

Although the claimant attends school full-time, she is still available to work full-time, given her school schedule, her desire to work second or third shift, and the type of work she was searching for. She is eligible for benefits under G.L. c. 151A, § 24(b).

**Board of Review
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Issue ID: 0033 2276 47

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 filed a claim for unemployment benefits with the DUA, which was determined to be effective December 22, 2019. On January 25, 2020, the agency sent the claimant a Notice of Disqualification, which notified her that she was not entitled to unemployment benefits. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency's initial determination in a decision rendered on February 14, 2020.

Benefits were denied after the review examiner determined that the claimant did not meet the availability requirements of G.L. c. 151A, § 24(b), and, thus, was disqualified from receiving unemployment benefits under that section of law. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we accept the claimant's application for review. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant is not eligible to receive benefits beginning December 22, 2019, is supported by substantial and credible evidence and is free from error of law, where the review examiner has found that the claimant was attending school full-time, but she was also available to work full-time and searched for suitable work.

Findings of Fact

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

1. The claimant most recently worked part time as a birth registrar at a hospital.
2. The claimant worked a varied, 32-hour a week schedule.

3. The claimant filed a new claim for unemployment benefits with an effective date of December 22, 2019.
4. On December 20, 2019, the claimant began attending a Licensed Practical Nursing program at Lincoln Technical School to obtain a Licensed Practical Nursing diploma. The claimant attends school full time, Monday through Friday, from 8:30 a.m. to 2 p.m. The claimant spent additional time studying on the weekends.
5. For the week ending December 28, 2019, and subsequent weeks, the claimant had no physical limitations or medical issues to prevent her from working.
6. For the week ending December 28, 2019, and subsequent weeks, the claimant was available for work from Monday through Friday, from 3 p.m. to 11 p.m., and Tuesday through Sunday, from 7 p.m. to 11 p.m.
7. During the week ending December 28, 2019, and subsequent weeks, the claimant looked for work five times in each week. The claimant searched for work by searching on the JobRecruiter.com, Indeed.com and signing up for different job search websites.

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 conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact, except for the second set of times mentioned in Finding of Fact # 6. In addition to being able to work Monday through Friday from 3:00 p.m. to 11:00 p.m., the claimant testified that she could work Tuesday through Sunday, from 11:00 p.m. to 7:00 a.m. The review examiner's finding that the claimant was available from 7:00 p.m. to 11:00 p.m. was not supported by this testimony, which the review examiner has clearly credited. As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is disqualified under G.L. c. 151A, § 24(b).

G.L. c. 151A, § 24(b), provides, in pertinent part, as follows:

An individual, in order to be eligible for benefits under this chapter, shall . . . (b)
Be capable of, available, and actively seeking work in his usual occupation or any
other occupation for which he is reasonably fitted

The claimant has the burden to show that she meets each requirement of this statutory provision. See Evancho v. Dir. of Division of Employment Security, 375 Mass. 280, 282–283 (1978). As to the capability and work search requirements, the review examiner has made sufficient findings of fact for us to conclude that the claimant met her burden to show that those two elements of the statute have been met. See Findings of Fact ## 5 and 7. We note that the claimant testified that she was searching for work on family-centric hospital units (in keeping with her prior work

experience as a birth registrar) and for work as a certified nursing assistant, as she has training in that area. She testified that she was looking for work “within my limits.”¹

The main issue to be addressed is whether the claimant was available for work, beginning December 22, 2019. In her decision, the review examiner purportedly quoted G.L. c. 151A, § 24(b), to conclude that the claimant did not meet the availability requirement, because she had no history of attending school full-time and simultaneously working full-time. The quoted language in the decision does not come from the statute. It is extracted from Section 1033(A) of the DUA’s Service Representative Handbook. In many decisions, spanning several years, the Board has rejected the notion that a person in school full-time can only meet her burden to show availability, for purposes of G.L. c. 151A, § 24(b), by providing evidence of a history of working full-time while being in school full-time. We have held that, although a history of working full-time while attending school full-time can be an indication that a person could meet the requirements of G.L. c. 151A, § 24(b), we do not think that this is the only way that a person can meet the burden. As we have previously held, attending school full-time does not result in a *per se* disqualification or in a presumption that a person cannot be available for full-time work. *See* Board of Review Decision 0011 9491 62 (Feb. 19, 2015). Each case must be considered individually and on its own merits.

Here, the review examiner found that the claimant attended school five days per week, for five and a half hours each day. She also spent some extra time studying on the weekends. Finding of Fact # 4. Although the claimant spent a large amount of time devoted to her schooling, this still leaves large blocks of time when the claimant could work a full-time schedule. The substantial and credible evidence in the record is that the claimant was available to work second or third shift on most days of the week. *See* Finding of Fact # 6.² The claimant was searching for work, such as a certified nursing assistant, which could have been done during those shifts. While going to school full-time and working full-time certainly could have created a hectic schedule for the claimant, the review examiner found that the claimant was available to work during the times she testified she could work. In light of her availability, we conclude that the claimant has met the requirements of G.L. c. 151A, § 24(b).

We, therefore, conclude as a matter of law that the review examiner’s initial decision to deny benefits was not free from error of law, because the claimant has shown that she was capable of, available for, and actively seeking work beginning December 22, 2019, despite attending school full-time.

¹ 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).

² As indicated above, we accept that the claimant was available to work Tuesday through Sunday from 11:00 p.m. to 7:00 a.m.

The review examiner's decision is reversed. The claimant is entitled to receive benefits, beginning December 22, 2019, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION – February 26, 2020



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.

SF/rh