

Despite not having a formal job offer, the claimant proved that he had already satisfied all of the hiring contingencies for being hired with the new employer. Thus, at the time he left his current job with the employer, he did so in good faith to accept new employment on a permanent full-time basis.

**Board of Review
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Issue ID: 0028 2475 22

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 reverse.

The claimant separated from his position with the employer on November 18, 2018. He filed a claim for unemployment benefits with the DUA, effective December 9, 2018, which was denied in a determination issued on February 16, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 16, 2019. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant did not show that he voluntarily separated from employment in good faith to accept a new full time job, and that he became separated from such new employment for good cause attributable to the new employer. Thus, she concluded that he was disqualified under G.L. c. 151A, § 25(e)(1). 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 his offer of work by the new employer. Both parties 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 original decision, which concluded that the claimant did not show that he had a firm job offer of new employment before resigning from his current employer, 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 and credibility assessment are set forth below in their entirety:

1. On March 25, 2017, the claimant took the 2017 civil service exams for Police Officer (Cities & Towns and MBTA) and State Trooper. The passing score for both is 70%. The claimant passed with 87 and 86.50 respectively. The claimant is a disabled veteran, which adds 2 points to his scores.
2. On or about September 1, 2017, the claimant learned that he was number 53 on the [Employer A] Civil Service List.
3. The claimant began working as an armed security guard for the employer, a security company, on November 17, 2017.
4. On February 26, 2018, the claimant received an email with a vacancy notice for Permanent Full-Time Police Officer for the [Employer A]. The email indicated that, if interested, the claimant should report to the HR director ([AA]) on or before March 9, 2018.
5. The claimant did so and was given information to attend a mandatory orientation on March 17, 2018, where he would be given more information and a sample of his hair would be cut for drug screening.
6. The claimant attended the March 17, 2018, orientation, had a sample of hair taken for the drug screening and was given a folder of documents for the background investigation. Between 150–200 recruits attended the orientation.
7. The claimant was assigned a detective who would guide him and 20 other recruits through the recruitment process. The detective informed the claimant he was required to pass each step of the process before moving on to the next. As long as he was invited to move to the next step, he would know he had passed the previous step.
8. On August 23, 2018, the claimant was given a letter indicating it was a “Conditional Offer of Employment.” The letter was clear that it was not a final offer, but was conditioned on the claimant successfully passing the medical and psychological screening, and the Physical Abilities Test (PAT).
9. The claimant would not have received the August 23, 2018, letter had he not passed the background investigation.
10. On August 31, 2018, the claimant received an email with the dates of his medical appointments which were scheduled for various dates in September.
11. The claimant had initially worked for the employer full-time, Monday – Friday, for 40 hours per week. In or about September 2018, the claimant requested to have his hours reduced and began working 24 hours a week, Saturday and Sunday for 12 hours each. The claimant reduced his hours in order to prepare for the PAT.

12. The claimant received a follow up email on October 10, 2018, requesting a copy of the most recent psychiatry/therapy records, which the claimant promptly provided.
13. On October 23, 2018, the claimant received an email from [AA] informing him that he must report for the PAT on October 25, 2018.
14. The claimant would not have received the October 23, 2018, letter had he not passed the medical and psychological testing.
15. On October 25, 2018, the claimant successfully completed the PAT and was handed a letter by [AA] indicating he had passed the PAT and that the [Employer A] intended to hire a recruit class to enter the Academy on December 3, 2018. The letter went on to say that the [Employer A] would use the civil service list to draw candidates by rank, and “(s)hould you fall within the rank at the time of selection, you will be notified and asked to report for a mandatory orientation session to receive a final offer.” The orientation was scheduled for November 19, 2018.
16. The claimant knew prior to beginning the recruitment process that Academy classes were generally more than 100 people in size from conversations he had had with other recruits, police officers, and from the [Employer A]’s website which lists the recruit class sizes. Given his civil service list rank of 53, the claimant reasonably believed he would be given a final offer on November 19, 2018. The claimant had additionally been told by various people throughout the process, including the detective assigned to guide him through the process, that he would receive an offer.
17. On October 29, 2018, the claimant gave his notice, informing the employer that his last day would be November 18, 2018. The claimant worked until that day.
18. As of October 29, 2018, the only contingency to the claimant being invited to enter the Academy was the number of recruits to be selected from the civil service list (on which the claimant was # 53).
19. The claimant quit his position on November 18, 2018, with the instant employer to accept employment with the [Employer A].
20. On November 19, 2018, the claimant attended the Employer A orientation and received a final official offer of employment as a student/probationary police officer for the [City A]. He was to begin at the Academy on December 3, 2018.
21. The claimant’s employment with the [City A] began on December 3, 2018 when he started at the Academy.

22. On the claimant's third day at the Academy, December 5, 2018, the claimant was injured and was advised by his Academy instructors to leave the Academy, heal, and join the next recruit class. The claimant resigned his [Employer A] position on December 5, 2018.

23. The claimant filed a claim for unemployment benefits on December 10, 2018, with an effective date of December 9, 2018.

Credibility Assessment:

The claimant and the employer both attended the initial hearing and the remand hearing. The credible testimony of both the claimant and the employer witness during both hearings was free of disagreement or conflict with regard to the facts of the claimant's employment and separation. The employer had no information on the details of the claimant's prospective employment with the [Employer A]. Given this, and the fact that the claimant provided voluminous documentary evidence at the remand hearing, which corroborated his testimony, the claimant's testimony in this area is accepted as credible. Included in the claimant's documentary evidence was a copy of the pay stub that had been entered at the initial hearing as Ex. 14. It was added to the record at the remand hearing, along with a pay check and the claimant's [City A] 2018 W-2, as Remand Ex. 19.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant has not shown that he left his job with the employer in good faith to accept new full-time employment.

The review examiner disqualified the claimant from receiving benefits pursuant to G.L. c. 151A, § 25(e)(1), which states, in relevant part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent

No disqualification shall be imposed if such individual establishes to the satisfaction of the commissioner that he left his employment in good faith to accept new employment on a permanent full-time basis, and that he became

separated from such new employment for good cause attributable to the new employing unit. . . . An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

The express language of these statutory provisions places the burden of proof upon the claimant.

We believe the consolidated findings establish that, at the time the claimant submitted his notice of resignation on October 29, 2018, he did so in good faith to accept new permanent, full-time employment with the [Employer A]. Although there were many contingencies tied to being hired by the new employer, the record shows that, at the time the claimant gave his notice, he had passed the new employer's drug screening, background investigation, medical and psychological screenings, and a physical abilities test. *See Consolidated Findings ## 5–10 and 12–15.* The only hurdle remaining was whether the claimant fell low enough on the list of civil service candidates ranked by test score. *See Consolidated Finding 15.* Given the claimant's rank of 53 and the fact that the new employer generally chose at least 100 candidates for hire, we agree with the review examiner that the claimant could reasonably conclude that he would be hired. *See Consolidated Findings ## 16 and 18.*

In fact, he was hired. *See Consolidated Finding # 22.*¹ But, three days later he quit. *See Consolidated Finding # 22.* Technically, before the claimant will be eligible for benefits under the provisions of G.L. c. 151A, § 25(e), cited above, he must also show that he left this new employment for good cause attributable to the new employer or due to urgent, compelling, and necessitous circumstances. Consolidated Finding # 22 indicates that he resigned because of an injury. It further suggests that he did so because the new employer's instructors advised him to. *Id.* However, there is a claimant statement in the record which indicates that other employer representatives advised him not to be in such a hurry to leave before seeking further medical attention, and other evidence indicates that his separation was not medically necessary.²

In order to resolve this conflicting evidence, this case would have to be remanded a second time because the review examiner, who is the fact finder, has the responsibility for determining the weight of conflicting evidence. *See Hawkins v. Dir. of Division of Employment Security*, 392 Mass. 305, 307 (1984); *Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463 (1979) (the "inquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited . . . to determining whether the review examiner's findings are supported by substantial evidence."). Because the DUA has already opened another

¹ *See also* Remand Exhibit 19, a pay check, pay stub, and W-2 showing his wages from this new employment. These exhibits are referenced in the review examiner's credibility assessment.

² *See* Exhibit 12, the claimant's December 5, 2018 letter of resignation, which states, "I feel that I will not be able to carry on even though I have not spoken to a doctor at this time. I was advised to seek medical attention before making a rash decision and I declined this offer at this time." *See also* Exhibit 13, a medical report from an emergency room visit on December 5, 2018, which diagnosed an achilles tendon injury, but which states that the claimant should be able to return to work in five days. While not explicitly incorporated into the review examiner's findings, these exhibits are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

eligibility issue in connection with the claimant's separation from the [Employer A], we think another remand in this case is not necessary. (See Issue ID # 0030 1480 29.) Whether or not the claimant left his new employment for good cause attributable to the new employer or for urgent, compelling, and necessitous reasons will be determined in the context of this new issue and with input from the new employer.

Therefore, we render our decision today on narrow grounds. We conclude as a matter of law that the claimant has met his burden to show that he left his job with the employer in this case in good faith to accept new employment on a permanent full-time basis. However, the claimant will not become eligible for benefits until Issue ID # 0030 1480 29, and any other outstanding issues on his claim, are resolved.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 9, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – June 5, 2019



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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