

The claimant is not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), while working full-time for the employer during the academic year, but he was in unemployment during the summer break, as he performed no wage-earning services and did not receive any other form of remuneration.

**Board of Review
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Issue ID: 0067 6696 70

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 filed a claim for unemployment benefits with the DUA, which was effective on March 15, 2020. On May 28, 2021, the agency determined that the claimant was not entitled to benefits. 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 August 20, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment, as he had been working full-time since filing his claim and, thus, was disqualified under G.L. c. 151A, §§ 29(a), 29(b) 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 evidence pertaining to the claimant's work schedule and earnings. 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 issue before the Board is whether the review examiner's decision, which concluded that the claimant was not in unemployment and was indefinitely ineligible for benefits as of the start of his 2020 claim, is supported by substantial and credible evidence and is free from error of law, where the consolidated findings after remand show that the claimant did not work for the instant employer or receive any form of remuneration during the summers of 2020 and 2021.

Findings of Fact

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

1. On 08/25/09, the claimant was hired by the instant employer city school department to work full-time as a union Paraprofessional. The claimant has

continuously worked in this full-time position, and he remains in full-time employment currently, being paid at a union rate of \$19.07 per hour.

2. On 12/30/12, the claimant took on a second job as a part-time Salesperson for [Employer A] department store. In his part-time job, the claimant would work 20-40 hours per week and with commission pay could earn \$500.00 - \$1,000.00 per week.
3. The claimant's part-time job frequently paid him more than his full-time job.
4. In March of 2020, the claimant separated from his part-time Salesperson job due to COVID-19 store closings.
5. On 03/20/20, the claimant filed a claim for unemployment benefits effective 03/15/20 due to the loss of his part-time job.
6. When filing, the claimant stated that he still was working for the instant employer city.
7. In his teaching job with the instant employer, the claimant works 32.5 hours per week, which is considered full-time by the employer city.
8. During the 2019-2020 academic year, the claimant's weekly earnings from the city employer were \$601.58. During the 2019-2020 academic year, the claimant's weekly earnings from the city employer were \$619.78. During the 2020-2021 academic year, the claimant's weekly earnings from the city employer were \$619.78.
9. The claimant is only paid during the months of the academic year.
10. The most recent academic years were from 08/28/19 through 06/22/20, from 09/01/20 through 06/25/21, and from 08/30/21 through 06/21/22.
11. The claimant did not work during the summer school break in 2020 and 2021.
12. For the claim filed effective 03/15/20, the claimant's weekly benefit rate was \$502.00, and his weekly earnings disregard amount was \$167.33. For the claim filed effective 03/14/21, his weekly benefit rate was \$317.00, and his weekly earnings disregard amount was \$105.67.
13. The claimant, when certifying his unemployment benefit claim each week, failed to report his gross weekly earnings, so initially no investigation into other employment was done by DUA.
14. On 05/28/21, the claimant was sent a Notice of Disqualification beginning 03/15/20, noting that the claimant is working a full-time schedule of hours for this instant employer and is not in unemployment.

15. The claimant requested a hearing on the 05/28/21 determination, noting that the part-time job he lost at [Employer A] frequently paid him more than the full-time job he had with the city 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 consolidated 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 consolidated findings of fact except as follows. We set aside the portion of Consolidated Finding # 8, which states that the claimant’s weekly earnings during the 2019–2020 academic year were \$619.78, as this is a typographical error.¹ 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 was not in unemployment during the entirety of his claim, as the consolidated findings establish that the claimant was neither working nor receiving remuneration during the summers of 2020 and 2021.

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

(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 originally denied benefits to the claimant as of the start of his 2020 claim, March 15, 2020, and for an indefinite period of time after concluding that the claimant was working full-time for the employer. We remanded the case to obtain additional evidence pertaining to the claimant’s schedule and earnings with the instant employer.

After remand, the review examiner found that the claimant filed a claim for unemployment benefits after he was laid off from his part-time retail job in March, 2020. *See Consolidated Findings ## 2, and 4–5.* The claimant reported to the DUA that he continued to work for the instant employer.

¹ The employer testified during the remand hearing that the claimant’s weekly wages were as follows: \$601.58 in the 2019-20 academic year and \$619.78 in the 2020–21 and 2021–22 academic years. 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).

See Consolidated Finding # 6. The instant employer considers a schedule of 32.5 hours per week to be a full-time schedule of work, and the claimant worked these hours for the employer through June 22, 2020, between September 1, 2020, and June 25, 2021, and beginning on August 30, 2021. See Consolidated Findings ## 7 and 10. The claimant did not work during the summer months of 2020 or 2021, because the instant employer school was not in session, and he did not receive any remuneration during these months. See Consolidated Findings ## 9 and 11.

Because the claimant was employed full-time during the dates of March 15, 2020, through June 22, 2020, September 1, 2020, through June 25, 2021, and beginning on August 30, 2021, he was neither in total nor partial unemployment during the weeks ending March 21, 2020, through June 20, 2020, the weeks ending September 12, 2020, through June 26, 2021, and as of the week ending September 4, 2021. However, because the claimant performed no “wage-earning services,” and he did not receive any remuneration or refuse offers of suitable work during the weeks ending June 27, 2020, through August 29, 2020, and the weeks ending July 3, 2021, through August 28, 2021, he was in total unemployment and is entitled to receive benefits during these weeks. Finally, because the claimant did not work his full-time schedule of hours during the week ending September 5, 2020, as the employer only had four days of work for him that week, and the findings indicate that he earned less than his weekly benefit rate plus earnings disregard, the claimant is entitled to partial unemployment benefits during this week.² See Consolidated Findings ## 8, 10 and 12.

We, therefore, conclude as a matter of law that the claimant was in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during any weeks that he did not work full-time.

The review examiner’s decision is affirmed in part and reversed in part. We affirm that part of the decision that denied benefits to the claimant for the weeks ending March 21, 2020, through June 20, 2020, the weeks ending September 12, 2020, through June 26, 2021, and as of the week ending September 4, 2021. However, we reverse that part of the decision that denied benefits to the claimant for the weeks ending June 27, 2020, through September 5, 2020, and the weeks ending July 3, 2021, through August 28, 2021, as the claimant was either in total or partial unemployment during these weeks.

We note that, because the claimant is a school employee, the agency will investigate whether the claimant is eligible for benefits during these summer periods pursuant to G.L. c. 151A, § 28A.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 1, 2022



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

² Because the claimant did not report any earnings for the week ending September 5, 2020, the agency will investigate to determine the claimant’s specific benefit entitlement during this week.

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.

SVL/rh