

**Because the claimant worked during the week at issue, and earned less than the benefit rate after taking into account the earnings exclusion, he was in partial unemployment and eligible to receive unemployment benefits.**

**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  
Charlene A. Stawicki, Esq.  
Member**

**Issue ID: 0022 0421 75**

## **BOARD OF REVIEW DECISION**

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

The employer appeals a decision by Eric Sullivan, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits for the week beginning May 28, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant filed a claim for unemployment benefits with the DUA, and the claim was determined to be effective March 26, 2017. On September 1, 2017, the DUA sent the claimant a Redetermination Notice of Disqualification, informing him that he was eligible to receive partial unemployment benefits for the week beginning May 28, 2017, but he had been overpaid \$60.00 for that week. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and awarded partial unemployment benefits in a decision rendered on November 15, 2017.

Benefits were awarded after the review examiner determined that the claimant was in partial unemployment for the week beginning May 28, 2017, pursuant to G.L. c. 151A, §§ 29(b) and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to allow the employer an opportunity to provide evidence. Both parties attended the remand hearing. 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 eligible to receive benefits for the week beginning May 28, 2017, is supported by substantial and credible evidence and is free from error of law, where the employer offered the claimant work for that week, the claimant worked the hours given to him, and the claimant did not refuse any hours of work.

### **Findings of Fact**

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

1. On 9/1/2017, the claimant was issued a Notice of Disqualification under Section 29(b) & 1(r) of the Law stating that since his earnings were less than the weekly benefit rate plus the [earnings] disregard, the claimant was in partial unemployment from 5/28/2017 through 6/3/2017.
2. The Notice also indicated that the claimant was overpaid \$60 for the week ending 6/3/2017.
3. The claimant opened an unemployment claim which was established with an effective date of 3/26/2017.
4. The claimant was determined to be monetarily eligible for unemployment benefits at the rate of \$742 per week with an earnings disregard of \$247.33.
5. The week of 5/28/2017 through 6/3/2017, the claimant worked on-call part-time for a subsidiary employer working 21 hours and earning \$556.64.
6. The claimant certified for unemployment benefits for the period of 5/28/2017 through 6/3/2017 stating that he worked and had earnings of \$616.40.
7. The claimant over-reported his actual earnings.
8. As a result of the over reporting his earnings, the claimant was paid less unemployment benefits than he was entitled to.
9. The claimant worked all hours available and did not refuse any work.
10. The employer did not produce at paystubs or records at the Remand Hearing.

### 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 there was no error in the review examiner's decision.

In order to be eligible for unemployment benefits for the week beginning May 28, 2017, the claimant must have been in a state of unemployment. Because the claimant worked for the employer during that week, he was not in total unemployment, as defined by G.L. c. 151A, §§ 29(a) and 1(r)(2). Rather, the issue to be addressed is whether he 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....

In this case, the review examiner found that the claimant earned \$556.64 during the week of May 28, 2017. He did not refuse any hours of work. This amount of earnings is less than his weekly benefit rate of \$742.00, after taking into account the earnings disregard. Therefore he was in partial unemployment for this week and is eligible to receive partial unemployment benefits.<sup>1</sup>

We, therefore, conclude as a matter of law that the review examiner’s decision to award benefits was supported by substantial and credible evidence, because the claimant’s earnings are less than his benefit rate and he is, therefore, in partial unemployment, pursuant to G.L c. 151A, § 1(r)(1).

The review examiner’s decision is affirmed. The claimant is entitled to receive benefits for the week beginning May 28, 2017, subject to the earnings disregard. The amount of his earnings, \$556.64, shall be applied to his claim for this week. If the employer has any inquiries regarding the charges to its account for this week, it may contact the DUA’s Employer Charge Section at (617) 626-6350.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - February 27, 2018**



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](http://www.mass.gov/courts/court-info/courthouses)

---

<sup>1</sup> The claimant’s work with this employer, which was on call, was subsidiary to other work in his base period. *See Consolidated Finding of Fact #5*. Therefore, he may be in partial unemployment in his benefit year, even when he works some hours. The holding of Town of Mattapoisett v. Dir. of Div. of Employment Security, 392 Mass. 546 (1984) does not apply, where on call work is established as subsidiary in the base period and it continues into the benefit year. *See Board of Review Decision 0021 5572 01* (December 15, 2017).

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