

**Board of Review  
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**Issue ID: 0019 9876 16**

## **BOARD OF REVIEW DECISION**

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

The claimant appeals a decision by Joan Berube, a review examiner of the Department of Unemployment Assistance (DUA), which concluded that the claimant is in unemployment beginning December 20, 2015. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On November 23, 2016, the agency initially determined that the claimant was entitled to unemployment benefits. However, the determination also informed the claimant that she had been overpaid \$639.00. The claimant appealed, and only the claimant attended the hearing. In a decision rendered on January 11, 2017, a DUA review examiner affirmed the agency determination, concluding that the claimant was eligible to receive benefits, pursuant to G.L. c. 151A, §§ 29 and 1. However, the review examiner's findings of fact changed the partial earnings for several of the weeks in the claimant's benefit year. The Board accepts the claimant's application for review.

### **Ruling of the Board**

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's decision is based on substantial evidence and is free from any error of law affecting substantive rights.

We issue this decision in order to clarify for the claimant why she is eligible for benefits under G.L. c. 151A, §§ 29 and 1. During the hearing, the review examiner explained to the claimant that, contrary to what she may have been told by agency employees, she was not eligible to receive benefits in any week in which she performed services for the employer. The examiner told the claimant that this was because the employer had hired her to be part-time and she was working a part-time, variable schedule of hours. In her appeal to the Board, the claimant expressed some confusion as to when she could be eligible to receive unemployment benefits.

To clarify, the information the review examiner provided to the claimant during the hearing was legally incorrect. The review examiner was explaining the holding of Town of Mattapoisett v. Dir. of Div. of Employment Security, 392 Mass. 546 (1984). Under Mattapoisett, a claimant who bases a claim primarily on on-call employment will not be considered to be in partial unemployment, under G.L. c. 151A, §§ 29(b) and 1(r)(1), in any week in which the claimant works on-call and part-time after the establishment of the claim. The Mattapoisett holding does

not apply to the claimant's situation in this case. First, the claimant is not an on-call employee. She is a regular, part-time employee who simply works a variable schedule of hours. Second, it does not appear that the employer in this case was her primary base period employer. The claimant earned most of her base period wages from her other primary employer. *See* Finding of Fact # 1 (noting claimant's base period employment history).

Although the information provided to the claimant during the hearing was incorrect, the review examiner's decision, as written, is legally correct. She did not actually decide the case on the basis of the Mattapoissett legal theory that she had discussed with the claimant during the hearing. The decision properly concludes that the claimant is eligible to receive benefits in any week in which she earned less than her benefit rate, after taking into account the earnings disregard. *See* G.L. c. 151A, §§ 29(b) and 1(r)(1).

We do make one final comment on this case. While reviewing the claimant's earnings<sup>1</sup> from the decision, the Board noted that they have been incorrectly entered into the UI Online computer system. This may be causing a larger overpayment than is appropriate in this case, based on the review examiner's findings of fact. To ensure that the proper earnings are in the UI Online computer system, and to guarantee that the amount of the overpayment is correct, the Board will forward this decision to the agency for further implementation. The agency should make sure that the following weekly earnings are noted in the computer system:<sup>2</sup>

For the week ending January 2, 2016: \$0.00.  
For the week ending April 9, 2016: \$200.00.  
For the week ending April 16, 2016: \$75.00.  
For the week ending April 30, 2016: \$112.50.  
For the week ending May 7, 2016: \$118.75.  
For the week ending May 14, 2016: \$93.75.  
For the week ending May 21, 2016: \$106.25.  
For the week ending May 28, 2016: \$153.15.  
For the week ending July 23, 2016: \$210.75.<sup>3</sup>  
For the week ending August 20, 2016: \$112.50.

In rendering her decision, the review examiner also noted the following partial earnings, which were for weeks not addressed by the initial determination:

For the week ending April 23, 2016: \$0.00.  
For the week ending June 4, 2016: \$100.00.

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<sup>1</sup> The review examiner's findings as to the claimant's weekly earnings are supported by the record, specifically by Exhibit # 3 and some of the testimony given by the claimant during the hearing. The Board notes, however, that it was difficult at times to follow the testimony, given that the week being referred to was at times unclear. A review of the testimony suggests that the claimant was reading from her own paystubs or pay records during the hearing. Unfortunately, those records were not entered into the hearings record as an exhibit, which would have been helpful. Nevertheless, the claimant has not argued on appeal that the earnings noted in the decision are incorrect. Therefore, the Board will not generally disturb the findings regarding the claimant's earnings.

<sup>2</sup> The weeks noted in this decision are taken directly from the agency's initial determination. *See* Exhibit # 8.

<sup>3</sup> Exhibit # 3 indicates that the claimant earned \$210.75 for the week ending July 23, 2016. The review examiner's finding of "218.75" appears to be a typographical error.

For the week ending June 11, 2016: \$225.00.  
For the week ending July 30, 2016: \$250.00.  
For the week ending August 6, 2016: \$0.00.  
For the week ending August 13, 2016: \$137.50.  
For the week ending September 3, 2016: \$150.00.

The agency may wish to update the claimant's unemployment claim with these earnings, if it desires.

The review examiner's decision is affirmed. Pursuant to G.L. c. 151A, §§ 29(b) and 1(r)(1), the claimant is eligible to receive benefits in any week in which she earns less than her benefit rate, after taking into account the earnings disregard. This decision will be forwarded to the agency for further action.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 10, 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](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.

SF/rh