

While on paid administrative leave of absence pending an investigation into alleged misconduct, the claimant signed a release of claims, ending the investigation and separating her from her employment. The monies paid to her prior to the signing of the release constituted remuneration under G.L. c. 151A, § 1(r)(3), so the claimant was not in unemployment. However, any monies paid to her after the signing of the release are not remuneration, pursuant to the holding of White, and she is eligible for benefits.

**Board of Review
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Issue ID: 0020 9713 01

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Meghan Orio-Dunne, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits from May 15, 2016, through October 8, 2016. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

The claimant stopped performing services for the employer on or about May 17, 2016. She filed a claim for unemployment benefits, and the claim is effective May 15, 2016. On May 3, 2017, the DUA sent the claimant a Notice of Disqualification, informing her that she was not eligible to receive benefits from May 15, 2016, through October 8, 2016, pursuant to G.L. c. 151A, §§ 29(a) and 1(r). 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 August 10, 2017.

Benefits were denied after the review examiner determined that the claimant was not in unemployment, as defined by G.L. c. 151A, §§ 29(a) and 1(r)(2), from May 15, 2016, through October 8, 2016, because she received disqualifying remuneration, as defined by G.L. c. 151A, § 1(r)(3), during that period of 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 and afforded the parties, including the DUA, an opportunity to submit written reasons for agreeing or disagreeing with the decision. The employer, the claimant, and the DUA 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 was not in unemployment from May 15, 2016, through October 8, 2016, due to her receipt of remuneration during that period of time is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for the employer, a municipality, as a full time director of human resources from 2002 until October 3, 2016. She last physically worked on May 17, 2016.
2. On May 17, 2016, the claimant was placed on administrative leave while the employer contemplated termination after an external investigation revealed misconduct.
3. Shortly thereafter, the claimant negotiated with the employer to "keep her on the books" through October 3, 2016, to increase her retirement benefits.
4. The employer agreed to keep the claimant on paid administrative leave through August 31, 2016. Through that date, she was compensated at her regular rate of pay.
5. The claimant was given the option to take a lump sum payout of her remaining vacation and personal days on August 31, 2016, or to use that time to extend her last day of employment to October 3, 2016.
6. On June 28, 2016, the claimant signed an agreement indicating that she would remain on paid leave until October 3, 2017 and would resign effective that date. The agreement reflected the claimant's decision to utilize her accumulated paid leave after August 31, 2016, extending her last day of employment to October 3, 2016.
7. Effective October 3, 2016, the claimant resigned.

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 one observation. We note that the exact reasons for why the claimant was placed on administrative leave, as of May 17, 2016, were not discussed at length during the hearing. From what we can tell from the record, there was an allegation of misconduct against the claimant, which led the employer to negotiate her separation. To the extent that Finding of Fact # 2 suggests that misconduct actually occurred, we do not accept that view. Thus, we adopt Finding of Fact # 2 with the understating that it contains information about the employer's decision to put the claimant on leave, including the start date of the leave. In adopting the remaining findings, we

deem them to be supported by substantial and credible evidence.¹ As discussed more fully below, we conclude that the claimant was not in unemployment for the period of time prior to when she and the employer signed the separation package, or agreement. However, because the claimant's payments after signing the agreement were contingent upon the execution of a release of claims, the monies paid to the claimant after the signing of the agreement (and prior to her separation) do not constitute remuneration.

In order for the claimant to receive unemployment benefits, she 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 was placed on administrative leave on May 17, 2016. Based upon the statutory definitions noted above, whether the claimant was in unemployment turns on whether she received remuneration on or after May 17, 2016. Remuneration is defined, in relevant part, at G.L. c. 151A, § 1(r)(3), as the following:

[A]ny consideration . . . 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

Following our review of the review examiner's findings and the documentary evidence, we conclude that there are two relevant periods of time in this case: the period before the parties signed the separation agreement and the period after the parties signed the agreement. Before the parties executed the agreement, the claimant was on a paid administrative leave of absence. She maintained her benefits, her salary, and her seniority with the employer. Receiving her pay

¹ We note that the review examiner failed to make specific findings about the content of the final agreement signed by the parties, as well as other portions of the communications between the claimant and the employer. Therefore, 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).

during this period was not contingent upon anything. Although the claimant was not performing any services, her status from May 17 through June 28, 2016, was akin to someone on a paid vacation. Under the definition quoted above, remuneration includes “payment for vacation allowance during a period of regular employment.” See DUA’s Service Representative Handbook § 1415(T). Since the claimant still had an employment relationship with the employer (*i.e.*, she was in a period of regular employment), and since the claimant continued to receive her salary, we conclude that the claimant received remuneration for the period from May 17, 2016, through June 29, 2017. Because she received her full salary, she was not in unemployment at all for the weeks May 15, 2016, through June 25, 2016.

On June 28 and 29, 2016, the parties signed an agreement (also called the separation package), whereby the claimant would separate from her job and the employer would cease its investigation into the claimant’s alleged misconduct. The agreement contains a release of claims. See Exhibit # 12, para. 11. The Massachusetts Appeals Court has held that payments made to a severed employee in return for a general release of claims are not disqualifying remuneration within the meaning of G.L. c. 151A, § 1(r)(3). White v. Comm’r of Department of Employment and Training, 40 Mass. App. Ct. 249, 252-253, *further app. rev. den’d*, 422 Mass. 1111 (1996). The fact that the claimant would receive nothing unless she signed the release of claims makes the payments after June 29, 2016, contingent on the claimant agreeing to the release.² After executing the agreement and the release, the payments made to the claimant do not fall into any of the categories of remuneration listed in G.L. c. 151A, § 1(r)(3). The monies are not for services rendered, and do not represent termination, dismissal, or severance pay. They represent monies paid out in order for the employer to secure the claimant’s release of claims against the employer. See DUA’s Service Representative Handbook §§ 1415(I) and 1417(F). In accordance with White and the agency’s policies adopted in accord with White, after June 29, the monies the claimant was receiving do not legally constitute remuneration.

During the week beginning June 26, 2016, the claimant received remuneration for June 27, June 28, and June 29 (three days during the week). Pursuant to the provisions of G.L. c. 151A, §§ 29(b) and 1(r)(1), the claimant may be in partial unemployment for that week if her earnings are less than her benefit rate, after taking into account the earnings disregard. Beginning July 3, 2016, she was in total unemployment, because she was not working and was not receiving any remuneration.

We, therefore, conclude as a matter of law that the review examiner’s decision to deny benefits from May 15, 2016, through October 8, 2016, is not supported by substantial and credible evidence or free from error of law, because the claimant’s signing of an agreement containing a release of claims means that the monies paid after the signing of the release on June 29 do not constitute remuneration within the meaning of G.L. c. 151A, § 1(r)(3).

² Because the agreement was signed by the employer on June 29, 2016, the agreement was fully executed and effective that day.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the period from May 15, 2016, through June 25, 2016. The claimant is entitled to receive benefits, beginning June 26, 2016, if otherwise eligible. The agency shall make a determination as to the amount of remuneration received by the claimant for the week beginning June 26, 2016, and issue benefits if allowable under the law accordingly.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 27, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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