During the school year, the claimant regularly worked 35-37 hours per week as a teaching assistant and caregiver in the after-school program. She filed for benefits when the school was closed due to COVID-19 and she lost her after-school hours. Although the employer reported that it deemed her 26-hour per week teaching assistant job to be full-time, the Board declined to rely on this to presume she continued to work full-time after losing her after-school hours. Board applied 430 CMR 4.75(1), concluding that the actual hours worked throughout the school year before the shut-down dictated that the teaching assistant work was not full-time. Held she was entitled to partial benefits pursuant to G.L. c. 151A, §§ 29 and 1(r).

Board of Review
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Member

Issue ID: 0057 4655 21

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, effective April 12, 2020, which was denied in a determination issued on May 25, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner modified the agency's initial determination and denied benefits from April 12 through June 13, 2020, in a decision rendered on November 17, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), and, thus, she was disqualified from receiving benefits. 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 concluded that the claimant was ineligible for benefits because she was both working full-time and earning more than her weekly benefit rate plus earnings disregard from April 12 through June 13, 2020, 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 an unemployment claim which was established with an effective date of 4/12/2020. The claimant's benefit rate was established as $339 a week with an earnings disregard of $113.

2. The claimant worked for the employer as a full-time teaching assistant working 24-26 hours a week earning $25.63 an hour.

3. The claimant also worked as a caretaker for an after-school program for 11 hours a week earning $17 an hour.

4. The week of 4/12/2020 through 6/12/2020, the employer's school system closed and operated remotely due to COVID-19.

5. The claimant work remotely for the employer until the school year ended on 6/12/2020. The claimant continued to work as a full-time teaching assistant for 24–26 hours a week earning $26.53 an hour.

6. The employer closed their after-school program, and the claimant was not compensated for any hours [sic] missing hours.

7. The claimant filed her unemployment claim due to the loss of her after school position with the employer.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject the portion of Finding of Fact # 2, which provides that the claimant was working full-time, as discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

The question before us is whether the claimant met the definition of being in unemployment within the meaning of G.L. c. 151A, § 29, which 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: provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .

> (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.

Also relevant to our analysis are the following DUA regulations at 430 CMR 4.75, which provide the criteria for determining full-time work. In relevant part, they state as follows:

> (1) The number of hours spent on the work and the wages earned for the week(s) *will dictate* whether the work was full-time or part-time.
>
> (2) The claimant's most recent work will be *presumed* to be full-time if he or she worked the normal full-time hours of the occupation in which the claimant was employed.

(Emphasis added.)

In this case, the claimant filed a claim for unemployment benefits because, when the employer closed its schools from April 12 through June 12, 2020, and finished the school year by operating remotely due to the COVID-19 public health emergency, the claimant lost her after-school job hours. *See* Findings of Fact ## 4–7. Since she continued to work as a teaching assistant, she was not in total unemployment within the meaning of G.L. c. 151A, § 1(r)(2). The issue before us is whether she was in partial unemployment during this period.

Prior to the schools closing, she had been working for the employer 24–26 hours a week as a teaching assistant plus 11 hours a week as a caretaker in the after-school program for a total of 35–37 hours per week. *See* Findings of Fact ## 2 and 3. This constitutes a drop of 30–31% from her usual weekly hours due to losing the after-school hours. Nonetheless, the review examiner concluded that she remained working full-time. We disagree.

Likely, the review examiner relied upon the response to the DUA's fact-finding questionnaire by the employer's third-party agent, which stated that the claimant "works 5.2 hours a day . . . [s]he is considered a full-time employee and is offered benefits through the school." *See* Exhibit 4.[1] Although not stated in his decision, it appears that the review examiner applied the presumption in 430 CMR 4.75(2), by interpreting the agent's response to mean that 26 hours per week is the normal full-time hours of the occupation in which the claimant was employed, and, therefore, he deemed her work to be full-time. However, in doing so, he failed to consider whether other evidence in the record rebutted this presumption and, instead, called for applying 430 CMR 4.75(1).

In 430 CMR 4.75(1), the regulation provides that the number of hours worked and wages earned for the weeks *will dictate* whether the work was full-time or part-time. Here, the record shows that, when taking into account both her teaching assistant and after-school hours, the claimant had been working 35–37 hours per week before the school closed due to COVID-19. *See* Findings of Fact ## 2 and 3. Thus, we must decide which regulation is appropriate given the facts of this

[1] Exhibit 4 is a fact-finding questionnaire completed by the employer's third-party agent, dated July 29, 2021.

case — whether to presume the claimant to be full-time pursuant to 430 CMR 4.75(2) based upon the employer's characterization of her teaching assistant position, or whether the actual hours worked will dictate whether the work was full- or part-time pursuant to 430 CMR 4.75(1).

In our view, the presumption under 430 CMR 4.75(2) that the claimant's teaching assistant work was full-time is rebutted by the record in its entirety.

We have stated that whether work in any given sector is considered full- or part-time is dependent on a number of factors. *See* Board of Review Decision 0032 4899 92 (Jun. 17, 2020). In a prior case involving a claimant who worked 32 ½ hours per week as a school instructional assistant, we held that this was full-time work, because the employer defined it to be full-time, the claimant also believed she held full-time status, and the collective bargaining agreement designated any employee in that classification to be full-time where they work at least 30 hours per week. *See* Board of Review Decision 0002 1404 09 (Oct. 21, 2014). Here, the claimant worked only 24–26 hours per week in her teaching assistant job during the relevant period, she did not agree that that was full-time, there was no collective bargaining agreement entered into evidence, and the employer did not participate in the hearing to explain why it characterized 26 hours per week as full-time.[2]

The claimant asserts that, even though the employer refers to her teaching assistant position as full-time, it is not really full-time. In support, she has presented a paystub for the bi-weekly period ending March 22, 2020, which shows that her regular weekly hours included both the teaching assistant and after-school hours before the school closed due to COVID-19. *See* Exhibit 3. She has also submitted an email from her employer's Assistant Superintendent to its third-party agent, dated May 27, 2021, which clarifies that the employer's previous report to the agent that their teaching assistants worked "full-time" did not tell the whole story, because many, such as the claimant, had regularly worked up to 40 hours per week throughout the school year by performing the after-school work. *See* Exhibit 8.[3]

There is no indication that the review examiner considered, weighed, or found this other undisputed evidence not to be credible. Thus, we cannot tell whether he rejected it or simply overlooked it in his decision. Inasmuch as the Assistant Superintendent's clarifying email indicates that the claimant's regular work week was filled with the hours from both positions, it seems that the parties are in agreement. Under these circumstances, we believe that pursuant to 430 CMR 4.75(1), the number of hours that she actually worked in both positions dictates that her teaching assistant work was, in fact, part-time for purposes of determining her unemployment status under G.L. c. 151A, §§ 29 and 1(r).

However, in order to meet the statutory definition of partial unemployment under G.L. c. 151A, § 1(r)(1), during each week at issue, the claimant must also show that she was paid less than the total sum of her weekly benefit rate of $339.00 plus her earnings disregard of $113.00. *See* Finding of Fact # 1. Thus, in any week in which she earned less than $452.00, she will be eligible for

[2] It may be that because the claimant worked sufficient hours to be paid fringe benefits, the employer characterized her as full-time. However, this is pure speculation because nothing in the record confirms this.

[3] 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).

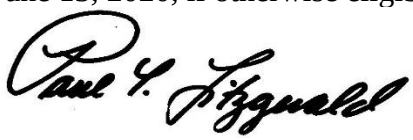
unemployment benefits, though the weekly payment is reduced by each dollar earned over the $113.00 earnings disregard.

On appeal, the claimant notes that, because she opted to have her full salary spread out over the summer when she would not be working, her actual gross weekly pay is $435 per week. For purposes of reporting wages and determining a claimant's monetary eligibility for unemployment benefits, the calculation is based upon when the wages are paid rather than earned. *See* 430 CMR 5.05(1); *see also* Naples v. Comm'r of Department of Employment and Training, 412 Mass. 631, 634–635.

It may be that the review examiner concluded that the claimant was paid more than her weekly benefit rate plus earnings disregard between April 12 through June 13, 2020, by multiplying her 24–26 hours per week by her $26.53 hourly rate. The product would be a gross weekly pay of between $636.72 and $689.78. However, the paycheck entered as Exhibit 3 for the period ending April 19, 2020, shows that the claimant was actually paid gross weekly wages of $435.71. Since this is less than $452.00, she is eligible for partial unemployment benefits.

We, therefore, conclude as a matter of law that the claimant was in partial unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).

The review examiner's decision is reversed. The claimant is entitled to receive partial unemployment benefits during the period April 12 through June 13, 2020, if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - March 18, 2022

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
(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