

**Review examiner improperly included the value of the claimant's home equity and 401(k) investment, non-liquid assets, in the calculation of available income to meet the claimant's monthly expenses. Since his household liquid income is insufficient to meet his monthly expenses, he is entitled to a waiver of recovery of the balance of overpaid benefits remaining.**

**Board of Review  
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**Issue ID: 0028 2938 56**

## **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 a waiver of overpaid unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from employment and filed an unemployment claim, effective February 5, 2017. He collected seven weeks of benefits, until the DUA determined he was ineligible under G.L. c. 151A, § 25(e)(1).<sup>1</sup> The claimant appealed that disqualification. Following a hearing, his disqualification was affirmed, and the claimant was required to repay all overpaid benefits.

Subsequently, the claimant filed a request for a waiver of his obligation to repay the benefits. In a determination issued on December 14, 2018, the DUA denied his request. The claimant appealed the waiver determination to the DUA hearings department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination and denied the claimant's request for a waiver of overpaid benefits in a decision rendered on May 29, 2019. We accepted the claimant's application for review and this is the case now before us.

The waiver was denied after the review examiner determined that the recovery of overpaid benefits would not defeat the purpose of benefits otherwise authorized within the meaning of G.L. c. 151A, § 69(c). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which denied the claimant's waiver request by counting non-liquid assets in the calculation of his ability to meet

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<sup>1</sup> See Issue ID 0021 0051 98.

his ordinary and necessary living expenses, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

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

1. The claimant filed a new claim for unemployment benefits effective February 5, 2017.
2. On August 14, 2018, the Department of Unemployment Assistance (DUA) found that the claimant was ineligible from receiving benefits that he was paid for the weeks ending February 18, 2017, February 25, 2017, March 4, 2017, March 11, 2017, March 18, 2017, March 25, 2017, and April 1, 2017, and further held that the claimant had been overpaid in the amount of \$3,724.
3. The DUA determined that the claimant was not at-fault for the overpayment.
4. On December 12, 2018, the DUA received the claimant's request for waiver of recovery of the remaining amount of the overpayment.
5. The claimant used the unemployment benefits he received to pay basic household expenses. The claimant did not incur any financial obligation that he might not have incurred but for the receipt of such benefits.
6. The claimant did not forego applying for any other type of benefits or insurance as a result of receiving unemployment insurance benefits.
7. The claimant lives in a home that he owns with his wife (the wife). The home's value has been assessed at approximately \$280,000. The claimant and the wife owe approximately \$30,000 to the mortgage lender.
8. The claimant has a retirement account with a cash-out value of approximately \$30,000.
9. The claimant is unemployed and receives no income from any source. The wife is employed as a nurse and earns approximately \$3,700 per month.
10. The claimant's monthly mortgage, homeowner's taxes, and home insurance is \$1,933.
11. The claimant and the wife each own their own vehicle, both of which are paid for. The claimant and the wife pay \$330 and \$121 respectively towards monthly auto insurance.
12. The claimant and the wife pay approximately \$500 per month towards health insurance.

13. The claimant pays approximately \$100 per month towards prescription drugs.
14. The claimant and the wife pay approximately \$760 per month towards their utility bills (heat, electric, gas, phone, water and sewer).
15. The claimant and the wife pay approximately \$400 per month in food.
16. The claimant and the wife pay approximately \$200 per month towards life and disability insurance.
17. The claimant and the wife pay approximately \$200 per month towards personal hygiene, household cleaning, and clothing costs.
18. As a result of a DUI, the claimant pays \$150 per month towards an ignition interlock.
19. The claimant has no outstanding student loan debt.
20. The claimant has no dependents.
21. The claimant has approximately \$11,000 in outstanding credit card debt.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 findings of fact except as follows. Since the record shows that the claimant paid a monthly expense of \$1,123 for his mortgage, \$450 in real estate taxes, and \$390 for homeowner's insurance, Finding of Fact # 10 should be a total of \$1,963, not \$1,933.<sup>2</sup> In adopting the remaining findings, we deem 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 ineligible for a waiver.

The claimant's eligibility for a waiver is governed by G. L. c. 151A, § 69(c), which provides, in relevant part, as follows:

The commissioner may waive recovery of an overpayment made to any individual, who, in the judgment of the commissioner, is without fault and where, in the judgment of the commissioner such recovery would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience.

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<sup>2</sup> See Exhibit 5, the claimant's application for a waiver. Although not explicitly incorporated into the review examiner's findings, this exhibit 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).

Under G. L. c. 151A, § 69(c), if the claimant received an overpayment of unemployment benefits without fault, it is his burden to establish either that the recovery of such benefits would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience. Following the hearing, the review examiner found that the claimant was not at fault for the overpayment. *See* Finding of Fact # 3. We agree that, because the claimant had not relinquished a valuable right based upon his receipt of benefits, the recovery of the overpayment would not be against equity and good conscience. *See* 430 CMR 6.03. However, we do not agree with his conclusion that the claimant failed to show that recovery would defeat the purpose of benefits otherwise authorized.

The phrase, “defeat the purpose of benefits otherwise authorized” is defined under the DUA regulation at 430 CMR 6.03, which provides, in relevant part, as follows:

Ordinary and necessary living expenses include, but shall not be limited to:

- (a) fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, accident and health insurance, taxes, and work-related transportation expenses;
- (b) medical and hospitalization expenses;
- (c) expenses for the support of others for whom the individual is legally responsible;
- (d) other miscellaneous expenses which may reasonably be considered as part of an individual’s necessary and ordinary living expenses.

Findings of Fact ## 10–18 show that the claimant’s monthly expenses are about \$4,724 per month. This does not include the additional expenses listed in Exhibit 5 of \$470 in credit card payments, a \$200 home equity loan payment, and \$40 in other medical expenses. Thus, the out-of-pocket expenses are actually \$5,434 per month. Finding of Fact # 9 provides that the claimant’s household income consists of his wife’s monthly salary of \$3,700.<sup>3</sup> Thus, the claimant’s monthly household expenses exceed the monthly income by over \$1,700.

In his decision, the review examiner improperly incorporated the value of the claimant’s retirement account and home equity into his calculation. We have held that non-liquid assets are not to be included in determining whether the claimant has sufficient income and resources to meet his ordinary living expenses. Board of Review Decision 0016 7937 34 (Mar. 9, 2016). As in that case, we do not expect the claimant to take out a home equity loan or withdraw money from a 401(k) account at substantial penalty in order to pay his bills or purchase food for his family.

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<sup>3</sup> This is her gross salary. *See* Exhibit 5. The review examiner did not inquire about her net income, *i.e.*, the amount paid after payroll taxes and other deductions. Consequently, we assume that the monthly cash income is actually less than this.

Since the claimant's ordinary and necessary living expenses exceed his monthly household liquid income, we conclude as a matter of law that he has met his burden to show that recovery of the overpayment would defeat the purpose of benefits otherwise authorized within the meaning of G.L. c. 151A, § 69(c).

The review examiner's decision is reversed. Recovery of the remaining overpaid benefit balance is waived.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - September 18, 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](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.

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