

**Severance payment was not remuneration under G.L. c. 151A, § 1(r)(3), because the claimant presented substantial evidence showing that he had to sign a release of claims in order to receive the lump sum payment.**

**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 2423 73**

## **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 for weeks ending June 24, 2017 through August 5, 2017. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from employment on June 19, 2017. He filed a claim for unemployment benefits with the DUA, which was determined to be effective July 2, 2017. On August 4, 2017, the DUA sent the claimant a Notice of Disqualification, informing him that due to the receipt of remuneration from his employer, he was disqualified from receiving benefits from July 2, 2017 through August 5, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant,<sup>1</sup> the review examiner affirmed the agency's determination and denied benefits in a decision rendered on September 26, 2017.<sup>2</sup> We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant received remuneration pursuant to G.L. c. 151A, § 1(r)(3), and, thus, he was disqualified from receiving benefits under 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 remanded the case to the review examiner to obtain further evidence pertaining to whether the claimant had to sign a release of claims in order to receive the employer payment at issue. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her 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 employer's \$4,816.15 lump sum payment was disqualifying remuneration under G.L. c. 151A, § 1(r)(3), is supported by substantial and credible evidence and is free from error of law, where the

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<sup>1</sup> The DUA invited the employer to participate in all of the hearings in this case as a witness only.

<sup>2</sup> The review examiner's decision denies benefits beginning the week ending June 24, 2017. Because the effective date of the claimant's unemployment claim is July 2, 2017, her decision effectively disqualifies the claimant during the same weeks as the DUA's determination, from July 2, 2017, through August 5, 2017.

consolidated findings after remand show that the claimant had to sign a release of claims in order to receive that payment.

### Findings of Fact

The review examiner's consolidated findings of fact and note discussing her assessment of the documentary evidence are set forth below in their entirety:

1. The claimant worked as an account manager for the employer, a computer training business, from March 2012 until his layoff on June 19, 2017.
2. On July 3, 2017, the claimant filed a new claim for unemployment benefits and obtained an effective date of July 2, 2017.
3. During the 4 completed financial quarters prior to the effective date of his claim, the claimant earned an average of \$1057 weekly through a combination of base wages and commission.
4. At the time of his separation, the employer provided the claimant with a lump sum payment of \$4846.15 (gross).
5. The lump sum was equivalent to 7 weeks of the claimant's base pay only, covering the weeks ending June 24, 2017 through August 5, 2017.
6. The severance was offered in exchange for a signed Release of Claims.
7. On June 19, 2017, the claimant was presented with the Release of Claims. He was required to sign and return the document that same day.
8. The claimant was not provided a copy of the page containing his signature.
9. No portion of the severance would have been payable in the absence of a signed release.

### NOTE:

The employer's failure to participate in the hearing prevented the Review Examiner from obtaining a complete, signed copy of the June 19, 2017 separation agreement as requested by the Board of Review. The release of claims, less the signature page, has been entered as Remand Exhibit 6.

The claimant submitted documentation of a July 5, 2017 deposit to his checking account (Remand Exhibit 9). The \$3423.97 deposit includes the lump sum severance payment less deductions (amount unknown) in addition to multiple personal checks.

## 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 original 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. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant's severance payment was disqualifying remuneration.

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's findings indicate that upon being laid off by his former employer on June 19, 2017, the claimant ceased performing any services. The question before us is whether, even though the claimant did not work for the employer, he still continued to receive remuneration. If he did not receive remuneration, he was in total unemployment. If he received remuneration that was less than his weekly benefit rate,<sup>3</sup> 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

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<sup>3</sup> The DUA's electronic record-keeping system, UI Online, shows that the claimant's weekly benefit rate for this claim was \$ 604.00.

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.

As a general rule, G.L. c. 151A, § 1(r)(3), disqualifies a claimant from benefits while receiving severance, separation, or dismissal pay. The Massachusetts Appeals Court has held that payments made to a severed employee in return for a general release of claims, however, 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.* (1996). Thus, if the claimant signed such a release of claims, his employer's \$4,816.15 lump sum payment will not be considered to be remuneration and he will be in total unemployment.

Consolidated Findings ## 6 and 7 show that, on June 19, 2017, the employer offered the claimant seven weeks of severance pay in the gross amount of \$4,846.15 in exchange for signing a release of claims. The offer letter, describing a comprehensive forfeiture of the claimant's right to bring legal claims against the employer, is now in the record as Remand Exhibit 6. Missing is a copy of the signature page, which, as the claimant explained, he turned into the employer without keeping a copy.<sup>4</sup> Because the employer did not respond to hearing notices requesting its participation at the hearing, we accept as the best available evidence a bank deposit transmittal record showing a \$3,423.97 deposit on July 5, 2017, together with the claimant's undisputed testimony that this reflected the employer's net severance payment, plus a few personal checks. *See New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 471 (1981) ("If the proponent has presented the best available evidence, which is logically adequate, and is neither contradicted nor improbable, it must be considered."), *quoting* L.L. Jaffe, *Judicial Control of Administrative Action* 598, 608 (1965). Although difficult to read, the employer's name appears on the front of the check, and the bank record shows that it was deposited on July 5, 2017. *See* Remand Exhibit # 9. This deposit date, roughly two weeks after the claimant's separation date, logically coincides with when the employer would have issued the severance payment.<sup>5</sup>

On this record, we are satisfied that the claimant's lump sum severance payment is not remuneration within the meaning of G.L. c. 151A, § 1(r)(3), because it was paid as consideration for signing the type of release of claims described in White.

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<sup>4</sup> The claimant's testimony about why he could not produce the signature page into evidence, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

<sup>5</sup> Remand Exhibit # 6, the severance offer letter, provides that payment would be made no later than 14 days after the effective date of the agreement.

The review examiner's decision is reversed. The claimant is not subject to disqualification, pursuant to G.L. c. 151A, §§ 29 and 1(r), for the period of time beginning July 2, 2017, through August 5, 2017, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 19, 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)

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.

AB/rh