours on 7/9/16 and earned \$117. He worked 12 hours on 7/10/16 and earned \$117.
  35. On 7/12/16, Program Manager "A" sent the claimant a text message asking if he was looking for hours. She indicated she was going to be scheduling on 7/13/16 or 7/14/16, and asked about his availability. The claimant replied and said he was not around those days and had hours for the weekend. Program Manager "A" replied and said she was not asking him to work on those dates; she was saying the schedule would be done on those days, and asking which days for next week the claimant would be available. The claimant replied and said he could only do weekends.
  36. The claimant worked 13 hours on 7/15/16 and earned \$126.75. He worked 12.5 hours on 7/16/16 and earned \$121.88. He worked 6.5 hours on 7/17/16 and earned \$63.38.
  37. On 7/14/16, Program Manager "A" sent the claimant a text message asking if he could work overnight on 7/22/16 and 7/27/16, 8 p.m. to 8 a.m. The claimant replied and said he could work on the 22nd but not the 27th, and said he was open for weekend shifts.
  38. On 7/15/16, the claimant asked Program Manager "B" if there were openings for the following weekend, as he was working an 8 p.m. to 8 a.m. shift next Friday.
  39. Program Manager "B" sent the claimant a text message on 7/15/16 offering him an 8 a.m. to 8 p.m. shift on 7/24/16.
  40. The claimant worked 12 hours between 7/22/16 and 7/23/16 and earned \$117. He worked 12 hours on 7/24/16 and earned \$117.
  41. The claimant started working 30 hours per week for another Massachusetts employer, "TI", on 7/18/16. As of 7/18/16, he works 36 hours per week, for "TI" and "MM", combined.
  42. On 7/19/16, Program Manager "A" sent the claimant a text message indicating there were 8 p.m. to 8 a.m. shifts open on Saturday 7/30/16 and Sunday 7/31/16. The claimant replied and said he did not think he could work those shifts because he thought he had something scheduled for that weekend.

43. On 7/19/16, Program Manager “B” sent the claimant a text message saying she was doing her August schedules and Saturdays and Sundays were open. The claimant replied and said he would not be able to come to Maine on weekends beyond the following week, and he would keep this different Program Manager posted if he was coming to Maine.
44. On 7/20/16, Program Manager “B” sent the claimant a text message asking the claimant if he was available to work 7/29/16 from 8 a.m. to 8 p.m. The claimant said he was working that Friday and asked if there was a 3 p.m. to 11 p.m. open on Saturday.
45. The claimant did not work for the instant employer on 7/29/16 or 7/30/16.
46. On 8/6/16, Program Manager “B” sent the claimant a text message asking the claimant if he could work an overnight that night. The claimant said he could not, as he was in Massachusetts.
47. The claimant earned \$9.75 for working between 11 p.m. and 12 a.m. on 8/10/16.
48. On 8/11/16, Program Manager “B” sent the claimant a text message asking if he wanted to work 8/13/16. He said he could work this shift. Program Manager “B” offered him an overnight shift for 8/20/16 and the claimant said he could not do it.
49. On 8/13/16, Program Manager “B” sent the claimant a text message asking if he was around that day. The claimant replied and said, no, and he was coming tomorrow.
50. On 8/16/16, Program Manager “B” sent the claimant a text message asking him to let her know if he is available on any Saturdays. He replied and said he works Saturday in Massachusetts but can cover Sunday through Wednesday.

#### Credibility Assessment:

Both parties provided inconsistent and conflicting testimony at various points during the hearing. The claimant, for example, indicated he was available for work with the instant employer between 2/13/16 and 3/24/16; he later said he would not have been available for work with the instant employer if he was working for his other employers and going to school during that time. On the claimant’s initial Fact Finding Questionnaire, submitted to DUA on 3/27/16, he indicated that he was hired to work part-time for the instant employer, and his hours did not change since he was hired. He indicated that he has a set schedule of Friday 3 p.m. to 11 p.m., Saturday 3 p.m. to 9 p.m. and Sunday 7 p.m. to 11 p.m. The claimant’s hours were reduced, however, when he

requested to change to relief, and he no longer had a set schedule after he transitioned to the Relief position.

The employer, for example, indicated in its Fact Finding Questionnaire that the employer asked the claimant for a resignation letter. At the hearing, the employer indicated that the employer asked the claimant for a letter saying he was switching from part-time hours to relief hours. At the hearing, the employer indicated that work was available to the claimant from 8 a.m. to 9 p.m., every Friday, Saturday, and Sunday, from 3/6/16 to 8/6/16. The employer provided no documentation to show this and provided no documentation to show whether the claimant was offered these shifts as they became open. The employer indicated that the claimant was offered hours in March, 2016. On cross-examination, the employer witness indicated she was confused and did not know if the employer offered the claimant work during March, 2016.

Both parties indicated that the employer called the claimant to offer him work and the claimant called the employer to ask for work; neither party provided documentation to indicate when these calls were made, nor did either party provide details about the content of these phone calls. Both parties agreed to the accuracy of text message documents presented by both parties. The evidence presented by the claimant was more credible than the evidence provided by the employer, as the claimant provided text messages to supplement his testimony. The employer provided some of the same text messages as the claimant, but did not provide additional evidence to supplement its testimony, such as schedules, additional text messages, and telephone records, to show when work available and when work was offered to the claimant.

### 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 and credibility assessment except as follows. Finding of Fact # 30 erroneously states that "[t]he claimant did not respond" to the Program Manager's May 23, 2016, text message about a shift on May 25, 2016. In reality, the documentary evidence indicates that the claimant responded, "Sorry I thought I responded. Yeah I can't drive for 8 hour shift. 16 hours or more would have been great." See Remand Exhibit # 17. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's original legal conclusion that the claimant was not in partial or total unemployment for the weeks beginning March 6, 2016. Rather, we believe that the review examiner's consolidated findings of fact support the conclusion that, though additional work may have been available to the claimant, any work offered to the claimant by this subsidiary employer was unsuitable due to the unreasonable commuting distance.

At the outset, we note that the parties extensively discussed the claimant's voluntary reduction in hours in late 2015. The claimant testified that he did so in order to move to Massachusetts and accept full-time employment with another employer (DF) located in Massachusetts<sup>1</sup>. We need not scrutinize the claimant's reasons for doing so<sup>2</sup>. The review examiner found that, for a period of approximately three months prior to filing for unemployment benefits, the claimant worked forty hours per week for DF while remaining a part-time relief employee for the instant employer, occasionally picking up hours when he visited Maine. The findings also indicate that, as of the final hearing date, the employer continued to employ the claimant in this same "relief status" capacity. In these circumstances, it appears that the instant employment is subsidiary to DF, the claimant's primary employment<sup>3</sup>. See DUA Service Representatives Handbook §§ 1404(C) and 1404(D).

G.L. c. 151A, § 29, authorizes benefits be paid only to those in "total unemployment" or "partial unemployment." These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part as follows:

(1) "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week....

(2) "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

When the claimant filed his claim effective March 6, 2016, his weekly benefit rate was determined to be \$241. The claimant requested unemployment benefits for 17 weeks, from March 6, 2016 through July 2, 2016<sup>4</sup>. During each of these weeks, the claimant worked less than full time and earned remuneration less than the weekly benefit rate of \$241. However, in order to be eligible, under G.L. c. 151A, § 1(r)(2), for those 16 weeks, the claimant must show that "though capable and available for work, he [was] unable to obtain any suitable work."

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<sup>1</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

<sup>2</sup> Note that, if the claimant had chosen to entirely quit this employment at this time, the instant employer would not be considered an "interested party" to his unemployment claim at all, as he subsequently worked more than eight weeks for another employer. See DUA Service Representatives Handbook § 1710.

<sup>3</sup> 430 CMR 5.05(1), which may be of interest to the employer, states in relevant part as follows: "Benefits for partial unemployment shall be charged in the same manner as for benefits in total unemployment, except that no charge shall remain against the account of any subsidiary employer who timely protests and who shows to the satisfaction of the Commissioner that it has continued to employ a claimant during the weeks of his claim to the same extent that it had previously employed him...."

<sup>4</sup> Generally, the claimant's availability and employment status outside of this window is not relevant to this decision.



The record contains no suggestion that the claimant was incapable of working at any time. And, while the claimant was attending school during the period of time in question, the review examiner found that, “[t]he claimant was available for full-time employment after 3/3/16.” *See* Finding of Fact # 21. This is supported by the fact that the claimant regularly worked full-time while attending school until being discharged on March 3, 2016. We also take administrative notice of the fact that, in four different adjudications, the DUA separately determined that the claimant met the availability requirements of the law during the period of time in question.

While the instant employer repeatedly offered the claimant specific relief shifts during this period, the claimant either failed to respond or declined such offers on at least three occasions. *See* Findings of Fact ## 28, 30, and 31. The employer also noted that other ongoing positions were open and available to the claimant. *See* Remand Exhibit # 13. The claimant lived in [Town B], Massachusetts at this time and was unwilling to travel to the employer’s location in [Town A], Maine solely for the purpose of working.

The claimant is essentially arguing that the employer’s offers of work were not suitable, as he lived in [Town B], Massachusetts, far from the employer’s location in [Town A], Maine. The definition of “suitable employment” includes the requirement that it be “located within reasonable distance of his residence.” G.L. c. 151A, § 25(c). A claimant need not be available for any possible work, only suitable employment which he has no good cause to refuse. Conlon v. Dir. of Division of Employment Security, 382 Mass. 19, 21 (1980). The fact that the claimant previously worked for this employer on a regular basis does not automatically render this employment suitable. “Suitability is not a matter of rigid fixation. It depends upon circumstances and may change with changing circumstances.” Graves v. Dir. of Division of Unemployment Assistance, 384 Mass. 766 (1981), *quoting* Pacific Mills v. Dir. of Division of Employment Security, 322 Mass. 345, 350 (1948). In the facts of this case, we find that this employment had become unsuitable at the time the claimant moved to Massachusetts and began working full-time for another employer.

Despite the fact that the claimant would have been justified in turning down all work from the employer as unsuitable, on several occasions during this period, the claimant visited Maine for other reasons, and contacted the employer to notify them that he would be temporarily available for work. *See* Findings of Fact ## 25, 26, 32, and 33. During the week ending May 21, 2016, the claimant did in fact work 12.25 hours and earn \$119 for the instant employer. G.L. c. 151A, § 29(b), explains that, when a claimant is in “partial unemployment,” his gross earnings are deducted from his weekly benefit rate, but that “earnings up to one-third of his weekly benefit rate shall be disregarded” and are not counted. The claimant’s weekly benefit rate was determined to be \$241, one-third of which is \$80. Therefore, for the week ending May 21, 2016, \$39 is to be deducted from the claimant’s weekly benefit amount<sup>5</sup>.

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<sup>5</sup> The record indicates that the claimant also worked another part-time job (MM) for at least some of the weeks in question. In regards to this other employment, DUA previously determined the claimant to be eligible for benefits under G.L. c. 151A, §§ 29 and 1(r). DUA records indicate that the claimant reported his hours and wages from this other employment during his weekly certifications. The claimant is subject to separate deductions to his benefit rate based on these separate earnings, pursuant to the formula described above.

The review examiner's decision is reversed. The claimant is entitled to benefits for the weeks ending March 12, 2016 through July 2, 2016, if otherwise eligible. For the week ending May 21, 2016, the claimant is subject to a \$39 reduction in benefits due to partial earnings.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 28, 2017**



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](http://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.

JRK/rh