

Although the claimant is not disqualified from receiving benefits, pursuant to the holding of Mattapoissett, because the claimant was limiting her on-call employment due to attending school, she is not in unemployment during the school semesters.

**Board of Review
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Issue ID: 0021 5572 01

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Stephen 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 we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, which was determined to be effective April 2, 2017. On May 11, 2017, the DUA sent the employer a Notice of Approval, stating that the claimant was in unemployment beginning April 2, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on August 4, 2017.

Benefits were denied after the review examiner determined that the claimant established on-call work in her base period, continued to work on-call in her benefit year, and reduced her availability for work and thus, was disqualified from receiving benefits pursuant to 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 allow the claimant an opportunity to provide evidence. Both parties attended the remand hearing.¹ 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, beginning April 2, 2017, is supported by substantial and credible evidence and is free from error of law, where the claimant's work with this employer was of an on-call nature, the claimant had other base period work where she worked longer and was paid more than with the instant employer, and the claimant attended school on in certain months during her benefit year.

¹ The claimant attended both sessions of the remand hearing, September 18 and November 21, 2017. The employer only attended the first session.

Findings of Fact

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

1. The claimant worked for the employer, a school, as an on-call substitute teacher, commencing December 5, 2016. The claimant is paid \$90.00 a day.
2. DUA records indicate the claimant filed her claim on April 14, 2017 with an effective date of April 2, 2017.
3. The claimant worked on-call in the base period (April 1, 2016 - March 31, 2017).
4. On January 18, 2017 (Spring Semester 2017), the claimant started taking pre-requisite courses at a community college for an associate's degree in nursing.
5. The claimant had previously attended college and was awarded a Bachelor's Degree in Biology.
6. The claimant's Spring Semester 2017 course schedule was as follows:

Monday 8:00 a.m. to 10:00 a.m. Microbiology (2 hours)
Tuesday 8:00 a.m. to 10:00 a.m. Microbiology (2 hours)
Wednesday 8:00 a.m. to 10:00 a.m. Microbiology (2 hours)
Thursday No classes
Friday No classes
Saturday No classes
Sunday No classes
7. The claimant is searching for work as a laboratory assistant and scientific researcher.
8. Work as a laboratory assistant and scientific researcher is available when the claimant is available for work.
9. Prior to the start of her claim, the claimant worked as a cashier, a personal care assistant, a nutrition instructor, and certified nursing assistant.
10. The claimant did not work at any other jobs while she was working for the employer.
11. On or about January 18, 2017, the claimant informed the scheduler she was attending school.
12. The claimant was not available for work Tuesday and Thursday because she had to study.

13. The claimant was available for work Monday and Wednesday after class and all Friday.
14. Other than school, there was nothing else affecting whether the claimant could accept [work] assignments from the employer.
15. The employer had substitute teacher work, office work and paraprofessional work for the claimant.
16. The employer left voicemails for the claimant on the day work became available and asked the claimant if she could work for any period of time during that day. The claimant was not told what job she would be performing until she arrived at work.
17. The employer did not have a record of any days the claimant refused an assignment or did not respond to voicemails.
18. The employer offered and the claimant accepted work and was paid for work on the following days:

Monday, January 9, 2017 \$90.00
Friday, January 13, 2017 \$90.00
Wednesday, January 18, 2017 \$90.00
Friday, January 20, 2017 \$90.00
Wednesday, January 25, 2017 \$90.00
Monday, January 30, 2017 \$90.00
Tuesday, January 31, 2017 \$45.00
Friday, February 3, 2017 \$90.00
Monday, February 6, 2017 \$90.00
Wednesday, February 8, 2017 \$90.00
Thursday, February 8, 2017 \$90.00
Wednesday, February 15, 2017 \$90.00
Thursday, February 16, 2017 \$90.00
Friday, February 17, 2017 \$90.00
Monday, March 6, 2017 \$90.00
Friday, March 10, 2017 \$90.00
Monday, March 13, 2017 \$90.00
Thursday, March 16, 2017 \$90.00
Tuesday, March 21, 2017 \$45.00
Friday, March 24, 2017 \$45.00
Thursday, March 30, 2017 \$90.00
Friday, March 31, 2017 \$90.00
Monday April 3, 2017 \$90.00
Friday, April 7, 2017 \$90.00
Monday, April 10, 2017 \$90.00
Thursday, April 27, 2017 \$90.00
Friday, April 28, 2017 \$90.00

Friday, May 5, 2017 \$90.00 (Remand Exhibit 14)

19. The claimant has not been offered work since May 5, 2017.
20. On May 11, 2017, the Department of Unemployment Assistance (DUA) in Issue ID # 0021 5570 47-01 sent to the claimant a Notice of Approval determining the claimant was eligible for benefits the period beginning April 9, 2017, and indefinitely thereafter, if otherwise eligible, because the claimant is in attendance at a full-time educational program and has demonstrated a prior history of both studying and working full-time, is able, available and actively seeking full-time work and therefore meets the availability requirements of the law. (Remand Exhibit 10)
21. On May 18, 2017, the Spring Semester 2017 ended.
22. Fall Semester 2017 began on September 9, 2017, and ends on December 15, 2017.
23. For the period of May 19, 2017, through September 8, 2017, while out of school, the claimant was physically and mentally capable of full-time work, looked for work on at least 3 different days each week. The claimant sought work in a laboratory, home care agencies and nursing homes.
24. The claimant's Fall Semester 2017 schedule is as follows:
 - Monday 8:00 a.m. to 11:00 a.m. Nursing Course (1 credit)
 - Tuesday No Classes
 - Wednesday 7:00 a.m. to 4:00 p.m. Clinical at a hospital
 - Thursday 9:00 a.m. to noon Principles of Nursing (2 credits)
 - Friday 9:00 a.m. to noon Principles of Nursing
 - Saturday No classes
 - Sunday 8:00 a.m. to 2:00 p.m. Works as a personal care attendant-\$14.56 per hour

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 conclude that the claimant is not eligible to receive benefits for the periods of time she is and was attending school.

The issue to be decided in this case is whether, as of the effective date of her unemployment claim, the claimant was in unemployment. 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), and 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.

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 the following:

The evidence and testimony presented in this hearing established the claimant worked as an on-call substitute teacher for the employer during the base period.

When a claimant’s unemployment claim is based upon on-call employment established in the base period, the claimant is disqualified from benefit for any week in which any work is available. The claimant qualifies for benefits for any week in which no work is available.

By focusing his analysis on the on-call nature of her work with the employer, the review examiner applied the holding of Town of Mattapoisett v. Dir. of Division of Employment Security, 392 Mass. 546 (1984). In Mattapoisett, the claimant was hired to be a part-time police officer. He worked on-call, whenever he was needed, under the terms of his employment contract. Some weeks he worked, and other weeks he did not work at all. There was no indication that he worked for any other employer while also working for the Town of Mattapoisett. The Court found that the claimant was not in partial unemployment in the benefit year, because “[t]o characterize [the claimant] who agreed to be part-time and on-call as ‘partially employed’ when both parties understood at the beginning of the employment relationship that the hours of employment were to be irregular and less than full time is to torture the plain meaning of the term.” Id. at 549. It held that “the Legislature did not intend a part-time employee whose hours vary from week to week to be considered in partial unemployment for any week in which he does not work as many hours as a full-time employee.” Id.

The principles of Mattapoisett were then applied by the Appeals Court in Town of Bourne v. Dir. of Division of Employment Security, 25 Mass. App. Ct. 916 (1987) (rescript opinion). In Bourne, the claimant’s only employment was as a substitute teacher who worked part-time and only when needed. The Appeals Court found that the reasoning of Mattapoisett controlled the outcome of the case. Importantly, the Court noted that “a person separated from full-time employment in non-disqualifying circumstances may be eligible for partial unemployment

benefits if subsequently employed part-time.” 25 Mass App. Ct. 916, *citing Mattapoisett*, 392 Mass. at 548. However, it declined to hold that the claimant was eligible for benefits under that theory, because the claimant had never advanced, over the course of the proceedings within the agency, that she was eligible for benefits based on her prior full-time employment, or filed a claim for benefits based on that employment.

From what can be discerned from the brief opinions in the cases, the holdings in Mattapoisett and Bourne address claimants who base their claims solely on on-call employment. Here, the claimant’s monetary eligibility for benefits derives from multiple base period jobs. Under these circumstances, we consider whether the claimant’s work for the employer was her primary or subsidiary employment. The DUA distinguishes between primary and subsidiary part-time jobs worked contemporaneously during the base period by examining the number of hours, wages earned, duration of the employment, and whether a particular job was other than the claimant’s primary occupation. *See* the DUA Service Representative Handbook (SRH) §§ 1220(L) and (N).²

A copy of the claimant’s base period wages was entered into the record as Remand Exhibit #8. The claimant had three employers, Employer D, Employer H, and the employer at issue in this case. It shows the following:

	2Q 2016	3Q 2016	4Q 2016	1Q 2017
Employer D	\$1,833.12	\$360.96	\$2,230.96	\$56.48
Employer H		\$1,486.50	\$972.50	\$237.00
Employer			\$360.00	\$2,060.00

As to the quarterly wages, no primary employer is apparent, as strictly defined under SRH §§ 1220(L) and (N). No employer paid the claimant substantially more than another employer. Although Employer D paid the claimant the most in her base period as a whole, the claimant was paid the most from this employer just prior to the filing of her unemployment claim. Moreover, the claimant only worked for this employer in the period of time leading up to the filing of the claim. The review examiner asked the claimant several times during the remand hearing whether she worked for the employer at the same time as she worked for another employer, and the claimant indicated that she did not. *See* Consolidated Finding of Fact # 10.

Although some factors tend to suggest that the claimant based her claim on her work with this employer, we decline to hold that this job was her primary employment in the base period. Over the course of the base period, Employer D paid the claimant almost twice what she was paid with this employer. The claimant worked longer for Employer D, and the claimant’s benefit rate would be significantly lower if the wages from Employer D did not exist. For all intents and purposes, Employer D should be treated as the primary base period employer. Because we conclude that the work with this employer was not the primary base period employment, we conclude that the reasoning from Mattapoisett does not disqualify the claimant from receiving

² *See also* 430 CMR 4.74, which sets forth the same criteria for deciding whether a claimant’s most recent work was full-time or part time to determine if a “constructive deduction” should be applied to a claimant’s weekly benefit amount.

benefits. *See* SRH §§ 1220(L) and (N); *see also* Board of Review Decision BR-123410-A (Sept. 28, 2012).³

However, this does not mean that the claimant is eligible to receive benefits. In order to receive unemployment benefits, a person must generally be available for full-time work.⁴ During the remand hearing, the claimant testified about her school schedule in the spring and fall semesters of 2017. As to the spring semester, the claimant testified that she was not available to work five days per week, because she needed to attend classes and study. This is reflected in the review examiner's Consolidated Findings of Fact ## 12 and 13. As to the fall semester, the claimant appears to have had similar limitations, with even more hours devoted to school. *See* Consolidated Finding of Fact # 24. Attendance at school is not an acceptable or good cause reason for limiting availability. The DUA views attendance and time spent on schoolwork to be a voluntary choice, rather than a compelling necessity. Therefore, the claimant is not eligible for benefits for the periods of time she was attending school. However, she is eligible to receive benefits during the summer, when she was available for full-time work and searching for it. *See* Consolidated Finding of Fact # 23.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits, beginning April 2, 2017, pursuant to G.L. c. 151A, §§ 29 and 1, was correct, but only in part. Because, while the claimant was not available for full-time work while she attended school, she was able, available, and actively seeking work for the period of time between the school semesters. She is eligible for benefits during that time.

³ Board of Review Decision BR-123410-A is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

⁴ Exceptions to this rule, mainly dealing with a physical inability to work full-time or an urgent reason for not being available full-time, are inapplicable here. *See* 430 CMR 4.45.

The review examiner's decision is affirmed in part and reversed in part. The claimant is denied benefits for the period from April 2, 2017, through May 20, 2017, and from September 10, 2017, through December 16, 2017. The claimant is eligible to receive benefits for the period from May 21, 2017, through September 9, 2017.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 15, 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