

**The employer placed the claimant on an indefinite administrative leave from his job as a police officer due to his failure to comply with its new COVID-19 policy. He demonstrated that he was unable to accept the employer’s requirement to get a COVID-19 vaccine due to his sincerely held religious beliefs. However, he failed to establish that accepting the alternative option to take a weekly COVID-19 test was in violation of such religious beliefs. He was, therefore, turning down suitable work and not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r).**

**Board of Review  
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**Issue ID: 0073 9343 63**

### Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was placed on an unpaid administrative leave from his position with the employer on October 26, 2021. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 28, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency’s initial determination and awarded benefits in a decision rendered on August 30, 2022. We accepted the employer’s application for review.

Benefits were awarded after the review examiner determined that the claimant was in total unemployment while on an administrative leave and, thus, he was not disqualified pursuant to G.L. c. 151A, §§ 29 and 1(r). After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the employer’s appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 in unemployment because his sincere religious beliefs rendered him unable to meet the new COVID-19 vaccination or weekly testing requirements of his job, 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 worked as a Police Officer for the employer, a municipality, from December 9, 2019 until October 22, 2021.

2. The claimant is a Jehovah Witness. As part of his religious beliefs, the claimant believed that only God could judge his body. The claimant has been a Jehovah Witness for at least 10 years.
3. During the 10-year period as a Jehovah Witness, the claimant has not received any vaccinations as it is against his religious beliefs. The claimant provided that information to the employer upon applying for the position of Police Officer.
4. When the claimant began his employment, he was required to submit to a physical examination by the employer. The claimant submitted to that examination.
5. On August 12, 2021, the claimant received the employer policy via email indicating that employees would be required to obtain the COVID-19 vaccination by October 4, 2021 or agree to submit to weekly testing. If an employee failed to do so, they would be placed on unpaid leave and could be subject to discharge. The employer policy provided for medical and/or religious exemptions.
6. The policy was in place to prevent the spread of COVID-19 and protect the staff and public.
7. The claimant was working in patrol, answering calls for service. In that position, the claimant was in contact with other employees and the general public.
8. On September 20, 2021, the claimant submitted a letter to request a religious exemption.
9. On October 18, 2021, the claimant received notification from the employer that he would need to complete a specific form to request a religious exemption. The claimant completed and returned the required form that same day. The claimant signed the form to request the exemption. The claimant understood that he was not required to submit a letter from a religious leader/higher authority and was never informed that he was required to do so.
10. If the claimant did not receive the COVID-19 vaccine, he would be required to submit to weekly testing and enter his weekly testing information into the employer portal, which would then indicate that the claimant was in compliance and could work.
11. The employer provided the employees with a list of all of the free testing sites to obtain weekly COVID-19 testing.

12. The claimant received confirmation that his request for a religious exemption was received, and that the employer would be in contact with him to begin the interactive process. (The employer did not start the process before placing the claimant on unpaid leave.)
13. On October 21, 2021, the claimant was sent an email communication from the employer indicating that he was in non-compliance and would need to be in compliance by the October 25, 2021, date. The email communication also provided information on how to submit to testing, the employer policy, and civil service information.
14. The claimant was on a scheduled vacation from work, during the period of October 23, 2021 through November 4, 2021.
15. During his vacation, the claimant received an email from the employer indicating that effective October 26, 2021, he was on unpaid administrative leave due to his non-compliance with the employer's vaccine policy. It did not indicate when the unpaid leave would end.
16. On October 28, 2021, the employer began the interactive process. The claimant met with the Interim Director of Labor Relations and a member of the Office of Human Resources. The labor relations person asked the claimant about his job, where he worked, his vaccination status and his religion. The claimant indicated that he is a Jehovah Witness. He stated that he does not put any foreign substance into his body and would not submit to weekly testing. The claimant explained that he had taken a test before, and it immediately burned his nose and he felt there was a foreign substance in the kit. The claimant indicated that he would agree to an accommodation of continuing to do the employer's daily self-assessment, which was answering questions before entering the employer building. (This process was in place beginning in October, 2020.) The labor relations person did not address the claimant's request for accommodation.
17. The claimant felt that the one time he submitted to a COVID-19 test was a moment of weakness in his faith because he was in fear of being discharged from employment.
18. On October 29, 2021, the claimant had a non-compliance hearing with a person from the Department of Labor Relations. The claimant was asked why he was not in compliance. The claimant indicated that he had submitted an exemption [request] and was waiting for a decision on the religious exemption/accommodation. The labor relations employee had no information on the claimant's exemption and indicated he was only there to inquire as to why the claimant was non-compliant.
19. On October 29, 2021, the claimant received an email from the employer indicating that his religious exemption was being denied due to undue hardship.

It did not define or indicate any specifics as to why the employer considered the claimant's exemption to create an undue hardship.

20. The claimant was scheduled to return to work from his vacation on November 7, 2021.
21. The claimant did not receive the COVID-19 vaccination and did not agree to submit to weekly COVID-19 testing because of his religious beliefs.
22. The claimant felt that the employer could have assigned him to work in the Booking Office, where he would be working in the office alone and would have minimal contact with others.
23. The claimant was not provided with any other assignment with the employer and began the unpaid administrative leave on November 7, 2021, when he was due to return from vacation.
24. The claimant is currently still on unpaid administrative leave. The claimant was aware that he could receive the COVID-19 vaccine or agree to weekly COVID-19 testing to allow him to return to work.
25. On December 28, 2021, a Notice of Disqualification was issued under Section 29(a) of the Law, indicating "You are on an indefinite personal leave of absence granted by your employer. Since work remains available to you, it is determined that you are not in unemployment and are subject to disqualification." "You are not entitled to receive benefits beginning 10/24/2021 and indefinitely thereafter until you meet the requirements of the Law." The claimant filed an appeal to that determination.

### 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 Finding of Fact # 1 to the extent it indicates that the claimant's employment ended on October 27, 2021, as other findings show that he remains employed on an indefinite administrative leave of absence. We also reject the portion of Finding of Fact # 21, which states that the claimant did not agree to weekly COVID-19 testing because of his religious beliefs, as it is not supported by substantial evidence in the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is eligible for benefits while on this administrative leave.

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; 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.

Thus, claimants are only eligible for benefits if they are physically capable of, available for, and actively seeking full-time work, and they may not turn down suitable work. They may meet these requirements, even though they are on a leave of absence from their regular employer. *See, e.g., Dir. of Division of Employment Security v. Fitzgerald*, 382 Mass. 159, 163–164 (1980).

There is no question that the claimant’s regular position as a police officer remains available to him if he meets the new terms of his employment to either get a COVID-19 vaccine or submit to weekly testing. Finding of Fact # 24. Thus, the question we must decide is whether, in declining to comply with the vaccine or testing requirements, he is turning down suitable work.

The record shows that, as a Jehovah’s Witness, the claimant has declined to get any type of vaccine, and he has not received any vaccines in the 10 years that he has been a Jehovah’s Witness. *See* Finding of Fact # 3. We believe that this long-standing practice to refuse vaccinations of any kind supports the review examiner’s conclusion that the claimant did not get the COVID-19 vaccine due to sincerely held religious beliefs as a Jehovah Witness.

However, the claimant has not demonstrated that his religious beliefs rendered him incapable of submitting to weekly COVID-19 testing.

The review examiner’s decision states, “Although the claimant agreed to submit to a physical examination to obtain his position with the employer, there was not evidence to support that doing so was contrary to the beliefs of a Jehovah Witness, or that the [claimant’s] actions were inconsistent with those religious beliefs when refusing the vaccine and/or the weekly COVID-19 testing.” This statement wrongly places the burden of proof upon the employer. To be eligible for unemployment benefits, it is the claimant’s burden to show that his regular position was no longer suitable. Thus, it is up to him to explain how a physical examination is in harmony with his religious beliefs while submitting to weekly COVID-19 testing is not.

The hearing decision further states that the claimant objected to the testing because it was intrusive and because only God can judge his body. *See* Finding of Fact # 2. In our view, the fact that the claimant would permit a health care provider to conduct a physical examination to determine whether he was fit for the position of police officer, by itself, shows that it is not only God that he

allows to judge his body. Moreover, it undermines his testimony that it is against his religious belief to demonstrate that he is not sick in order to have a job.<sup>1</sup>

We also consider his objection to the insertion of the cotton swab into his nose in order to obtain a nasal discharge sample as part of the weekly COVID-19 test. Finding of Fact # 16 states that he objected to the COVID-19 test because he does not put any foreign substance into his body, and that, when he took the test before, the cotton swab burned his nose and he felt there was a foreign substance in it. To be sure, the procedure is unpleasant, but the claimant has presented no evidence that the swab actually has any substance on it other than cotton, or that it leaves any foreign substance behind when it touches the inside of his nostril. Further, the claimant admitted under cross-examination that, as part of the physical examination to obtain his job, he submitted to a blood test wherein a needle was inserted into his arm to draw blood. We fail to see how a needle placed into his arm is less intrusive than the nasal swab administered with the COVID-19 test.<sup>2</sup>

In written comments to the Board, the claimant's counsel argues that the Board should dismiss the employer's appeal, because, he states, "the Board of Review has previously declined to comment on the merits of a Claimant's request for religious exemption, [ruling] that request[s] for religious exemptions are not relevant to eligibility for benefits under G.L. c. 151A, §§ 29 and 1(r)." This mischaracterizes the Board's ruling. In Board of Review Decision 0073 9136 51 (Jun. 27, 2022), we stated, "While we acknowledge the claimant's testimony that his faith prohibits him from taking the COVID-19 vaccine, we decline to comment on the merits of the claimant's request for a religious exemption, as it is not relevant to his eligibility for benefits under G.L. c. 151A, §§ 29 and 1(r)." In that case, whether the claimant had a sincerely held religious belief *was* irrelevant to our decision. That claimant did not meet the requirements of G.L. c. 151A, §§ 29 and 1(r), on the separate ground that he failed to actively search for work while placed on a leave of absence for refusing to get vaccinated.

In short, the claimant in the present appeal has failed to demonstrate that the employer's requirement that he submit to a weekly COVID-19 cotton swab test renders the job unsuitable due to his sincerely held religious beliefs as a Jehovah's Witness. He is choosing not to work rather than accept the employer's requirement to take a weekly COVID-19 test. In doing so, the claimant is declining suitable work, which renders him ineligible for unemployment benefits while on administrative leave.

We, therefore, conclude as a matter of law that the claimant has failed to sustain his burden to show that he is in unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r).

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<sup>1</sup> While not explicitly incorporated into the review examiner's findings, this portion of the claimant's testimony as well as the portions discussed below are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. 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). We note that, as written, the findings are unclear as to whether the claimant was a Jehovah's Witness when he submitted to a physical examination for his police officer position. See Findings of Fact ## 1 and 2. Because he offered testimony as to why taking a physical examination was in harmony with his religious beliefs, we can reasonably infer that he was a Jehovah's Witness at the time.

<sup>2</sup> The claimant testified, "Taking blood is not an issue. I just don't receive blood." Since he has not demonstrated that the COVID-19 test swab actually inserts any substance into his body, this is a distinction without a difference.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning November 14, 2021, and for subsequent weeks, until he meets the requirements of G.L. c. 151A.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - November 29, 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.

AB/rh