

Following claimant's discharge, an arbitrator awarded reinstatement with back pay, but the employer appealed that decision to Superior Court. Because the Superior Court upheld the back pay award and the claimant has finally received his back pay, he must repay DUA all unemployment benefits. The back pay is disqualifying remuneration under G.L. c. 151A, § 1(r)(3).

**Board of Review
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Issue ID: 0025 6422 15

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 affirm.

The claimant was discharged from his position with the employer on April 28, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 25, 2018. 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 denied benefits in a decision rendered on August 17, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that due to an arbitration award granting full back pay to the claimant, he was disqualified under G.L. c. 151A, §§ 29(a) 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 determine whether the claimant had actually received his back pay award. 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, which decided that an arbitration award of back pay constituted disqualifying remuneration under G.L. c. 151A, § 1(r)(3), is supported by substantial and credible evidence and is free from error of law in light of new consolidated findings confirming that the employer has finally provided the claimant with the back pay.

Findings of Fact

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

1. The claimant was a Director of Occupational Health, for the employer, the City [A].
2. The claimant began working for the employer on October 21, 2014.
3. The claimant was paid \$57.54 per hour for 35 hours of work per week.
4. The claimant reported to work on April 28, 2017.
5. On April 28, 2017, the employer informed the claimant that he was being discharged, effective immediately.
6. The claimant filed for unemployment benefits and received an effective date of April 30, 2017.
7. DUA established the claimant's weekly benefit amount to be \$742.
8. The claimant is member of SANA Local 9158 Union.
9. The claimant grieved his termination.
10. The grievance went to an arbitration.
11. On March 19, 2018, the arbitrator found for the claimant. The remedy was found to be to rescind the claimant's termination and reduce discipline to a Letter of Warning. The arbitrator also found that the claimant was entitled to all lost compensation and/or contractual benefits.
12. The City [A] appealed the arbitrator's decision to Superior Court.
13. On May 25, 2018, DUA issued a Notice of Disqualification, indicating that the claimant was not entitled to unemployment benefits for the time period beginning April 30, 2017 through April 28, 2018, because the back pay which he received from his employer constituted remuneration during a period of regular employment. The Notice further indicated that the disqualification resulted in an overpayment in the amount of \$23,760, representing the weeks which he was paid by DUA for the time period beginning May 7, 2017 through February 10, 2018.
14. The award of back pay was not reduced by the amount of unemployment the claimant received during the aforementioned weeks.
15. The claimant appealed the disqualification.
16. As of the date of the remand hearing (January 15, 2019), the Superior Court issued a decision.

17. The Superior Court issued a decision on October 26, 2018.
18. There has been no appeal of the Superior Court's decision.
19. The limitations period for appealing the Superior Court's decision has expired.
20. As of the date of the remand hearing (January 15, 2019), the claimant has received back pay from the employer.
21. The claimant received \$175,755.17 in back pay from the employer.
22. The back pay paid to the claimant covers April 28, 2017 through November 28, 2018.
23. On January 15, 2019, the claimant repaid DUA moneys paid in the amount of \$23,760.

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. After such review, the Board adopts the review examiner's consolidated findings of fact except to note a minor error in Consolidated Finding # 17. Remand Exhibits 14 and 15 show that the date of the Superior Court's decision was actually October 24, 2018.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits based upon the new findings of fact.

In rendering her decision, the review examiner relied upon the following statutory provisions. G.L. c. 151A, § 29(a) authorizes benefits be paid to those in "total unemployment." Total unemployment is defined by G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

(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.

"Remuneration" is defined at G.L. c. 151A, § 1(r)(3), which states as follows:

¹ Exhibit 14 is the Superior Court docket sheet and Exhibit 15 is the Superior Court's Memorandum of Decision, which were both dated October 24, 2018. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. 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).

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; . . .

Remuneration shall be deemed to have been received in such week or weeks in which it was earned or for such week or weeks, including any fractions thereof, to which it can reasonably be considered to apply. If the length of the period to which the remuneration applies is not clearly identified, such period shall be determined by dividing such remuneration by the amount of the individual's average weekly wage.

(Emphasis added.)

The findings provide that, through his union, the claimant grieved his termination from employment and succeeded in obtaining an order from an arbitrator reinstating him with full back pay. *See Consolidated Findings of Fact ## 9–11.* It is settled law that an award of back pay is remuneration within the meaning of G.L. c. 151A, § 1(r)(3). Meyers v. Dir. of Division of Employment Security, 341 Mass. 79, 82 (1960) (upon award of back pay, DUA properly issued a notice of redetermination and overpayment of benefits concluding that the claimant was not in total unemployment, as the award of back pay was remuneration from the employer for wages).

In Meyers, the employer promptly complied with the arbitration award, paying the claimant back wages three weeks after the arbitrator's decision. Id. at 80–81. In the present case, however, the employer did not immediately comply with the arbitrator's reinstatement and back pay award, choosing instead to exercise its right to appeal the arbitrator's decision to court. As of the date of the original hearing, the claimant had not received any back pay because that appeal was pending.² We remanded to find out the current status of the employer's arbitration appeal. The consolidated findings now show that the Superior Court upheld the arbitrator's back pay award, the employer has not further appealed the court's decision, and it has finally provided the claimant with his back pay. Consolidated Findings ## 17–20. Because the claimant has now received wages during the period of time when he had originally received unemployment benefits, he is obligated to return those benefits to the DUA.

Pursuant to Meyers, this award of back pay is remuneration and, we, therefore, conclude as a matter of law that the claimant is disqualified from receiving benefits under G.L. c. 151A, §§ 29(a) and 1(r).

² See Finding of Fact # 17 from the original hearing decision, entered into evidence as Remand Exhibit 2.

The review examiner's decision is affirmed. The claimant is denied benefits for the period April 30, 2017 through April 28, 2018.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2019



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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