

**Because the claimant chose to work only part-time hours as an on-call employee, he is not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r) during the benefit year.**

**Board of Review  
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**Issue ID: 0059 9186 48**

### 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 filed a claim for unemployment benefits effective April 5, 2020, which was denied in a determination issued on February 24, 2021. 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 and denied benefits in a decision rendered on September 14, 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 the law because he declined suitable work and, thus, 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 obtain additional information about the claimant's unemployment status. 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 decision, which concluded that the claimant was not in unemployment because the claimant declined available suitable work and did not request a leave of absence to address his increased risk from exposure to COVID-19, 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. The claimant opened a claim for benefits with an effective date of April 5, 2020.

2. In 2018, the claimant retired as a police officer from another employer, a town. The claimant was required to retire by the town. At the time, the claimant was 70 years old.
3. The claimant began employment as a reserve deputy sheriff/first responder with the employer on May 1, 2019.
4. The employer considers the claimant an on-call employee.
5. The claimant is still employed by the employer. The claimant is 72 years old and a disabled veteran.
6. On average, the claimant worked 16 to 24 hours per week for the employer prior to April 5, 2020.
7. The claimant's schedule is determined by the bids/assignments accepted by the claimant. Prior to April 5, 2020, the claimant only accepted enough assignments for a part-time schedule of work. The employer had sufficient assignments available if the claimant wanted to work full-time.
8. The claimant's pay is determined according to the bids/assignments he works.
9. Prior to April 5, 2020, the claimant was capable of working a full-time schedule for any employer. The claimant's status as a disabled veteran did not impact his capability to work.
10. Prior to April 5, 2020, the claimant was not available to work a full-time schedule for any other employer.
11. The claimant was not available to work full-time for unknown reasons. Prior to April 5, 2020, the claimant restricted himself to part-time work, as he was only accepting 16–24 hours of work per week from the employer.
12. If COVID-19 was not a factor, the claimant would have been capable of working full-time.
13. If COVID-19 was not a factor, the claimant would not have been available to work full-time for this, or any other employer. Prior to April 5, 2020, the claimant was not working full-time, even though such work was available from the employer.
14. From April 5, 2020, until December 19, 2020, the claimant did not bid on any assignment offered by the employer because he was at high risk for severe illness if he contracts COVID-19.
15. The claimant has chronic medical conditions that place him at high risk if he contacts COVID-19.

16. From April 5, 2020, through December 19, 2020, the employer had multiple assignments/work available for bids that would allow the claimant to work full-time.
17. The claimant did not request a leave of absence from the employer for the period of April 5, 2020, through December 19, 2020.
18. The claimant did not inform the employer of his high risk of illness to COVID-19.
19. Between April 5, 2020, and December 19, 2020, the claimant did not search for full-time work that he could perform from home.

Credibility Assessment:

The claimant contends that he was available to work a full-time schedule prior to April 5, 2020. He further contends that between April 5, 2020, and December 19, 2020, he searched for full-time, part-time and on-call work that he could perform from home. The claimant's testimony is not deemed credible.

The employer offered unrefuted testimony that during the claimant's employment, it had enough bids/assignment available for the claimant to work full-time. However, the claimant's average of work hours prior to April 5, 2020, was 16 to 24 hours per week, which is a part-time schedule of work. Although the claimant had the opportunity to work fulltime prior to COVID-19, he failed to do so for unknown reasons. Therefore, it is concluded that the claimant's testimony that he was available for full-time work and searched for fulltime work is not credible.

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. Upon 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. While we believe the review examiner's rationale was erroneous, we conclude that the review examiner's consolidated findings of fact support the conclusion that the claimant was not entitled to benefits.

To be eligible for unemployment benefits, the claimant must show that he is in a state of unemployment within the meaning of the statute. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those terms are 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 . . . .

(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.

The review examiner disqualified the claimant in part because he failed to request a leave of absence from his employer despite his increased risk from exposure to COVID-19. However, in this case, the claimant’s failure to request a leave of absence has no bearing on his eligibility for benefits under G.L. c. 151A, §§ 29 and 1(r).

The claimant is an on-call employee with the instant employer. Consolidated Finding # 4. Given the on-call nature of his work, we must consider application of the holding in Town of Mattapoisett v. Dir. of Division of Employment Security, 392 Mass. 546 (1984). In Mattapoisett, the claimant was hired to be a part-time police officer. He worked on-call, whenever he was needed, under the terms of his employment contract. Some weeks he worked, and other weeks he did not work at all. There was no indication that he worked for any other employer while also working for the Town of Mattapoisett. The Court found that the claimant was not in partial unemployment in the benefit year, because “[t]o characterize [the claimant] who agreed to be part-time and on-call as ‘partially employed’ when both parties understood at the beginning of the employment relationship that the hours of employment were to be irregular and less than full time is to torture the plain meaning of the term.” Id. at 549. It held that “the Legislature did not intend a part-time employee whose hours vary from week to week to be considered in partial unemployment for any week in which he does not work as many hours as a full-time employee.” Id.

As was the case in Mattapoisett, the claimant here accepts only part-time work with the instant employer on an on-call basis, working irregular hours. Consolidated Findings ## 7 and 11. Further, there is no indication from the record that the claimant worked in any capacity other than his on-call work for the instant employer. Pursuant to the court’s holding in Mattapoisett, the claimant cannot be in partial unemployment within the meaning of G.L. c. 151A, § 1(r)(1). Id. at 549. Moreover, as noted in the credibility assessment, because the claimant remained unavailable for any other suitable full-time work during his benefit year, he was not in total unemployment within the meaning of § 1(r)(2).

We, therefore, conclude as a matter of law that the review examiner’s initial conclusion that the claimant was not entitled to benefits under G.L. c. 151A, §§ 29(a), 29(b), and 1(r), during the period between April 5, 2020, and December 19, 2020, is based on substantial evidence and is free from any error of law affecting substantive rights.

The review examiner's decision is affirmed. The claimant is denied benefits from the week beginning April 5, 2020, through December 19, 2020.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 5, 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](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.

LSW/rh