

**Due to conduct in a prior job, the claimant had to voluntarily surrender her nursing license and take an unpaid leave of absence from the employer while working to reinstate her license. As she remained able and available for work which did not require a license, she was eligible for benefits while on the leave pursuant to G.L. c. 151A, §§ 29 and 1(r). The employer then terminated her at the end of her leave because the claimant still had no license. Because the claimant chose to engage in the prohibited conduct which brought about her own statutory impediment to work, her separation from employment was voluntary and she was ineligible for benefits thereafter pursuant to G.L. c. 151A, § 25(e)(1).**

**Board of Review  
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**Issue ID: 0063 4010 16**

#### 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 we affirm in part and reverse in part.

The claimant took a leave of absence from her position with the employer and was subsequently discharged on April 27, 2021. She filed a claim for unemployment benefits with the DUA, effective January 31, 2021, which was denied in a determination issued on June 25, 2021. 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 November 6, 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), while on her leave of absence and, therefore, she was ineligible for benefits during this period. Benefits were further denied after the claimant's discharge on April 27, 2021, because he determined that she brought about her own unemployment and, thus, 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 about the circumstances concerning the claimant's loss of her nursing license and its reinstatement. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issues before the Board are whether the review examiner's decision, which disqualified the claimant while on an unpaid leave of absence because she had requested the leave, and which disqualified the claimant thereafter because it was her failure to maintain her nursing license that caused her discharge, 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 01/29/20 the claimant began working full-time as a non-union Dispensing Nurse for this employer's substance abuse treatment center.
2. A valid nursing license is a requirement for this position.
3. 01/31/21 was the claimant's last day on the job before the start of her employer approved leave of absence.
4. In 2016, the claimant had violated the Commonwealth of Massachusetts Board of Registration in Nursing standards of conduct by not keeping professional boundaries while working. The claimant admitted that she had a sexual relationship with an inmate while working as a Licensed Practical Nurse (LPN) at [Correctional Facility] in August of 2016. The claimant's behavior was reported to the Board of Registration in Nursing and a lengthy investigation was done.
5. It was this discovered inappropriate behavior which led to a voluntary surrender of the claimant's nursing license in February 2021 until the Board of Registration in Nursing agreed to reinstate the claimant's nursing license.
6. The claimant knew in 2016 that her behavior violated the Board of Registration in Nursing (Nursing Board) standards of conduct, as it is common knowledge in the medical field and in the world at large that professional boundaries must be kept between patients and their medical service providers.
7. The inmate at issue was transferred to a different correctional facility and the claimant visited him there identifying herself as a significant other on the visitor forms. The inmate at issue and the claimant were later married.
8. On 02/01/21, the claimant signed the consent agreement to voluntary surrender her nursing license (agreement) and she surrendered her license the same day. Paragraph 3 of the agreement states that the claimant's nursing license must be surrendered for no less than 30 days. The agreement also gave the claimant a list of requirements to be completed before the claimant could petition the Nursing Board for reinstatement of her nursing license.
9. Requirements on the list included a review of continuing education units (CEU) nurse trainings, obtaining letters of reference, work performance records and attendance records. The deadline to obtain these documents was 04/01/21. The claimant obtained the requested documents and submitted them on 04/01/21.

There were no delays in completing the requirements and the claimant submitted them before the deadline of 04/01/21 had passed.

10. There was a backlog of cases at the Nursing Board due to the [COVID]-19 pandemic and the time needed to review the cases.
11. The claimant first petitioned the Board of Nursing to reinstate her license later in February 2021, although she had not completed and submitted proof of meeting the list of requirements until 04/01/21.
12. The claimant's license was voluntarily surrendered on 02/01/21, the claimant completed the list of requirements on 04/01/21 and her nursing license was reinstated on 06/24/21. [COVID]-19 caused a delay in the Nursing Board's ability to act on the petition for reinstatement.
13. Due to the 02/01/21 surrender/suspension of her nursing license, the claimant requested an unpaid personal leave of absence from the instant employer to preserve her job until her nursing license could be reinstated.
14. The employer granted the claimant an unpaid personal leave of absence from 02/01/21 through 04/26/21. While on her leave, the claimant was able and available to work in positions that did not require a nursing license such as a Personal Care Attendant (PCA). The claimant was actively seeking work as a PCA but due to [COVID]-19, the claimant received no offers of work.
15. On 02/04/21, the claimant filed a claim for unemployment benefits effective 01/31/21.
16. On 04/26/21, at the end of the approved personal leave, the claimant could not return to work as her nursing license had not yet been reinstated.
17. Due to the employer's legitimate business needs, the employer could not extend the leave of absence and the claimant was separated from employment on 04/27/21 as a voluntary quit, failure to maintain a valid nursing license, which is a requirement for the job.
18. Had the claimant maintained a valid nursing license her job would not have been in any jeopardy.
19. On 06/24/21, the claimant's nursing license was reinstated.
20. On 06/25/21, the claimant was sent a Notice of Disqualification beginning 01/31/21 noting that the claimant was not eligible for unemployment benefits because she was, at the time of filing, on an employer approved personal leave of absence granted by her employer. The claimant requested a hearing.

21. The hearing was noticed to address the leave of absence issues under Sections 29 (a) 29 (b) & 1 (r), and the separation issues under Sections 25 (e)(1) & (e)(2).

**Credibility Assessment:**

The portion of the claimant's testimony where she denied that she knew that having sexual relations with an inmate patient violated the Board of Registration in Nursing Standards of Conduct, is rejected as not credible. The claimant knew or reasonably should have known that having sexual relations with an inmate patient while working as the inmate's nurse would place her nursing license in jeopardy.

**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. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant was ineligible for benefits prior to her separation.

The first question we must decide is whether the claimant was eligible for benefits during her leave of absence. G.L. c. 151A, § 29, 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.

From February 1, 2021, until April 26, 2021, the claimant was granted an unpaid leave of absence because she had surrendered the nursing license necessary to perform her job as a dispensing nurse for the employer. *See Consolidated Findings ## 2, 5, 13, and 14.* The consolidated findings indicate that, during this leave of absence, the claimant did not work at all. *See Consolidated Finding # 14.* Therefore, we consider whether she was in total unemployment during this period.

The review examiner's denial of benefits merely because it was the claimant who had requested the leave of absence is incorrect as a matter of law. It is well settled that an individual may be

eligible for benefits while on a leave of absence as long as she is capable of performing and actively seeking other employment. *See Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159 (1980) (welder who was medically unable to perform her welding duties because of pregnancy was nevertheless in unemployment and eligible for benefits while on maternity leave, because there were other light duty jobs that she was capable of performing and she actively sought work). Because Consolidated Finding # 14 provides that the claimant remained able, available for, and actively sought PCA work that did not require a nursing license while on her leave, she was in total unemployment from February 1 through April 26, 2021.

At the end of her leave of absence, the employer terminated the claimant's employment because she did not have the necessary nursing license to return to her job. *See Consolidated Findings ## 16 and 17*. Upon being separated from employment on April 27, 2021, the claimant's eligibility for benefits is governed by G.L. c. 151A, § 25(e).

In deciding whether to analyze this case as a voluntary resignation under G.L. c. 151A, § 25(e)(1) or § 25(e)(2), we are mindful of the Supreme Judicial Court's decisions in *Rivard v. Dir. of Division of Employment Security*, 387 Mass. 528 (1982), and *Olmeda v. Dir. of Division of Employment Security*, 394 Mass. 1002 (1985) (rescript opinion). In *Rivard*, the SJC stated, "a person who causes the statutory impediment that bars his employment leaves his employment "voluntarily" within the meaning of § 25(e)(1) when the employer realizes the impediment and terminates the employment." 387 Mass. at 529. Several years later, in *Olmeda*, the SJC upheld the denial of unemployment benefits to a claimant who was unable to get to work, because his driver's license was suspended following a conviction for driving while intoxicated. 394 Mass. at 1002. The Court rejected the claimant's contention that he did not leave work voluntarily. In so doing, the Court noted that the word "voluntarily," as used in G.L. c. 151A, § 25(e)(1), "is a term of art that must be read in light of the statutory purpose of providing compensation for those who are thrown out of work through no fault of their own." *Id.* at 1003 (citations, brackets and internal quotes omitted). The SJC further opined that, in determining whether an employee left work "voluntarily" for purposes of G.L. c. 151A, § 25(e)(1), the inquiry is not whether the employee would have preferred to work rather than become unemployed, but whether the employee brought his unemployment on himself. *Id.*, citing *Rivard*, 387 Mass. at 530.

In her appeal, the claimant asserts that the reason she was unable to return to work after her leave of absence was because the nursing board was delayed in reinstating her license due to the COVID-19 pandemic. *See Consolidated Finding # 12*. While this may be so, it was admittedly the claimant's own behavior of engaging in sexual relations with an inmate while working at the House of Corrections, which caused her to surrender her license to begin with. *See Consolidated Findings ## 4 and 5*.

Also important to this analysis is that the review examiner found that, at the time, the claimant knew that her behavior violated the Board of Registration in Nursing standards of conduct. Consolidated Finding # 6. In rendering this finding, the review examiner rejected the claimant's testimony denying that she knew her behavior violated those standards. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). "The test is whether the finding is supported by "substantial evidence." *Lycurgus v. Dir. of Division of Employment*

Security, 391 Mass. 623, 627 (1984) (citations omitted.) “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’” Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted.) We see no reason to disturb this finding.

Because the claimant chose to engage in the prohibited conduct which brought about her own statutory impediment to work, her separation from employment was voluntary and due to her own actions.

We, therefore, conclude as a matter of law that, during the claimant’s leave of absence, she was in total unemployment and eligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r). We further conclude that, once the leave of absence ended, the claimant is deemed to have voluntarily separated from employment and she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(1).

The review examiner’s decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits from the week beginning January 31, 2021, through April 24, 2021, if otherwise eligible. The claimant is denied benefits from the week beginning April 25, 2021, and for subsequent weeks until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 27, 2022**



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.

AB/rh