



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-111378 (May 21, 2010) – On-call, part-time benefit year employment did not disqualify the claimant from receiving partial unemployment benefits. He was entitled to those benefits as a result of his full-time base period job, from which he was laid off.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA) to deny unemployment benefits during any week in which the claimant performed work for his part-time employer. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was laid off from a prior full-time job with a different employer on April 1, 2008. Based upon wages earned during the four full quarters preceding his layoff, the claimant qualified for and received benefits. Near the end of that benefit year, the claimant began working for this employer on a part-time, on-call basis and has continued this on-call employment into a second benefit year. On May 16, 2009, the DUA approved the second benefit year claim. The employer appealed that determination to the DUA hearings department. A hearing on the merits was attended by both parties. In a decision rendered on October 2, 2009, the review examiner modified the agency's initial determination, concluding that the claimant was entitled to benefits only during those weeks that he performed no services for the employer.

Benefits were denied after the review examiner determined that the claimant's part-time, on-call employment disqualified him from being in partial unemployment under G.L. c. 151A, §§ 1(r)(1) and 29(b). Our decision is based upon consideration of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue on appeal is whether the claimant's on-call, part-time employment disqualifies him from partial unemployment benefits.

Findings of Fact

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

1. The claimant has been employed as a part-time, on-call calibration technician since 3/1/09. He is still employed in the same capacity.
2. The claimant filed his most recent new claim for benefits effective Sunday 4/26/09. The claimant has full time wages earned from a previous employer during the base period (quarter ending 6/30/08). The claimant has on-call wages earned during the quarter ending 3/31/09. There was no concurrent work and no subsidiary status exists.
3. The claimant was laid off from his full time position on 4/1/08. He started the on-call position as of 3/1/09 during his previous continued claim (BYE 4/25/09) and reported partial earnings while on the continued claim. He continued his on-call position through the lag period of the new claim base period and into the new benefit year.
4. The claimant has been registering for benefit(s) since filing the new claim. The employer protested the new claim as "still employed or on-call".
5. The claimant understood at [sic] time of hire that he would be called when work was available. The nature of the work does not allow for pre-planned schedules. The claimant was called weekly and often daily for work. He earned \$22.00 per hour.
6. The claimant can work one day or several days per week, or full time hours if needed. He has not refused work since filing his claim. The available hours fluctuate week to week. The claimant had no work available from the [week ending] 5/16/09 through 6/6/09 and the [week ending] 8/15/09.
7. The claimant has never been offered a full time position by the employer, but is available for same. His employment status has never changed. He has worked occasional full time hours ([week ending] 9/5/09 for example) but then returned to the reduced on-call schedule as before.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

“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;...

As a general rule, claimants do not qualify for partial unemployment benefits based upon on-call employment. *See Town of Mattapoissett v. Dir. of Division of Employment Security*, 392 Mass. 546 (1984). Thus, in a case before the Massachusetts Appeals Court, an on-call, part-time, substitute teacher was not entitled to collect partial unemployment benefits from her current employer. *Town of Bourne v. Dir. of Division of Employment Security*, 25 Mass. App. Ct. 916 (1987) (rescript opinion).

However, an employee reduced from full-time to part-time hours may collect partial benefits. More specifically, “[A] person separated from full-time employment in non-disqualifying circumstances may be eligible for partial unemployment benefits if subsequently employed part-time.” *Town of Bourne*, 25 Mass. App. Ct. at 916, *citing Town of Mattapoissett*, 392 Mass. at 548. The Appeals Court noted that had the on-call substitute teacher shown that she had separated from a prior full-time position under non-disqualifying circumstances, there may have been a basis for collecting partial benefits from her subsequent part-time employer. *Town of Bourne*, 25 Mass. App. Ct. at 917.

In this appeal, we break down the claimant's eligibility into two time periods. During his first benefit year (April 27, 2008 – April 25, 2009), the claimant's separation from his prior full-time employment rendered him eligible to collect benefits. His eligibility was based upon the wages he had earned during the last four completed quarters prior to April 27, 2008.

At issue before us is the claimant's eligibility during a second benefit year (April 26, 2009 – April 24, 2010). He became monetarily eligible for a new claim for benefits during this second benefit period based upon the last four completed quarters prior to April 26, 2009. The claimant earned \$24,900.00 from his prior full-time employment during the first of these quarters and

\$1,793.00 from his part-time, on-call employer during the last of these quarters.¹ Not only was his monetary eligibility for benefits during this second benefit year based substantially upon those full-time earnings, but the part-time earnings, taken alone, would have been well below the G.L. c. 151A, § 24(a), minimum amount needed to qualify for unemployment benefits.²

Since the claimant's eligibility during the present (second) benefit year is based upon full-time employment, and the findings show that he separated from that full-time employment under non-disqualifying circumstances, he is eligible for partial unemployment benefits for any weeks that he has less than full-time employment. *See* DUA Service Representatives Handbook § 1405(E).

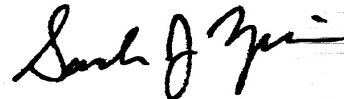
We, therefore, conclude as a matter of law that the claimant's on-call, part-time employment during the second benefit year does not disqualify him from partial unemployment benefits.

The review examiner's decision is reversed. The claimant is awarded total unemployment benefits during any week in which he has no work and partial unemployment benefits during any week in which he has less than regular full-time employment, beginning the week ending May 2, 2009 and for subsequent weeks if he is otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - May 21, 2010



Sandor J. Zapolin
Member

Member Stephen M. Linsky did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT – June 21, 2010

AB/jv

¹ The claimant's employment history detail in Exhibit #2, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Director, DET, 64 Mass. App. Ct. 370, 371 (2005).

² The minimum earnings amount, which is pegged to changes in the minimum wage, is presently \$3,500.00.