

Payment made after the claimant separated from employment is deemed to be termination pay for the services he would have performed if he had continued working through the end of his contract. Because the payment, averaged across the remaining weeks in his contract, amounted to less than his weekly benefit rate, he is eligible for partial unemployment benefits.

**Board of Review
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Issue ID: 0020 9658 04

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Stephen A. Dougal, 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 on December 26, 2016. On February 27, 2017, the agency determined that under G.L. c. 151A, § 1(r)(3), the claimant was not entitled to benefits between the weeks ending January 28, 2017, and May 20, 2017, because he had received pay that constituted remuneration after his separation from the employer. The agency also determined that, as a result of the claimant's receipt of remuneration, his benefit year would be extended by 17 weeks. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 31, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant received remuneration, as meant under G.L. c. 151A, § 1(r)(3), between January 24, 2017, and May 19, 2017, and, thus, was disqualified from receiving benefits pursuant to the provisions of 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 took the case for review. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's conclusion that the claimant is subject to disqualification under G.L. c. 151A, §§ 29 and 1(r), is supported by substantial and credible evidence and is free from error of law, where the record establishes that the remuneration received by the claimant after his separation represented his earnings from only one of the four jobs he had held with the employer.

Findings of Fact

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

1. The claimant worked for the employer, a community college, in a number of positions, among which, was a radio station advisor.
2. The academic year spanned September 6, 2016 through May 19, 2017.
3. The claimant was contracted to be paid \$5,385.60 in his radio station advisor position for the academic year September 6, 2016 through May 19, 2017.
4. On January 23, 2017, the claimant separated from the employer (all positions).
5. The claimant had already been paid \$2,625.60 of his radio station advisor position contract through January 23, 2017.
6. Subsequent to his termination, the employer paid the balance of the radio station advisor position contract (through May 19, 2017) to the claimant in the amount of \$2,736.00.
7. The claimant was not required to sign a release of claims to receive the \$2,736.00.
8. The money received by the claimant was not a lump sum payment issued in connection with a plant closing.
9. On February 27, 2017, the Department of Unemployment Assistance (DUA) notified the claimant it had been determined the claimant was not entitled to benefits under Section 1(r)(3) of the law because he had received termination, severance or dismissal pay, or payment in lieu of dismissal notice, which constituted remuneration and, therefore, was not entitled to benefits beginning January 22, 2017 through May 20, 2017, and, therefore, his benefit year will be extended by 17 weeks with a new benefit year expiration date of April 21, 2018.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the findings of fact are supported by substantial and credible evidence; and (2) whether the original conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner's findings of fact. In adopting these findings, we deem them to be supported by substantial and credible evidence. However, we conclude that the findings support an award of partial benefits to the claimant.

In order for the claimant to receive unemployment benefits, he must be in some state of 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. . . .

G.L. c. 151A, § 29(a) authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

“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.

The review examiner found that the claimant held several positions with the employer, and on January 23, 2017, he separated from all of the positions. Consequently, after that date, the claimant performed no services for the employer. However, the employer decided to pay the claimant the remaining portion of his earnings for his position as a radio station advisor; the claimant received \$2,736.00, which covered the period of January 24, 2017, through May 19, 2017. In light of these findings, the question before us is whether, even though the claimant did not work for the employer, he still continued to receive remuneration. If he received no remuneration, he was in total unemployment, and if he received remuneration which was less than his weekly benefit rate, then he was in partial unemployment.

Remuneration is defined, in relevant part, at G.L. c. 151A, § 1(r)(3) as the following:

[A]ny consideration, whether paid directly or indirectly, including salaries, commissions, and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all payments in any medium other than cash, received by an individual (1) from his employing unit for services rendered to such employing unit; (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice, whether or not notice is required, or as payment for vacation allowance during a period of regular employment; provided, however, that for the purposes of this chapter, "remuneration" shall not include any payments made pursuant to subsections (b) and (c) of section one hundred and eighty-three, and subsection (b) of section one hundred and eighty-four of chapter one hundred and forty-nine, nor shall it include payment for unused vacation or sick leave, or the payment of such termination, severance or dismissal pay, or payment in lieu of dismissal notice, made to the employee in a lump sum in connection with a plant closing, nor shall this clause affect the application of subsection (d) of section twenty-nine. . . .

The record before us indicates that when the employer terminated the claimant, it paid the claimant the monies that he would have received had he remained employed as the radio station advisor. We consider this payment to be termination pay. In its Service Representative handbook (SRH), the DUA defines termination pay as “the maintenance by an employer of an employee’s wages following the employee’s separation from the employ of an employer.” SRH § 1414(R). Here the employer paid the claimant the balance of the wages he would have earned during the remainder of his contract as the employer’s radio advisor. Thus, the employer maintained a portion of the claimant’s wages after his separation. Since the claimant received remuneration in the form of termination pay, he was not in “total unemployment” as defined under G.L. c. 151A, § 1(r)(2). We believe, however, that the claimant was in “partial unemployment” within the meaning of the statute.

Under the statute, remuneration is deemed received in such week or weeks in which it was earned, or for such week or weeks to which it can reasonably be considered to apply. G.L. c. 151A, § 1(r)(3). Here, the payment of \$2,736.00 made to the claimant covered the 17 weeks between January 24, 2017, and May 19, 2017. Thus, the payment of \$2,736.00 amounts to \$161.00 per week when divided by 17 weeks.¹ We take administrative notice of the claimant’s monetary summary in the DUA’s electronic record-keeping system, UI Online, which shows the claimant had a benefit rate of \$705.00, with an earnings disregard of \$235.00. Taking into account the claimant’s earning disregard, his aggregate remuneration of \$161.00 per week is less than his benefit rate of \$705.00. Therefore, the claimant is in partial unemployment under G.L. c. 151A, § 1(r)(1).

We, therefore, conclude as a matter of law that the claimant is eligible for partial benefits under G.L. c. 151A, §§ 29 and 1(r).

¹ When divided by 17 weeks, \$2,736.00 amounts to \$160.94, but pursuant to G.L. c. 151A, § 1(w), that average weekly wage amount must be raised to the next highest dollar — \$161.00.

The review examiner's decision is reversed. The claimant is not subject to disqualification between the weeks ending January 28, 2017, and May 20, 2017. When calculating any deductions to the claimant's weekly benefit amount, the agency shall use \$161.00 as the claimant's earnings amount during each of the weeks at issue. The claimant's benefit year will not be extended by 17 weeks.

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.

SVL/rh