

**Under G.L. c. 151A, §§ 29(b) & 1(r), the claimant is ineligible for benefits during any week in which his part-time earnings exceed his weekly benefit rate plus earnings disregard.**

**Board of Review  
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**Issue ID: 0023 5110 97**

## **BOARD OF REVIEW DECISION**

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

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award partial 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 on October 31, 2017. On May 11, 2018, the DUA issued a Corrected Notice of Approval under G.L. c. 151A, §§ 29(b) and 1(r), stating that the claimant was entitled to partial benefits beginning November 5, 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 affirmed the agency's initial determination and awarded partial benefits in a decision rendered on June 23, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was in partial unemployment and, thus, was not disqualified under 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 obtain additional testimony and documentary evidence pertaining to the claimant's earnings with the instant employer. Only the employer 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 decision, which concluded that the claimant was entitled to partial benefits, is supported by substantial and credible evidence and is free from error of law, where, after remand, the review examiner found that during the majority of the weeks at issue, the claimant's earnings exceeded her weekly benefit rate plus earnings disregard.

### **Findings of Fact**

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

1. In November 2015, the claimant started working for the instant employer, a municipality, as a part-time maintenance person.
2. The claimant has always worked part-time for the instant employer.
3. The claimant was paid \$26.36 per hour by the instant employer until April 1, 2018. The claimant's rate of pay effective April 1, 2018 was \$27.10 per hour.
4. The claimant was hired to work by the instant employer 15 hours per week. The claimant was initially scheduled [to] work for the instant employer on Mondays from 8AM until 4PM and on Tuesdays from 8AM until 3PM. The claimant also worked more hours if needed for the instant employer.
5. The claimant also works part-time for the 2nd employer as a painter.
6. On October 31, 2017, the claimant filed an initial claim for unemployment insurance benefits (Exhibit 1). The effective date of the claim is the week beginning October 29, 2017.
7. On the employment history records with the Department of Unemployment Assistance (hereinafter the Department), an employment end date with the 2nd employer is listed as October 20, 2017 and a separation reason is listed as layoff (Exhibit 2 Page 3).
8. The claimant's base period on the claim effective October 29, 2017 runs from the 4th quarter 2016 through the 3rd quarter 2017 (Exhibit 2A). Both the instant employer and the 2nd employer are base period employers.
9. During the claimant's base period, the claimant was paid the following wages (Exhibit 2A):

Employer	4th Quarter 2016	1st Quarter 2017	2nd Quarter 2017	3rd Quarter 2017
Instant Employer	\$4,789.32	\$5,829.36	\$5,074.30	\$5,720.12
2nd Employer	\$1,272	\$0.00	\$1,921	\$3,412.50
10. On a questionnaire submitted to the Department, the claimant listed that he worked part-time for the 2nd employer at the same time he worked for the instant employer (Exhibit 7).
11. The claimant's weekly benefit rate is: \$310.00. The claimant's weekly earnings disregard amount is: \$103.33.

12. The claimant has been able and available for work with the instant employer in his part-time capacity and since the week beginning October 29, 2017 and continues to be able and available for work with the instant employer.
13. The claimant has not turned down any work from the instant employer.
14. The claimant has continued to work part-time for the instant employer since the week beginning October 29, 2017 through present time.
15. Effective April 1, 2018, the instant employer increased the claimant's hours from 15 to 19 hours per week. Effective April 1, 2018, the claimant also works Wednesdays from 8AM-12PM with the instant employer.
16. On the claim effective October 29, 2017, the claimant has requested unemployment insurance benefits for the weeks ending November 4, 2017 through April 7, 2018 (Exhibit 1).
17. On May 11, 2018, the Department issued a Notice of Approval granting the claimant benefits under Sections 29(b) & 1(r) of the Law commencing the week beginning November 5, 2017, and subsequently thereafter if otherwise eligible (Exhibit 8).
18. The employer has calculated [the] claimant's hours and earnings during each week between the week[s] ending November 4, 2017 and April 7, 2017. The employer calculated this information based upon the Department's week running from Sunday to Saturday. The claimant's hours and earnings during each week between the weeks ending November 4, 2017 and April 7, 2018 are as follows (Remand Exhibit 5C Page 1):

<b>Week Ending</b>	<b>Hours Worked</b>	<b>Hourly Rate</b>	<b>Weekly Earnings</b>
November 4, 2017	15	\$26.36	\$395.40
November 11, 2017	15	\$26.36	\$395.40
November 18, 2017	15	\$26.36	\$394.40
November 25, 2017	15	\$26.36	\$395.40
December 2, 2017	15	\$26.36	\$395.40
December 9, 2017	16	\$26.36	\$421.76
December 16, 2017	17	\$26.36	\$448.12
December 23, 2017	18	\$26.36	\$474.48

December 30, 2017	16	\$26.36	\$421.76
December 30, 2017	2 Hours Holiday Overtime	\$39.54	\$79.08
January 6, 2018	19.5	\$26.36	\$514.02
January 13, 2018	17	\$26.36	\$448.12
January 20, 2018	17.5	\$26.36	\$461.30
January 27, 2018	19.5	\$26.36	\$514.02
February 3, 2018	16	\$26.36	\$421.76
February 10, 2018	19	\$26.36	\$500.84
February 17, 2018	17.5	\$26.36	\$461.30
February 24, 2018	17	\$26.36	\$448.12
March 3, 2018	16	\$26.36	\$421.76
March 10, 2018	18	\$26.36	\$474.48
March 17, 2018	18	\$26.36	\$474.48
March 24, 2018	19.5	\$26.36	\$514.02
March 31, 2018	18.5	\$26.36	\$487.66
April 7, 2018	16	\$26.36	\$421.76

### 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 reject the review examiner's legal conclusion that the claimant is entitled to benefits each week as of the week ending November 4, 2017. The consolidated findings establish that during the majority of the weeks at issue, the claimant is not entitled to benefits because his earnings exceeded his weekly benefit rate plus earnings disregard.

In analyzing the matter before us, we look to G.L. c. 151A, § 29, which authorizes benefits be paid only to those in "total unemployment" or "partial unemployment." These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(1) "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 . . . .

(2) "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.

After remand, the review examiner found that the claimant continued to work part-time for the instant employer after he was laid off by his other base period part-time employer. Under these circumstances, pursuant to G.L. c. 151A, §§ 29(b) and 1(r), the claimant shall be entitled to partial benefits during any week in which he works less than a full-time schedule of work, his earnings are less than his weekly benefit rate plus earnings disregard, and he accepts all suitable work offered by the employer. The review examiner's consolidated findings establish that during the period at issue here, the weeks ending November 4, 2017, through April 7, 2018, the claimant accepted all work offered by the instant employer, which amounted to 15 to 19.5 hours each week. However, the findings also establish that during the majority of these weeks, the claimant's earnings exceeded his weekly benefit rate plus earnings disregard of \$413.33. Specifically, the claimant's earnings exceed \$413.33 during the weeks ending December 9, 2017 through April 7, 2018, and his earnings were less than \$413.33 between the weeks ending November 4, 2017 and December 2, 2017. In light of these findings, we conclude that the claimant was not in partial unemployment between the weeks ending December 9, 2017, and April 7, 2018, and he was in partial unemployment within the meaning of G.L. c. 151A, §§ 29(b) and 1(r), between the weeks ending November 4, 2017, and December 2, 2017.

We affirm that part of the review examiner's decision that awarded benefits to the claimant between the weeks ending November 4, 2017, and December 2, 2017. However, we reverse the part of the decision that awarded benefits to the claimant between the weeks ending December 9, 2017, and April 7, 2018, as his earnings with the instant employer rendered him ineligible for unemployment benefits during this period of time.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - October 31, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



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](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.

SVL/rh