

The claimant's military separation pay constitutes disqualifying severance pursuant to G.L. c. 151A, § 1(r)(3).

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0025 4730 66

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 unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we reverse in part and affirm in part.

Following his discharge from the employer on May 1, 2018, the claimant filed a claim for unemployment benefits with the DUA. In a determination issued on June 7, 2018, the claimant was denied benefits for the period of May 6, 2018 through January 12, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties via telephone, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 24, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant received disqualifying remuneration for the period of May 6, 2018, through January 12, 2019, and thus, was disqualified 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 additional evidence. Both parties attended the remand hearing via telephone. 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 received disqualifying remuneration for the period of May 6, 2018, through January 12, 2019, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant most recently started working for the employer, a military branch, on August 21, 2008. The claimant was placed on active duty at this time. The claimant had previously been enlisted by the employer in November 1999.

2. The claimant was a Staff Sergeant.
3. The claimant was paid two times per month (24 times per year). The claimant was paid on the 1st and 15th of the month.
4. The claimant nor the employer know the claimant's correct gross weekly salary. The claimant's approximate weekly gross salary was: \$1,457.30.
5. The claimant's last date of work with the employer was on May 1, 2018. The claimant was separated from work at that time. This was an honorable discharge.
6. On the employer's DD Form 214 for the claimant, the employer lists the following: "Separation Pay \$38,060.57" (Exhibit 8).
7. The claimant has not signed a release of claims to receive the severance payment.
8. The employer calculated the severance payment based upon years of service.
9. The claimant has an unemployment insurance claim effective the week beginning May 6, 2018 (Exhibit 1).
10. The employer is the only base period employer.
11. The claimant's correct gross wages that he was paid during his base period are (Exhibit 4):

	2 nd Quarter 2017	3 rd Quarter 2017	4 th Quarter 2017	1 st Quarter 2018
Employer	\$18,945	\$18,945	\$18,945	\$18,945
Total: \$75,780				

12. On June 7, 2018, the Department issued a Notice of Disqualification denying the claimant benefits under Section 1(r) (3) of the Law from May 6, 2018 through January 12, 2019 (Exhibit 11). As a result of the Disqualification, the Department extended the claimant's benefit year to expire on January 11, 2020.
13. On October 10, 2018, the claimant received the separation pay from the employer. The gross amount of the separation pay was \$38,060.57. The claimant's net payment for the separation pay was approximately a little over \$27,000.

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. In addition, after remand, we agree with the review examiner's conclusion that the claimant's separation pay constitutes disqualifying remuneration pursuant to G.L. c. 151A, § 1(r), as outlined below.

G.L. c. 151A, § 29 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.

(3) For the purpose of this subsection, "Remuneration", any 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 period of regular employment

As the claimant performed no "wage-earning services" after May 1, 2018, the issue before the Board is whether the claimant received any remuneration from the employer which could be attributable to any period after this date. At the time of his separation, the claimant was promised "separation pay" of \$38,060.57. The claimant was eventually issued this payment on October 10, 2018. This payment exhibits the classic attributes of severance pay, including that the amount was directly related to the claimant's length of service, the payment was not subject to limitation if the claimant obtained employment with other employers, and the claimant was permanently severed from employment. See Bolta Products Division v. Dir. of Division of Employment Security, 356 Mass. 684, 689–690 (1970).¹ In these circumstances, the payment constituted remuneration pursuant to G.L. c. 151A, § 1(r).

¹ 430 CMR 4.38 defines "Severance Pay" as "a payment to an employee at the time of separation in recognition and consideration of the past services the employee has performed for the employer. The amount of the payment is usually based on years of service." This definition gives further support to our conclusion that the claimant received severance pay and, therefore, remuneration.

Because the claimant received this remuneration in the form of a lump sum, it must be determined how many weeks of his regularly salary this payment represented. The lump sum amount of \$38,060.57 divided by the claimant's regular weekly salary of \$1,457.30 equals approximately 26 weeks.

We, therefore, conclude as a matter of law that the claimant received 26 weeks of remuneration in excess of his benefit rate of \$729.

The review examiner's decision is modified. The claimant is denied benefits for 26 weeks, from October 7, 2018, through April 6, 2019. The claimant is eligible to receive benefits from May 6, 2018, through October 6, 2018, and again beginning April 7, 2019, if otherwise eligible. His benefit year shall be extended by 26 weeks.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2019



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

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.

JRK/rh