

Held claimant was in partial unemployment after her hours were reduced because, ultimately, it was the employer's decision to eliminate her hours in one of her assigned departments where it felt the claimant was causing strife.

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

**Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member**

Issue ID: 0019 2336 15

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Eric M. P. Walsh, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits for the period from July 1, 2016, through September 8, 2016. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant's hours with the employer were reduced as of July 1, 2016, and the claimant filed a claim for unemployment benefits, effective June 26, 2016. On January 30, 2017, the DUA issued a determination finding the claimant eligible for benefits. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 27, 2017.

Benefits were denied after the review examiner determined that the claimant was not working all available hours for the employer and, thus, was not in unemployment as defined under G.L. c. 151A, §§ 29 and 1. 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 and remanded the case to the review examiner to take additional evidence as to the reasons why the claimant was no longer working in the Assessor's Office. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 is not in unemployment and, therefore, not eligible to receive unemployment benefits from June 26, 2016, through September 10, 2016,¹ is supported by substantial and credible evidence and is free from error of law, where, ultimately, it was the employer's decision to reduce her hours.

¹ Although the findings indicate that the claimant's reduction in hours began on July 1, 2016 (the start of the employer's new fiscal year), and ended on September 8, 2016 (the date of the claimant's permanent separation from this employer), the DUA must apply disqualifications on a weekly basis. Therefore, since the review examiner found the claimant to be partially disqualified for the weeks containing the days of July 1 and September 8, his decision effectively disqualified the claimant from June 26, 2016 (the Sunday of the week which contains July 1), to September 10, 2016 (the Saturday of the week which contains September 8).

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 for the employer, a town, from September of 2012 to June 30, 2016 with the Assessor's office, most recently as an Assessor's Clerk at \$14.00 per hour, sixteen hours per week, and from July 1, 2014 to September 8, 2016 as a Town Planner at \$21.00 per hour, nineteen hours per week.
2. The claimant's hours and pay rate reflect \$399.00 per week in her role of Planner (19 hours x \$21.00 = \$399.00) and \$244.00 per week in her role of Assessor (16 hours x \$12.00 = \$244.00) for a total of \$613.00. The claimant's base period actually reflects an average weekly wage of \$746.00 giving her a benefit rate of \$373.00 with an earnings disregard of \$124.33.
3. In August of 2014, the claimant began work in the Assessor's office. First as a Clerk, and later, split roles as Clerk and Assessor starting in February of 2015. The claimant's planning hours reduced by five to accommodate the assessor hours.
4. In November of 2015, the claimant informed the Town Manager that she no longer wished to work with the Principal Assessor. The claimant also indicated that her husband was ill and that she desired to spend more time with him. The Town Manager responded that he will work it into the upcoming budget.
5. On November 3, 2015, the claimant reduced the request to writing citing only that it was due to her husband's surgery. The claimant also expressed her desire to continue her work in the Planning office but at twenty to twenty-four hour per week from nineteen hours, which was addressed by the Town Manager verbally indicating that it is only budgeted for nineteen hours in the current fiscal year. The claimant suggested that the additional hour come from the expense account for the remainder of the fiscal year.
6. On November 4, 2015, the claimant followed up with the Town Manager in an email expressing that the office was unorganized giving examples of how it adversely affects efficiency and productivity. The claimant specifically stated, "There are people who thrive on this environment, which they, themselves create and truly, I prefer not to be around it. I do not want to hear the constant complaining that is supposed to be my cue to elicit sympathy. I'll give it for a while, but I see this is standard operating procedure around her and honestly don't want to be involved in it. I have tried to clean up and organize, to make it easier for everyone now and in the future, but I've gotten resistance for it, not the welcome relief or encouragement I was hoping for." The claimant

went on to explain how disheartened she was due to attitude towards her Planning and DDIC work. The claimant ended the email, stating, “This is not the leadership I was hoping for. And I mean no offense, but I have to be honest – so please don’t fault me for it (just get me out of here).”

7. The claimant presently states that she no longer wished to work with the Principal Assessor, generally because the claimant believed the Principal Assessor to be incompetent (*see* subpara. k. below), but specifically due to what the claimant believed to be illegalities in the performance of her duties, which made the claimant feel uncomfortable (see generally all examples below).

- a. During the claimant’s start in the Assessor’s office, the claimant developed a belief that the Principal Assessor scheduled all wrong for training purposes. Specifically, the claimant was scheduled to work at the same time as the Principal Assessor, who did not engage in active training with the claimant, rather than with another employee, who could have shown more to the claimant.

- b. Around February of 2015, an excise tax was assessed against a bus company who [sic] business location was (and where the buses were garaged) in a neighboring town. The claimant raised the issue with the Principal Assessor, who responded that it was okay and to just leave it.

- c. On November 20, 2015, the claimant raised a concern over the database for the abutter’s [sic] list not being updated since 2009. The Principal Assessor acted surprised and said that she appreciated the claimant’s concern.

- d. On December 2, 2015, the claimant observed the Principal Assessor panic over tax exemption denials not being mailed timely with the belief of an appeal deadline of ten days when in reality an appeal deadline of three months existed as noted on the form.

- e. In April of 2016, the claimant raised an issue of a resident getting double-billed on a vehicle excise tax. The resident was billed with ex-husband’s name on the title, as generated from the RMV, and on which she paid. The resident had the ex-husband removed, which generated a second report from the RMV and a second excise tax bill on the same vehicle for the year. The Principal Assessor did not seem concerned so the claimant contacted the RMV to get answers. The Principal Assessor became upset that the claimant went “over her head” on the matter.

- f. In May of 2016, the claimant raised an issue of a property line error, which the Assessor resisted correcting. The claimant and Principal Assessor butted heads over it because the claimant believed a taxing issue was at stake.

- g. In November of 2016, the claimant first raised an issue with the Principal Assessor that properties were not being inspected once every nine years as the assessors' guidelines required. The Principal Assessor resisted conducting inspection due to anxiety over potential harm coming to her while on someone's property.
 - h. Generally, the Principal Assessor compelled the claimant to be available to the public and take a "working meal period" at her desk, which the claimant protested and made inquiries into.
 - i. Generally, the claimant developed a belief that the Principal Assessor resisted any kind of change and/or taking charge to facilitate such a change even when necessary. Specifically, the claimant observed a server that frequently crashed, which caused delays in productivity and the Principal Assessor not making any effort to correct the issue, such as getting a replacement, before it crashed, which did eventually take place.
 - j. Generally, the claimant observed the Principal Assessor express her frustration of being overwhelmed all the while no delegation of duties taking place.
 - k. Overall, the claimant believed the Principal Assessor was a poor manager, made bad decisions, did not have the education to be the Principal Assessor, and did not have the ability to be a department head.
- 8. On December 16, 2015, the claimant's husband was scheduled to have surgery on his ACL. The claimant anticipated a long rehabilitation/recuperation time and believed that she would be needed at home.
 - 9. The claimant would not have requested to be relieved of duties solely due to her husband's medical issue.
 - 10. The claimant instead took leave under FMLA and was out shorter than anticipated due to a speedy recovery.
 - 11. The claimant did not express her desire to rescind her request to no longer work in the Assessor's office prior to June 30, 2016, but implied it by continuing to work in the office, which was for the sake of retaining her benefits.
 - 12. The employer contended and contends that the additional hour was a budgeted item and would require approval at a town meeting. Though a special town meeting was scheduled shortly after the claimant's initial request, the employer contends that, first the Selectmen would need to approve, and second, it would have been inappropriate to incorporate the claimant's additional hour on the agenda given the purpose of the special town meeting

as it was called by the citizens to address a specific matter regarding the purchase of land.

13. The employer could have relieved the claimant from the duties in late 2015, but the claimant would lose her benefits.
14. The employer elected not to reappoint the claimant into the Assessor's office for the new fiscal year because of the strife (employer used term "insubordination") caused by the claimant after not getting what she wanted. The employer opined that the claimant initiated the deterioration of the relationship after speaking with both the claimant and the Principal Assessor. The Town Manager believed it was appropriate to inform the Principal Assessor of the claimant's desire to no longer work in that office in anticipation of a vacancy.
15. In June of 2016, the Town Manager informed the claimant that she will not be re-appointed into her position in the Assessor's office.
16. On June 30, 2016, the claimant's duties in the Assessor's office ended with the fiscal year.
17. In mid-August of 2016, the claimant informed the employer that she will not return to work until her complaints were resolved.
18. On September 8, 2016, the employer terminated the claimant's remaining employment due to job abandonment.

Credibility Assessment:

The claimant raised a host of issues on appeal that were not raised at the time of her employment. While employed, the claimant cited lack of efficiency caused by disorganization and a culture of complaining as reasons for not wanting to work in the Assessor's office (*see* November 4, 2015 email, Ex 6). Yet, on appeal, the claimant testified that her desire stemmed from "illegalities." In regards to those "illegalities," the claimant gave examples of what one could call errors, but suggested that her supervisor did not care to address [them] once brought to her attention. Single examples and indifference towards those errors does not demonstrate "illegality" and furthermore, such "illegalities" did not outweigh her desire to retain her benefits. Therefore, her desire to leave appears to be born more from general dissatisfaction and her dislike of her supervisor who she apparently believed to be incompetent.

The employer initially testified that his choice to not reappoint the claimant was primarily due to her desire not to continue in that role. However, the employer later testified that his decision to not reappoint the claimant was due primarily to her insubordination (strife she caused) in that office. The latter appears to be the case.

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems 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 was not in unemployment at the start of her unemployment claim.

The review examiner found that the claimant had two positions with the employer. Some of her hours were in the Assessor's Office while other hours were as a Town Planner. The issue before the Board arises out of a change in job status as of June 30, 2016. As of that time, the claimant's Assessor's Office hours were dropped. However, she kept her hours as Town Planner until her ultimate, permanent separation on September 8, 2016.²

Because the claimant continued to perform services for the employer after June 30, 2016, the question is whether the claimant was in partial, rather than total, unemployment as of June 26, 2016.³ G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), and provides, in relevant part, as follows:

“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....

In his decision, the review examiner concluded that the claimant was not in partial unemployment. He reasoned as follows:

The claimant informed the Town Manager that she no longer wished to perform her Assessor duties and at the end of the Fiscal year, the employer removed those duties from the claimant as she earlier expressed with no intervening expression to the contrary. . . . In such a case, the claimant is considered to have caused her own reduction of hours from thirty-five to nineteen [T]hough she may have had good reason for refusing to work[,] . . . Section 29(b) and 1(r) has no good cause provision for not working available hours.

² The claimant's separation from employment was addressed in a different case, Issue ID 0019 8885 63. Our decision in this case does not affect the Hearings Department decision in that case, which held that the claimant is disqualified, pursuant to G.L. c. 151A, § 25(e)(1), as of September 8, 2016. Following appeal to the Board from that decision, the Board denied review.

³ Total unemployment refers to a week in which a claimant performs no wage-earnings services at all. Here, the claimant performed services as a Town Planner after June 30, 2016.

While the review examiner was correct to note that G.L. c. 151A, §§ 29(b) and 1(r)(1), do not expressly allow a person to decline work and remain in partial unemployment, the Board has recognized certain limited circumstances in which a person could refuse work and still be eligible for benefits. *See e.g.*, Board of Review Decision 0014 0062 59 (March 9, 2015) (refusal of unsuitable work did not result in conclusion that claimant not in partial unemployment); Board of Review Decision 0019 9158 79 (March 28, 2017) (full-time work unsuitable based on claimant's pregnancy).⁴ This principal stems from the general proposition that a claimant has no obligation to accept unsuitable work. *See Conlon v. Dir. of Division of Employment Security*, 382 Mass. 19, 21 n. 1 (1980) ("an individual need only be available for suitable employment which he has no good cause to refuse"). Thus, in order to render a legally complete and supported decision, the review examiner needed to make findings as to why the claimant wanted to eliminate her Assessor's Office hours. If her work in the Assessor's Office had become unsuitable for her, she may have had good cause to refuse to continue to work those hours. The Board remanded the case to take additional evidence about this issue, as well as to clarify whether the Assessor's Office hours were ultimately eliminated due to the claimant's request or due to the employer's decision to not re-appoint her to her position there.

Following our review of the record and the consolidated findings of fact, we conclude that the claimant has not shown that the job in the Assessor's Office had become unsuitable in November of 2015, when she requested that her hours there be taken away from her. As noted in Consolidated Finding of Fact # 7, the claimant generally believed that "the Principal Assessor was a poor manager, made bad decisions, did not have the education to be the Principal Assessor, and did not have the ability to be a department head." The claimant testified to, and the review examiner noted, various mistakes made in the Assessor's Office and questionable decisions made by the Principal Assessor. *See Consolidated Finding of Fact # 7a-g.* Generally, though, the claimant's dissatisfaction does not amount to good cause to refuse the work, nor do the circumstances noted by the review examiner indicate that the work had become unsuitable for her. Disagreements over management style, competency, attitude, and judgment calls do not amount to good cause. *See Sohler v. Dir. of Division of Employment Security*, 377 Mass. 785, 789 (1979).

Our inquiry does not end here, however. Although the claimant's work in the Assessor's Office was suitable, it nevertheless ended on June 30, 2016. As noted above, the review examiner concluded that "the claimant . . . caused her own reduction of hours" Indeed, a claimant who reduces her availability for work without a good reason for doing so is not usually considered to be in partial unemployment. However, if an employer reduces a claimant's schedule, then the worker is partially out of work as a result of the employer's actions, not her own. Thus, we must ultimately decide in this case whether the claimant or the employer is responsible for the reduction of the claimant's hours (the non-reappointment to the Assessor's Office hours) as of July 1, 2016.

As to this issue, the review examiner made several relevant findings. He found that, in November 2015, the claimant told the employer that "she no longer wished to work with the Principal Assessor." When she reduced her request to writing, she stated that she only desired to

⁴ Unpublished decisions of the Board of Review are available upon request. For privacy reasons, identifying information is redacted.

work as a Town Planner at twenty hours per week. *See* Consolidated Findings of Fact ## 4–5. The employer could not increase the claimant’s hours as a Town Planner from nineteen to twenty per week. Consolidated Finding of Fact # 12. The evidence in the record is that, if the claimant’s hours were reduced below twenty per week, she would lose her benefits. Thus, the claimant continued to work in the Assessor’s Office. The review examiner found that, although she had not formally rescinded her November 2015 request to leave the Assessor’s Office, she “implied it by continuing to work in the office, which was for the sake of retaining her benefits.” Consolidated Finding of Fact # 11. Based on this finding, we conclude that the employer understood that the claimant wanted to continue working in the Assessor’s Office, so that she would keep her benefits, including health insurance. Moreover, in June 2016, the employer decided not to re-appoint the claimant due to the “strife” in the office, not necessarily due to her November 2015 request. *See* Consolidated Finding of Fact # 14. In this way, we think that the reduction in the claimant’s hours is ultimately attributable to the employer, not the claimant.

We, therefore, conclude as a matter of law that the review examiner’s decision to deny benefits beginning the week of June 26, 2016, was not supported by substantial and credible evidence or free from error of law, because, although the claimant had a long list of complaints regarding her work in the Assessor’s Office, the employer ultimately decided not to re-appoint her to that position in the office, thus putting her in partial unemployment.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period beginning June 26, 2016, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 13, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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.

SF/rh