BR-117146-A (May 25, 2011) – The claimant's severance pay was disqualifying remuneration, because at the time he accepted his voluntary separation package, he did not sign a general release or relinquish a valuable right. Because a covenant not to compete had been part of a collective bargaining agreement entered into years prior to accepting the severance payment, it does not constitute a right relinquished at the time of separation. *[Note: The District Court remanded the decision for additional evidence. Subsequently, the appellant defaulted and the case was dismissed.]*

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BR-117146-A

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), that the claimant is not disqualified from receiving unemployment benefits due to receipt of certain monies received by the claimant as part of a separation plan offered by the employer. We review, pursuant to our authority under G.L. c. 151A, § 41; we affirm in part and reverse in part.

The claimant resigned from his position with the employer on June 19, 2010. He filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on August 26, 2010. 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 December 9, 2010.

Benefits were awarded after the review examiner determined that the payments the claimant received upon his separation from employment were not remuneration and, thus, the claimant was not disqualified, under G.L. c. 151A, § 1(r)(3). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we accepted the employer's application for review and provided the parties with an opportunity to submit written reasons for agreeing or disagreeing with the review examiner's decision. Only the claimant responded. Our decision is based upon our review of the entire record.

The issue on appeal is whether an $88,000 payment the claimant received upon his acceptance of a voluntary separation package (VSP) was disqualifying remuneration or non-disqualifying consideration for the claimant's agreement to relinquish certain rights.

Findings of Fact

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

1. The claimant worked fulltime as a union Equipment Installation Technician for this employer's telephone company from 12/25/66 until he was offered a separation package, with incentives to leave work, as a part of a cost saving reduction in force effort by the employer, resulting in a last day of work for the claimant on 06/19/10.

2. The claimant was offered total incentives of $138,000.00 to leave his job. The separation agreement between the parties contains a 48 month from termination non-compete restrictive covenant.

3. All separation money was contingent on the claimant agreeing to abide with the four year covenant not to compete. The claimant did sign the agreement and he understands he is bound to the covenant not to compete for a period of 48 months after the date of termination.

4. On 06/24/10 the claimant filed a claim for unemployment benefits.

5. On 08/26/10 the claimant was mailed a "Notice to Claimant of Disqualification Due to Receipt of Remuneration" Form 3720-RA. This Notice informed the claimant that he was disqualified from receiving benefits for the week ending 06/26/10 and until he had worked for eight weeks and in each week earned an amount equal to or in excess of his weekly benefit rate due to the remuneration received at the time of employment termination.

6. The claimant requested a hearing on the remuneration issues.

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, § 1(r)(3) defines remuneration, in relevant part, as follows:

> . . . any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses . . . received by an individual . . . (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice . . .

Following a hearing, the review examiner determined that the payments that the claimant received upon his separation from the employer did not fall within those categories laid out above in the statute. Therefore, he was not disqualified due to receipt of remuneration.

We have no quarrel with the review examiner's treatment of the $50,000 payment. As a bonus paid to all employees who applied for and were accepted in the (VSP) program, this program had none of the characteristics of severance pay — that is to say it was not paid based on the claimant's years of service, and it was not paid in recognition of past services. It was, instead, merely a bonus for taking up the VSP opportunity.

The $88,000 payment, however, is another matter. As the Supreme Judicial Court has observed in Itek Corp. v. Dir. of Div. of Employment Security, 398 Mass. 682, 686 (1986):

> Economic realities may dictate the elimination of certain jobs, but an employer may choose to keep its employees on the payroll. In such cases, the Legislature has provided that one who is receiving a guaranteed wage, even though not actually working, is still employed. § 1(r)(3). The Legislature did not intend that unemployment compensation serve as a supplemental income for those receiving their regular salaries.

Against this background, we conclude that the $88,000 separation payments made to the claimant in this case constituted "severance pay." The payments exhibit classic attributes of severance, including that the total amount paid was directly related to years of service, the payments were not subject to limitation if the claimant obtained other employment within the period of time he was to accept payments, and the claimant was permanently severed from employment. *See* Bolta Prods. Div. v. Dir. of Div. of Employment Security, 356 Mass. 684, 689-690 (1970).[1] In this case, the claimant received $2,200 per year of service up to a maximum of 40 years. Therefore, he received $88,000, to be distributed over forty-eight months. Although the claimant's contract provided that these payments would cease if he obtained a job with a company in direct competition with the employer, he was not totally prohibited from obtaining other employment while continuing to receive payments. Finally, the claimant was permanently separated. He could not be recalled or rehired with the same seniority and benefits as he had prior to the separation.

We disagree with the review examiner's conclusion that the principle enunciated in White v. Comm'r of Dep't of Employment & Training, 40 Mass. App. Ct. 249 (1996), applies to the $88,000 payment. In White, 40 Mass. App. Ct. at 252-253, the Appeals Court held that payments made to a severed employee in return for a general release of all federal and state, statutory and common law claims against the employer were not severance pay, within the meaning of G.L. c. 151A, § 1(r)(3), but rather were consideration for relinquishment of a valuable right. The review examiner in the present case found that

[1] 430 CMR 4.38 defines "Severance Pay" as "a payment to an employee at the time of separation in recognition and consideration of the past services the employee has performed for the employer. The amount of the payment is usually based on years of service." This definition gives further support to our conclusion that the claimant received severance pay and, therefore, remuneration.

all of the claimant's payments were contingent on him agreeing not to work for a direct competitor of the employer for forty-eight months after the date of his separation. He concluded that the claimant had therefore given up a valuable right, and that the money he received in exchange did not constitute remuneration.

The claimant did not execute a general release of claims in this case. Therefore, the White decision is not squarely on point. Nevertheless, assuming the review examiner's reasoning, that giving up a valuable right may be a basis for removing a payment from the scope of G.L. c. 151A, § 1(r)(3), we do not agree that the claimant gave up anything *at the time he accepted his voluntary separation package*. The non-compete agreement was a part of the union collective bargaining agreement which had been entered into years prior to the claimant's acceptance of the VSP. No new consideration was given up by the claimant at the time of his separation. *Cf.* White, 40 Mass. App. Ct. at 254 (noting that the employee's consideration for the severance agreement was the release of claims, because an employee has no obligation, as a part of the services he or she is to provide to the employer, to renounce legal rights possessed by him or her), *quoting* Moore v. Digital Equip. Corp., 868 P.2d 1170, 1173 (Colo. App. 1994).

Based on the specific facts of this case, and in light of the underlying purpose of the statute, we, therefore, conclude as a matter of law that the $88,000 payment that the claimant received was disqualifying remuneration.

The review examiner's decision is affirmed as to the $50,000 bonus, which we conclude was not remuneration, but is reversed as to the $88,000 separation payment. The DUA's Determination Department is instructed to calculate the appropriate number of weeks of disqualification consistent with this decision and to extend the claimant's benefit year accordingly.

BOSTON, MASSACHUSETTS
DATE OF MAILING –May 25, 2011

John A. King, Esq.
Chairman

Stephen M. Linsky, Esq.
Member

Sandor J. Zapolin
Member

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 24, 2011

SF/rh