Because the claimant's services during his base period did not affect his eligibility for, or increase the amount of, his pension, his weekly benefit will not be reduced by his pension payments pursuant to G.L. c. 151A, § 29(d)(6).

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0077 4127 93

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 his 2022-01 claim for unemployment benefits with the DUA effective July 3, 2022. On August 11, 2022, the DUA issued a determination under G.L. c. 151A § 29(d)(6), which stated that his weekly benefit rate would be reduced by half of his employer funded retirement benefit beginning July 3, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner reversed the agency's initial determination and denied benefits in a decision rendered on November 4, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant's pension was wholly funded by the employer, and, thus, it would be fully deducted from his weekly benefit amount, as required by G.L. c. 151A, § 29(d)(6). 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 pension contributions. The claimant 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's full pension payment had to be deducted from his weekly benefit amount because it was wholly funded by his employer, 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 was a member of the [Union local number] (Union).

2. The claimant retired from the Union on 4/1/2022.

3. The claimant had approximately thirty-seven (37) years of service as a member of the Union.

4. On 7/5/2022, the claimant filed a new claim for unemployment insurance benefits, effective 7/3/2022.

5. The Department of Unemployment Assistance (DUA) determined the claimant's base period to be from 7/1/2021 to 6/30/2022.

6. The DUA established the claimant's weekly benefit rate to be $944.00 based on earnings from his base period employers which included wages earned as a Union electrician.

7. During his base period, the claimant worked for two Union employers, [Employer A] and [Employer B].

8. The claimant's pension was calculated based on his years of service in the Union, he received one good year of service after he worked 1,400 hours a year.

9. As part of the "total package" offered by the Union, the claimant received an hourly wage and a separate hourly pension wage.

10. The Union employers paid the claimant his hourly wage and paid the hourly pension wage into the claimant's pension maintained by the Union for each hour he worked.

11. The Union multiplied the claimant's years of service by 123 to determine his monthly pension.

12. As of 4/1/2022, the claimant's gross monthly pension was calculated to be $5,714.54.

13. The claimant began receiving a monthly pension through the Union effective 4/1/2022, in the gross amount of $5,714.54, and the net amount of $4,700.51 which Union employers solely funded.

14. The claimant's monthly pension amount did not change between 4/1/2022 and 8/23/2022.

15. The claimant did not contribute to the pension.

16. The claimant's services for the base period employers affected the claimant's eligibility for the pensions because the pension was calculated using the claimant's total years of service.

17. The claimant's services for the base period employers increased the amount of the claimant's pension amount, because the pension was calculated using the claimant's total years of service up to April 2022.

Credibility Assessment:

The claimant provided a letter from the Union dated 8/9/2022 that confirmed the gross and net amounts of the claimant's monthly pension. Further, the claimant agreed with the letter's amount and testified that he had received the same amount from the start of his retirement. Given the totality of the claimant's testimony over both hearings, [sic] his documentation provided at both the initial and the remand hearing, the claimant's testimony is deemed 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 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 reject Consolidated Findings ## 16 and 17, as they are unsupported by the record, as discussed below. In adopting the remaining findings, we deem 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, we reject the review examiner's conclusion that the claimant's pension is deducted from his weekly benefit amount.

G.L. c. 151A, § 29(d)(6), mandates that a claimant's weekly benefit rate be reduced if he is receiving a pension under certain circumstances. Specifically, the statute provides, in relevant part, as follows:

> (d) An individual in unemployment and otherwise eligible for benefits, who is receiving, has received, or will receive payments in the form of retirement benefits, any part of which was financed by a base period employer, shall be paid for each week of unemployment an amount computed as follows:
>
> (6) Notwithstanding any of the foregoing provisions of this subsection, the amount of benefits otherwise payable to an individual for any week which begins in a period with respect to which such individual is receiving governmental or other pension . . . shall be reduced by an amount equal to the amount of such pension . . . which is reasonably attributable to such week; provided, further, that . . . such reduction shall apply only if a base period employer contributed to or maintained such pension . . . and . . . services of the individual for such employer *during the base period* affected eligibility for or increased the amount of such pension . . . and provided further, that if the individual contributed to such plan, the amount of benefits otherwise payable to such individual shall be reduced by fifty percent of the amount of such pension . . . .

(Emphasis added).

Pursuant to this statute, in order for the agency to apply a full pension deduction, certain conditions must be met. The full reduction applies only if the base period employer contributed to or maintains the pension, and the services performed by the claimant during the based period affected eligibility for, or increased the amount of, the pension.

In this case, the claimant's base period employers contributed to his pension, as the employers paid his hourly wage and the hourly pension wage into the pension maintained by the union for each hour he worked. Consolidated Findings ## 8, 9, and 10. However, because the claimant worked less than 1,400 hours, the services he performed during the base period neither affected his eligibility for, nor increased the amount of, his pension.

The claimant's pension was calculated based on hours worked and years of service in the union. Working 1,400 hours constituted a good year of service. Consolidated Finding # 8. Although not in the findings, we can reasonably infer that, with his 37 years of service, he had become eligible for a pension long before his base period. *See* Consolidated Finding # 3.

As for increasing the amount of his pension, the record shows that in the base period, he earned $59,894.16 and his wage rate was $56.36 per hour. *See* Exhibit 3 and 12.[1] Dividing $59,894.16 by his wage rate, $56.36, shows he worked approximately 1,063 hours during the base period. Since this was less than the 1,400 hours necessary to be considered a good year of service, his services during the base period did not increase the amount of the pension. Thus, his weekly benefit amount is not reduced by his full pension amount under this claim.

Nor is his weekly benefit amount reduced by fifty percent of the pension payment, since the claimant did not contribute to his pension. Consolidated Finding # 15. Since the services performed during the base period did not affect his eligibility for or increase the amount of the pension, and he did not contribute to his pension, he is not subject to a pension deduction.

We, therefore, conclude as a matter of law that the claimant is not subject to a pension deduction pursuant to the provisions of G.L. c. 151A, § 29(d)(6), for benefits paid under his 2022-01 claim.

The review examiner's decision is reversed. The claimant is entitled to his full weekly benefit amount, beginning July 3, 2022, and for subsequent weeks if otherwise eligible.

[1] Exhibit 3 is a December 22, 2021, paycheck. Exhibit 12 is a monetary summary screen from UI Online, the DUA's electronic record-keeping system, showing base period wages reported by his employers. While not explicitly incorporated into the review examiner's findings, these exhibits 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).

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 29, 2024

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

MR/rh