

**Although the claimant did refuse some work offered by this employer, he did so because he was working at another job, where he had worked longer and on a more regular schedule. Where a claimant has multiple jobs whose hours may conflict, a claimant is not disqualified under G.L. c. 151A, §§ 29 and 1, if he chooses to work at one job rather than at the other.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> 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: 0020 5664 64**

## **BOARD OF REVIEW DECISION**

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

The claimant appeals a decision by Dena Lusakhpuryan, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits for the two weeks ending December 31, 2016 and January 7, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

After filing a claim for unemployment benefits, effective November 6, 2016, the claimant obtained on-call, part-time work with this employer. On February 8, 2017, the DUA sent the employer a Notice of Approval, allowing benefits for the period beginning December 25, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner modified the agency's initial determination and denied benefits for the two weeks ending December 31, 2016 and January 7, 2017.

Benefits were denied after the review examiner determined that the claimant was not accepting all available work from this employer, and, thus, was not in unemployment, as defined in 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the employer responded. 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 for the weeks ending December 31, 2016, and January 7, 2017, is supported by substantial and credible evidence and is free from error of law, where the claimant turned down work with this employer to work at a different part-time job.

### **Findings of Fact**

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

1. The claimant was separated from work from his fulltime job at the 1<sup>st</sup> employer's establishment and subsequently filed for unemployment insurance benefits.
2. On November 15, 2016, the claimant filed an initial claim for unemployment insurance benefits (Exhibit 1). The effective date of the claim is the week beginning November 6, 2016.
3. The claimant has subsidiary part-time employment with the 2<sup>nd</sup> employer. The 2<sup>nd</sup> employer is a food store.
4. On December 16, 2016, the claimant started working as an on-call worker for the instant employer. The instant employer is a landscaping company. The claimant was hired as a snow removal person for the instant employer. The claimant does not have a set schedule with the instant employer. The instant employer notifies the claimant if work is available.
5. The instant employer pays the claimant \$20.00 per hour.
6. The claimant requested benefits for the weeks ending December 31, 2016 through January 7, 2017 (Exhibit 1). The claimant has stopped requesting benefits after the week ending January 7, 2017.
7. The claimant has not been able and available for all work the instant employer has had available for him due to schooling conflicts and conflicts with his job at the 2<sup>nd</sup> employer's establishment.
8. During the week ending December 31, 2016, the claimant was not able and available for work with the instant employer. The claimant turned down work offered by the employer this week. On December 27, 2016, the instant employer offered the claimant work. The claimant turned down work with the instant employer as he had to work at the 2<sup>nd</sup> employer's establishment and was not available to work with the instant employer. The claimant did not work for the instant employer this week.
9. During the week ending January 7, 2017, the claimant was not able and [] available for work with the instant employer. The claimant turned down work offered by the instant employer this week. On January 6, 2017, the instant employer offered the claimant work. The claimant turned down work with the instant employer as he had to work at the 2<sup>nd</sup> employer's establishment and was not available to work for the instant employer. The claimant did not work for the instant employer this week.
10. On February 8, 2017, the Department issued a Notice of Approval granting the claimant benefits under Sections 29(b) and 1(r)(2) of the Law

commencing the week ending December 31, 2016 (Exhibit 5). The employer appealed the Notice of Approval.

### 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 except as follows. We reject the portion of Finding of Fact # 7 that indicates that the claimant was not available for work with this employer due to schooling conflicts. Although the claimant mentioned this during the hearing, the review examiner's other findings of fact do not indicate that the claimant refused work due to school. *See* Findings of Fact ## 8 and 9. In adopting the remaining 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 was not in unemployment beginning December 25, 2016.

In order to be eligible for unemployment benefits, the claimant must be either in total or partial unemployment. Total unemployment refers to a period in which a claimant does not work and receives no remuneration. *See* G.L. c. 151A, § 1(r)(2). Since the claimant worked in the period of time addressed by the review examiner, the total unemployment provisions do not apply. The question before the review examiner, and the Board now, is whether the claimant was in partial unemployment.

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), which 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....

The review examiner denied benefits using the following reasoning:

In the case at hand, the claimant is not entitled to benefit under Sections 29(b) and 1(r) of the Law for the 2 weeks ending December 31, 2016 through January 17, 2017 because the employer offered the claimant work on December 27, 2016 and January 7, 2017 but the claimant turned down work and was not available to work as he was working at the 2<sup>nd</sup> employer's establishment.

Although the details of the other employment were not fully fleshed out in the review examiner's decision, the claimant testified during the hearing that he obtained his other job at a supermarket

in May of 2016.<sup>1</sup> He was working at that job on a part-time schedule that was more regular than his work with the employer in this case, which was purely on call. *Compare* Finding of Fact # 3 with Finding of Fact # 4. In both of the weeks at issue here, the claimant turned down work with this employer to work at the supermarket job.

Although the review examiner was correct to note in Part III of her decision that a person will be in unemployment only if he accepts all suitable work offered to them, a problem arises if the person has multiple jobs. What is a claimant's employment status if he turns down work for one employer to work at a different employer? The Board has addressed this circumstance before. In Board of Review Decision 0001 1361 33 (September 14, 2014), the Board held the following:

It is entirely reasonable for the claimant to have refused temporary work with this employer in order to work at other permanent jobs. A claimant who refuses work with a particular employer because she is working other suitable employment does not suffer a disqualification under G.L. c. 151A, §§ 29(a), 29(b), and 1(r).

In this case, the claimant's work with this employer as a snow remover, which was on-call, dependent on the weather, and available to him only during the winter time, is akin to the temporary work noted in the above-referenced decision.. The decision to refuse that work in order to work at a job where the claimant had worked longer, on a more consistent schedule, and through all the seasons, was just as reasonable as the decision by the claimant in that case. In both cases, the claimants did what they were supposed to do, which was to obtain suitable work. The claimant here should not be penalized for finding a job and working. Following the reasoning in Decision 0001 1361 33, we conclude that the claimant is not subject to disqualification.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, pursuant to G.L. c. 151A, §§ 29 and 1, was not supported by substantial and credible evidence or free from error of law, because, although the claimant did reject some work offered by this employer (and may not have been available for work with this employer), he did so only because he was working other suitable employment which conflicted with the work from this employer.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period beginning December 25, 2016.

---

<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).

**N.B.:** The employer expressed concerns during the appeal process that it would be charged for benefits paid out on the claimant's claim, even though he refused hours of work with the employer. Since this employer is not a base period employer on the claimant's 2016 claim (the claimant obtained his job with the employer after he established the claim in November 2016), it would not be charged for benefits paid on the claim. If the employer is concerned about charges to its account, it may contact the DUA's Employer Charge Section at (617) 626-6350.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION – May 31, 2017**



Judith M. Neumann, Esq.  
Member



Charlene A. Stawicki, Esq.  
Member

Chairman Paul T. Fitzgerald, 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