

The claimant, a bartender, was available for full-time work under § 24(b), where she attended school four days a week from 8:30 a.m. to 2:30 p.m. and was available to work every afternoon and evening, all day Friday, and both weekend days.

**Board of Review
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Issue ID: 0018 8094 32

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by J. 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 on May 20, 2016, with an effective date of May 15, 2016. On June 17, 2016, the DUA issued a Notice of Disqualification determining that she was ineligible for benefits, under G.L. c. 151A, § 24(b), while participating in a training program from February 22, 2016, through September 15, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's determination in a decision rendered on October 25, 2016. In her decision, the review examiner agreed that the claimant did not meet the availability requirements of G.L. c. 151A, § 24(b), during this period, because she was attending a full-time school program and had no history of working part-time and attending school full-time. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accepted the claimant's application for review.

The issue before the Board is whether the review examiner's conclusion that the claimant was unavailable for work between February 22, 2016 and September 15, 2016, pursuant to G.L. c. 151A, § 24(b), is supported by substantial evidence and is free from error of law, where the claimant has, in the past, both worked and attended school full time, and, while attending her recent school program four days a week from 8:30 a.m. to 2:30 p.m., she remained available to work in her usual occupation every afternoon, evening, and all day on Fridays and weekends.

Findings of Fact

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

1. The claimant filed an unemployment insurance claim on 5/20/16, and obtained an effective date of her claim of 5/15/16.

2. The claimant attended a Certified Health Claims Specialist and Certified Medical Coder training program, Monday through Thursday, from 8:30am to 2:30pm, from 2/22/16 to 9/15/16.
3. The claimant was physically capable of performing work from 2/22/16 to 9/15/16, and continues to be physically capable of performing work.
4. The claimant worked full-time and attended school full-time approximately twenty years ago.
5. The claimant looks for work seven days per week. She searches for full-time bartender positions, as she has over thirty four years' experience in the bar and restaurant business.
6. The claimant was available for full-time work after she stopped attending school on 9/15/16.

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. After such review, the Board adopts the review examiner's findings of fact with the exception of Finding of Fact #6, as discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we reject the review examiner's legal conclusion that the claimant did not meet the availability 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 she meets the requirements of this statutory provision.

The review examiner found that the claimant was capable of performing work during the period at issue. Finding of Fact # 3. She further found that, while the claimant was attending school, she was searching for full-time work as a bartender seven days a week, an occupation in which she has had more than 34 years of experience. Finding of Fact # 5. Although not addressed in her legal analysis, we can infer, based upon Finding of Fact # 5, that the examiner concluded that the claimant had also satisfied the statutory requirement to actively search for work. Thus, the only issue before us is whether the claimant's full-time enrollment in school from February 22, 2016 through September 15, 2016 rendered her unavailable for work within the meaning of the above provision.

The review examiner's sole basis for concluding that the claimant did not meet the availability requirement of G.L. c. 151A, § 24(b), was that the claimant did not demonstrate a history of attending school full-time while working full-time. This was an error. 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), while in school, we have previously held that having such a history is not the only way a claimant can meet this burden. Attending school full-time does not result in a *per se* disqualification or even a presumption that a person cannot be available for full-time work. Each case must be considered individually. *See* Board of Review Decision # 0011 9491 62 (Feb. 19, 2015), *citing* BR-106530 (June, 2008). Additionally, we note that in this case, the claimant does have some history of working full-time and going to school full-time, albeit it was rather remote. Finding of Fact # 4 states that the claimant worked full-time and attended school full-time approximately 20 years ago.

More importantly, the claimant must demonstrate that being in school did not interfere with her ability to work in a full-time job. The DUA's Service Representative Handbook, § 1005(B) states that a claimant may meet the availability requirements of G.L. c. 151A, § 24(b), while a full-time student, provided that the claimant is available during hours typical for a claimant's occupation. Here, the findings show that the claimant's field of work is bartending and that she was available for work after 2:30 p.m. Monday through Thursday, all day Friday, and on weekends. *See* Findings of Fact ## 2 and 5. Bartenders are typically employed during afternoon and evening hours. Since the demand for the claimant's occupation would include the same hours for which the claimant was available for work, we are satisfied that the claimant's class schedule did not render her unavailable for work. In this connection, we reject Finding of Fact # 6, to the extent that it suggests that the claimant was available for full-time work only after she stopped attending school on September 15, 2016. The other findings of fact establish that the claimant was available for full-time work during the entire period at issue.

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 she was capable of, available for, and actively seeking work from February 22, 2016, to September 15, 2016, despite attending school full-time during that period of time.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period from February 22, 2016, through September 15, 2016, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 14, 2017



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.

SPE/rh