THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-111428 (February 25, 2011) -- Between tours of duty on the employer's merchant marine vessel, the claimant was in total unemployment under G.L. c. 151A, sec. 1(r). He was out of work because the collective bargaining agreement mandated an end to his assignment. He registered with the hiring hall and, as an uncertified bosun, could only be re-employed through his hiring hall and only if a certified bosun was available.

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 following the claimant's separation from employment. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was separated from his position with the employer on June 14, 2009. He filed a claim for unemployment benefits with the DUA and was denied benefits in a determination issued on July 9, 2009. 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 determination and denied benefits in a decision rendered on October 1, 2009.

Benefits were denied after the review examiner determined that the claimant was not in unemployment during the week in which he filed his claim, and, thus, was disqualified under G.L. c. 151A, §§ 29(a) 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 for the parties to submit written responses to questions about the claimant's terms and conditions of employment, his access to vacation monies, and his efforts to find new employment after his separation from this employer. Both parties submitted written responses. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessments. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant was in unemployment between his tours of duty aboard the employer's merchant marine vessel.

Findings of Fact

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

1. This examiner has made a sincere attempt to fully and accurately respond to each of the questions posed by the Board's order. However, it proved to be a very difficult task since only written answers were submitted by each party and such answers were often vague, unresponsive, or very short, as little as one word. The claimant provided responses that included photocopies of pages from a contract which were extracted from their context. Other times he submitted photocopies of pages from a memo he testified was prepared by his union and which provided the unions [sic] position regarding the interpretation of the contract. It was impossible to ask questions of one party regarding the answers given by the other party, or even to ask a given party to elaborate and explain that party's response. The ability to make credibility findings was also limited.

   Specific credibility assessments appear in connection with a number of findings below, but it was not possible to conclude whether or not one party or the other was generally more credible than the other. Of course no credibility assessments could be made based on demeanor; not even the voices of the parties were heard. This examiner found it impossible to provide an answer to a critical issue posed by the Board; that is whether or not the claimant is permitted by his union to work without interruption if that is his choice.

2. It remains unclear whether the employer's witness was placed under oath prior to giving his testimony. The employer did not provide any evidence in response to Question 1 in the Board Order. The claimant stated only that he did not know whether or not the employer was placed under oath. The employer did not provide a sworn affidavit confirming the truth of the employer's witness's testimony.

3. The employer is a shipping line that contracts with the Department of Defense. Its employees, including the claimant, are governed by a contract between the employer and the Seafarers International Union.

4. The claimant began working aboard one of the employer's ships, a ship known as the [Employer Vessel], on 8/8/05. The claimant's response was too vague. The employer's was supported by documentary evidence. It was judged the more credible evidence.

5. His [sic] was on duty aboard the [Employer Vessel] on approximately 25 times thereafter.

6. The claimant was aboard the ship from 8/8/05 to 8/10/05, from 8/11/05 to 8/17/05, from 8/18/05 until 12/7/05, from 12/8/05 to 2/19/06, for one day on 2/26/06, from 2/27/06 to 3/3/06, from 4/24/06 to 6/25/06, from 7/18/06 to 7/20/06, from 7/21/06 to 8/28/06, from 8/29/06 to 11/05/06, from 11/06/06 to 11/15/06, from 11/16/06 to 12/10/06, from 2/5/07 to 5/23/07, from 5/24/07 to 6/2/07, from 7/18/07 to 7/27/07, from 8/3/07 to 8/13/07, from 8/14/07 to 11/6/07, from 11/7/07 to 11/15/07, from 11/16/07 to 2/9/08, from 5/12/08 to 5/14/08, from 5/15/08 to 8/1/08, from 8/2/08 to 9/14/08, from 12/15/08 to 6/14/09. He signed onto the ship again on 10/12/09 and has yet to return from that voyage. This finding reflects the employer's documentary evidence which was submitted in response to the Board's request; the claimant's response was very general and lacked specifics.

7. The claimant stated that his employment ends each time he signs off the vessel. However, in support of that statement he cited Section 28 of the Union Contract. However, that provision of the contract does not appear to settle that issue. It merely states that wages will begin to be paid from the time the claimant signs on to the vessel and actually begins work.

8. Even though the employer considers the claimant to be a permanent employee of the [Employer Vessel] and would not require him to leave the vessel, it is clear from the union documents which were submitted by the claimant that the union does encourage its members to rotate—leave a vessel/job situation after 120 days—in order to give more union members a chance for employment. However, it is not clear that [sic] union prohibits its members from working longer if they so desire. The union does consider the time ashore between voyages a time for relaxation and deems that time necessary for the safety of union members.

9. The claimant also stated in his written answers that he first worked on the [Employer Vessel] some 20 years ago. He then said he has worked on many other ships and for other employers since first working on the [Employer Vessel]. That does not necessarily mean however that he has worked on other ships or for other employers since 8/8/05. Also, as can be seen from the dates of service aboard the [Employer Vessel] that are listed above[,] it does not appear that the claimant would have had a great deal of opportunity to work elsewhere. In response to question 2.b.i.[,] the claimant adds that he has worked on a number of specific vessels that he identifies. However, he does not give dates for service on those vessels. Therefore, ultimately neither of the parties presented written answers that permit this Examiner to answer Question 2.b. in the Board Order definitively.

10. The claimant is considered by the employer to be a permanent employee on the [Employer Vessel].

11. The claimant last worked for the employer as a bosun aboard a particular ship, the [Employer Vessel], between 12/15/08 and 6/14/08 [sic]; at that point on 6/14/08 [sic] he left the ship and returned home. He filed a claim for unemployment benefits on 6/16/08 [sic].

12. The claimant left the ship on 6/14/08 [sic] believing, based on his understanding of the contract between his union and the employer, that he was required to do so. He believed based on information/advise [sic] he had received from his union that he could serve no more than 120 days on a tour of duty (unless the employer specifically asked him to stay on board for a longer period). In the case at hand[,] he had served 180 days because he was requested to do so by the Officer in Charge of the vessel.

13. About two weeks prior to his 120th day[,] the claimant approached the Officer in Charge and told him that the 120 days was coming to an end. The officer in charge asked the claimant to remain on board after the 120 period to complete inspections and audits. He told the claimant that he could sign of [sic] on 6/14/09.

14. The employer does not agree with the claimant's interpretation of its contract with his union. The employer sets no time limit on the length of time that the claimant can remain aboard. The employer considered the claimant's leaving the ship entirely a matter of his own choosing in order to take time off.

15. The employer's written answers stated that before leaving the ship on 6/14/08 [sic] the claimant submitted a vacation request to the Officer in Charge, and that he stated that he would take a three month vacation. The claimant denied submitting such a request and denied making such a statement. The claimant's written answers[,] though brief[,] were deemed the more credible evidence and the finding is that he did not do so. The employer would have had access to the written document making such a request and the employer failed to provide a copy of it.

16. The employer did not give him a recall date. The employer stated in its written responses to the Board's questions that the employer gave the claimant a recall date of 9/21/09. The claimant said the employer did not. The claimant was the more credible on this issue since the employer indicated in another of its answers that the claimant next worked on the [Employer Vessel] beginning on October 12, 2009, which is [sic] contradicts a recall date of 9/21/09.

17. The employer believes that it has an agreement with the union that permits the claimant to serve on the [Employer Vessel] without interruption, or on rotation, and without the claimant becoming recertified as a bosun. It failed to provide a copy of this alleged agreement. The claimant was totally unaware of the existence of any such agreement; the employer had never notified him of such an agreement between the union and the employer.

18. As stated above in finding #10 the employer considers the claimant to be a permanent employee of the [Employer Vessel]; the employer stated it "holds his job for him" when he leaves for vacation. The claimant is not a recertified bosun; it is his understanding that any recertified bosun will be given preference for his job aboard the [Employer Vessel] if they apply. The employer may "hold the job open for the claimant" in some sense, but the claimant provided convincing evidence that he can only reclaim the identical position aboard the [Employer Vessel] when it again comes available because the person who had replaced him in the position rotates off the ship.

19. The union contract provides that if a permanent employee accepts another job during a period where he has rotated off the ship at the end of 120 days, then he will forfeit his right to reclaim the position he left aboard that same ship.

20. The claimant was not required to wait before registering with his union hall for new employment. He could immediately apply for any position aboard any vessel owned by any employer. However, the claimant felt certain that the position he had left aboard the [Employer Vessel] would not be available to him for 120 days due to the fact that the man who had replaced him aboard the [Employer Vessel] was entitled to work for about 120 days.

21. The rotation system—whereby a union member is expected to leave the ship for a vacation period after about 120 days—is the same for all union members of whatever classification; the employee's classification/certification has no impact on whether or not he is to rotate off the vessel after a period of 120 days. The only exception to that general statement is that when a vessel is in fully operational status the contract provides that "not more than half of the officers or crew shall rotate at one time within the deck, engine or steward department."

22. The claimant believes that as an unrecertified bosun he cannot be made a permanent employee and that he is only eligible for rehire; he does not believe that his job is being held open for him by the employer. He believes his interpretation [sic] shared by and imposed on him by his union.

23. After leaving the [Employer Vessel] on 6/14/09 the claimant registered with his union hall to reclaim his job; when the claimant was again sent aboard the [Employer Vessel] in October of 2009[,] the union recorded him as having reclaimed his job. It did not list him [sic] new hire. It is unclear whether or not the claimant has made any other effort after 6/14/09 to obtain full time employment with another employer on another ship.

24. While he worked the claimant did not accrue leave/vacation time. As of the date he left the ship and the date he filed his claim[,] the claimant was not entitled to any vacation pay and was not receiving any. He is, however, entitled to "vacation pay", from a fund to which the employer contributes and which is maintained by the union. This fund is regulated by the Employee Retirement [sic] Security Act of 1974 ("ERISA") and is governed by a board of trustees. The claimant is able to claim a stipend from this fund by applying to his union; he accrues benefits from this fund at the rate of five paid days for every 30 days that he works aboard the [Employer Vessel]. It is unclear whether or not the claimant applied for payment through this fund after he left the vessel on 6/14/09. Union members may claim benefits from this fund maintained by the union even while working; they do not actually have to be on vacation to claim benefits from the fund. Sums paid to them under the plan are not considered wages or salary.

25. There is a distinction made between a fully operational ship and a reduced operating status ship. The [Employer Vessel] is a reduced operating status ship. That status has no impact what so ever [sic] on the claimant's ability to obtain assignment on the [Employer Vessel]. It does affect the wages paid to the crew of the vessel and limits the number of crew members that can be rotated in certain departments.

26. When the Officer in Charge asked the claimant to stay on the ship after his 120 tour had expired it was stated that the claimant would only serve for an additional 60 days. When that 60 days was up the Officer in Charge not only prepared a discharge certificate for the claimant but also made and delivered an itinerary for the claimant's travel home. The Officer in Charge told the employer that he did that because the claimant had requested to take vacation time. The claimant did not in fact state that he was requesting "vacation time" (see credibility assessment above).

27. It is clear that the claimant is now aboard the [Employer Vessel] in the same position he left[,] effective 10/12/09. He received the job though [sic] the union hiring hall. It is not clear when he asked the union for the position. He was dispatched by the union hiring hall in New Orleans, by a person named James Brown.

28. It is unclear, because the claimant failed to provide any information, whether the claimant made any other effort to obtain any other job on any other ship between the time he left the [Employer Vessel] and the time he once again boarded that ship. It appears, but is not clear, that he registered with his union hiring hall telling them that he was able, ready and willing to work aboard any ship in any position and with any company that was prepared to hire him. This examiner states that it is unclear because the claimant did not state that he registered with the union hall; he merely stated in his written answer that he is

> a member in good standing of the seafarers union and that as such he is able, available and willing to accept any position on any vessel; it remains unclear whether the claimant was required to take any action to inform the union of his availability and desire for placement, or that he actually took any action to give the union notice of his availability and willingness to work.

Ruling of the Board

The Board adopts the review examiner's consolidated findings of fact and credibility assessments[1]. 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.

The review examiner denied benefits pursuant to G.L. c. 151A, § 29(a), which authorizes benefits to be paid to those in total unemployment. Total unemployment is defined at G.L. c. 151A, § 1(r)(2), which provides, in relevant part, as follows:

> "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 initially concluded that the claimant had not become separated from employment, that the employer considered the claimant to be an employee on a requested leave of absence, and that the claimant was not in unemployment. We remanded the case to take additional evidence regarding the nature of the employment relationship between the claimant and the employer; whether the claimant received vacation pay or some equivalent after leaving work on June 14, 2009; and whether the claimant was able, available, and actively seeking employment after leaving work on June 14, 2009.

As the review examiner found, the parties' employment relationship was in large part dictated by the terms of a collective bargaining agreement between the employer and the claimant's union. This agreement provided for rotating tours of duty, including service on vessels for periods of 60 to 120 days, or as scheduled by the company.[2] The review examiner found that the claimant's

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[1] In light of the claimant's occupation as a merchant marine, who was at sea and could not be available in person or by telephone for a hearing, the Board allowed the parties to submit written responses to its remand questions in lieu of a hearing. Although the review examiner noted his inability to ask follow-up questions or to measure the demeanor of the witnesses under these circumstances, we accept the parties' responses as the best available evidence. *See* G.L. c. 151A, § 39(b). "If the proponent has presented the best available evidence, which is logically adequate, and is neither contradicted nor improbable, it must be considered." New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 471 (1981), *quoting* L.L. Jaffe, Judicial Control of Administrative Action 598, 608 (1965).

[2] Provisions of the collective bargaining agreement between the employer and the Seafarers International Union, including this one appearing in Exhibit #10, 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 Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

tour was extended beyond his 120th day, until June 14, 2009, by the employer. The review examiner rejected the employer's contention that the claimant stopped working on June 14, 2009, because he requested vacation. We see no reason to disturb this finding. The record shows that the length of the claimant's tour of duty was imposed by the union contract and by his employer.

The evidence also supports a conclusion that the claimant's position with the employer was not that of a permanent employee. Finding of Fact #18 notes that the claimant was not a certified bosun during the relevant period. This is significant because under the terms of the collective bargaining agreement appearing in Exhibit #30, he could only be chosen to fill a crew vacancy if a recertified bosun was not available. Additionally, the review examiner's Finding of Fact #16 provides that when the claimant left the [Employer Vessel] on June 14, 2009, the employer did not give him a recall date. Notwithstanding the employer's characterization of the claimant as a permanent employee, only persons with a recertified boatswain rating are designated as having permanent status.[3] In sum, when the claimant's tour of duty ended on June 14, 2009, he could not know when or whether he would return to work for the employer.

Furthermore, the collective bargaining agreement dictated that the claimant could only be re-employed as a bosun through his union hiring hall. Exhibit #9 shows that the system for assignments was developed by the union and the company; Exhibit #10 provides that a return to work required permission by both the union and the company; and Exhibit #17 states that no one may be employed or reassigned without clearance from the hiring hall. Findings of Fact # 23 and #27 provide that upon completing his tour with the employer on June 14, 2009, the claimant registered with his union hall to reclaim his job with the employer and that he was not sent back aboard the ship until October 12, 2009. In light of the industry practice to impose mandatory rotations and to rehire exclusively through the hiring hall, we are satisfied that the claimant made himself available, but was unable to obtain any work in his occupation during the period between tours of duty with the employer.

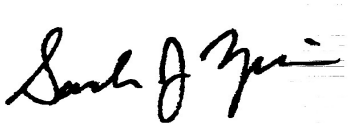
Therefore, we conclude as a matter of law that the claimant was in unemployment within the meaning of G.L. c. 151A, §§ 29(a) and 1(r)(2), during the relevant period between his tours at sea.

[3] Exhibit 11 incorporates into the collective bargaining agreement the Shipping Rules contained in the Standard Freightship Agreement. The shipping rule regarding permanent status for Recertified Boatswain is found in exhibit 13. The title "boatswain" is commonly referred to as a "bosun." American Heritage College Dictionary 159 (4th ed. 2004).

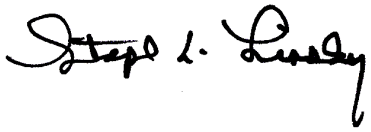
The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending June 20, 2009, and for subsequent weeks, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF MAILING –February 25, 2011

John A. King, Esq.
Chairman



Sandor J. Zapolin
Member



Stephen M. Linsky, Esq.
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- March 28, 2011

AB&JPC