

Held the claimant was available for full-time employment where she was able to work 32 hours per week and this is considered full-time in her usual occupation. She is eligible under G.L. c. 151A, § 24(b).

**Board of Review
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Issue ID: 0022 3634 38

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to deny benefits during the period July 2 through August 5, 2017. Benefits were denied on the ground that the claimant was not available for full-time work, as required by G.L. c. 151A, § 24(b).

The claimant had filed a claim for unemployment benefits, which was denied for the weeks July 2 through August 5, 2017, in a determination issued by the agency on September 14, 2017. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on October 21, 2017. The claimant sought review by the Board, which affirmed, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On August 10, 2018, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence specifically concerning the claimant's availability or unavailability to work a 40-hour week during the relevant time period. The claimant attended the remand hearing and, thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's original decision, which concluded that the claimant was ineligible for benefits under G.L. c. 151A, § 24(b), because she was not available for full-time work, is supported by substantial and credible evidence and is free from error of law, where the record after remand clarifies that the claimant's occupation considers 32 hours per week to be full-time employment.

After reviewing the entire record, including the recorded testimony and evidence from the original and remand hearings, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked for the employer, a child abuse protection agency, as a youth educational counselor, from October 2015 until June 30, 2017. The claimant was paid about \$20.00 per hour.
2. The claimant's position was created as a 32-hour position.
3. The claimant's benefits included paid holidays, paid vacations, health insurance and sick time.
4. Beginning in the fall of 2015, the claimant worked for the employer 32 hours per week and attended school part time.
5. On June 5, 2017, the claimant started summer classes in pursuit of a mental health counseling license which were scheduled to end on August 7, 2017.
6. The [claimant's] course schedule for the summer classes was as follows:

Monday: Internship Seminar (Class-3 Credits) 6:00 p.m. to 9:30 p.m.
Tuesday: Mental Health Counseling Internship 5:00 p.m. to 9:00 p.m.
Wednesday: Mental Health Counseling Internship 5:00 p.m. to 9:00 p.m.
Thursday: Mental Health Counseling Internship 5:00 p.m. to 9:00 p.m.
Friday: Mental Health Counseling Internship 9:00 a.m. to 4:00 p.m.
Sunday: Women and the Family (Class-3 Credits) 9:00 a.m. to 4:00 p.m.
7. The internship was required for the claimant's Mental Health Counseling Masters Degree program.
8. On June 30, 2017, the claimant separated from the employer.
9. For the week beginning July 2, 2017 through August 5, 2017, the claimant was available for work on Monday, Tuesday, Wednesday, Thursday and Saturday.
10. For the week beginning July 2, 2017 through August 5, 2017, the claimant was physically and mentally capable of work.
11. The claimant has searched for work on at least three different days of each week she has claimed benefits.
12. The maximum hours of work per week the claimant is looking for is 32 hours due to her internship.
13. On September 14, 2017, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Disqualification determining the claimant was

not available for work and was not entitled to receive benefits for the period beginning July 2, 2017 through August 5, 2017, because she was available for work only during a specific timeframe of hours which was too restrictive to meet the requirements of the law.

14. Mental Health Counselor positions have been advertised as 32 hours - Full-time. (Remand Exhibit 14)

15. On February 10, 2018, the claimant was approved for Section 30 Training Opportunities Program benefits. (Remand Exhibit 16)

16. The claimant was available for full-time work.

Ruling of the Board

In accordance with our statutory obligation, we review the record to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original decision is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consolidated Finding # 16 is a legal conclusion to be made by the Board of Review. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463–464 (1979) (“Application of law to fact has long been a matter entrusted to the informed judgment of the board of review.”). In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we reject the review examiner's original legal conclusion that the claimant was ineligible for benefits during the relevant period.

At issue is whether the claimant met the requirements under G.L. c. 151A, § 24(b), which provides, in pertinent part, as follows:

[An individual, in order to be eligible for benefits under this chapter, shall] . . . (b)
Be capable of, available, and actively seeking work in his usual occupation or any other occupation for which he is reasonably fitted

Although not specifically stated in G.L. c. 151A, § 24(b), other provisions of the Massachusetts Unemployment Statute show that unemployment benefits are intended to assist claimants seek and return to *full-time* work. *See, e.g.*, G.L. c. 151A, §§ 29 and 1(r), which provide for the payment of benefits only to those who are unable to secure a full-time weekly schedule of work.

The review examiner originally disqualified the claimant because she was only looking for 32 hours of work per week, not 40. The District Court Order continued to focus on whether the claimant was available for a 40-hour per week job. However, the definition of full-time work under the DUA's regulations is not so rigid. 430 CMR 4.44 defines part-time employment as employment at less than the full-time work schedule customary for the individual's occupation. In this case, the claimant was in the field of mental health counseling. *See* Consolidated Finding # 1. The record shows that a full-time work schedule in mental health counseling is 32 hours per

week. *See* Consolidated Finding # 14, Remand Exhibit 14.¹ Because full-time employment in this occupation is only 32 hours per week, and the claimant was available for a 32-hour per week position, she is considered to have been available for full-time employment. She did not have to be available for 40 hours.

Consolidated Finding # 12 provides that the claimant was available for 32 hours of work per week from July 2, 2017, through August 5, 2017. Thus, we are satisfied that the claimant met the DUA's requirement to be available for full-time work in her usual occupation during the relevant period.

It is also worth noting that it is implicit in the active work search requirement under G.L. c. 151A, § 24(b), that the claimant have searched for jobs for which she was suited. Portions of the record indicate that the claimant did not yet have the Master's degree needed for many of the jobs she sought. *See* Exhibit 5. However, the claimant also testified that the credentials required for the job she had just been laid off from included a Master's degree, which she did not have at the time, but they hired her anyway.² In light of this evidence, we decline to conclude that the claimant was not searching for suitable employment.

We, therefore, conclude as a matter of law that the claimant has shown that she has satisfied the requirements to be eligible for benefits under G.L. c. 151A, § 24(b).

¹ We also note that the claimant's job prior to layoff was 32 hours per week with full benefits, which would suggest that it was considered full-time employment. *See* Consolidated Findings ## 2–4.

² This portion of the claimant's testimony, while not explicitly incorporated into the review examiner's findings, 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).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period July 2, 2017, through August 5, 2017, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 29, 2018



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

AB/rh