

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Stephen M. Linsky, Esq.
Member
Judith M. Neumann, Esq.
Member**

Issue ID: 0019 7438 36

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by JoAnn Amico, a review examiner of the Department of Unemployment Assistance (DUA), that the claimant's unemployment benefits are subject to pension reduction, pursuant to G.L. c. 151A, § 29(d)(6). We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant separated from his position with the employer on February 15, 2013. He filed a claim for unemployment benefits with the DUA, which was approved. Thereafter, the DUA learned that the claimant was also receiving pension income, and redetermined his benefit rate. On July 31, 2013, the DUA issued a notice of redetermination and overpayment, reducing the claimant's benefit rate by \$79 per week. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination in a decision rendered on October 21, 2013. We accepted the claimant's application for review.

The reduction was imposed after the review examiner determined that the claimant's pension plan was funded in part by the employer, as set forth in G.L. c. 151A, § 29(d)(6). Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant's unemployment benefits are subject to the statutory reduction is supported by substantial and credible evidence and free from error of law, where the pension being received by the claimant is funded, in part, by the employer.

Findings of Fact

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

1. The claimant's benefits became effective the week ending 2/17/13, and he thereafter received benefits. His weekly regular unemployment insurance benefit rate was \$416.
2. Subsequently, additional information was received which made necessary a notice of disqualification which disqualified the claimant from receiving full benefits for the week beginning 2/17/13, and indefinitely. The notice stated

that because the claimant was receiving a retirement benefit funded in part by a former base period employer, his benefit rate was reduced by 50% of his average weekly retirement benefit.

3. The disqualification was dated 8/5/13, and made under Section 29(d)(6) and Section 71 of the Law. An overpayment was established for the weeks ending 3/9/13 to 7/13/13, as the claimant's benefit rate was reduced by 50% of his average weekly retirement benefit.
4. The claimant worked full-time for the employer, a county sheriff's office, from 7/1/88 to 2/15/13. He worked as a lab technician and also as a corrections officer during the course of his employment.
5. The county sheriff's office is the claimant's sole base period employer. The claimant's base period for this claim is from 1/1/12 to 12/31/12.
6. The claimant contributed a percentage of his biweekly pay to the pension fund equal to \$149.78 per pay period.
7. The employer maintained the pension fund from which the claimant receives monthly pension disbursements.
8. The claimant's pension became effective on or around 2/15/13. He receives monthly pension disbursements of \$680.31. He has not rolled over any retirement allowance monies to a retirement account.
9. The amount the claimant receives in monthly pension disbursements is not equal to the money he contributed per pay period to this fund; additional funds maintained by the employer are a part of the total monthly disbursement the claimant receives and will receive for the rest of his life.
10. The claimant is able to work, available to work, and seeking work.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact, except for finding of fact # 9, which we set aside because it is not relevant to the proper interpretation of the applicable law, as discussed below. In adopting the remaining findings of fact, the Board deems them to be supported by substantial and credible evidence. We also agree with the examiner's ultimate conclusion that the claimant's benefits are properly subject to reduction, but we clarify the legal basis for that conclusion.

G.L. c. 151A, § 29(d)(6), provides for the reduction of unemployment benefits paid to persons receiving pensions:

[T]he amount of benefits otherwise payable to an individual ... receiving governmental or other pension ... which is based on the previous work of such individual, shall be reduced ... provided ... that ... a base period employer contributed to or maintained such pension, retirement or ... other payment plan; 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 per cent of the amount of such pension, retirement or retired pay, annuity, or other payment, notwithstanding the amount contributed by the individual to such plan.

When an otherwise eligible claimant for unemployment benefits is also collecting retirement or pension benefits based on his or her own employment, the review examiner must determine whether the employer contributed to the plan. If the employer contributed, then the claimant's unemployment benefit is reduced by half of the pension amount.

In this case, the review examiner inferred in finding # 9 that the employer had contributed to the claimant's pension fund, because the pension documents established that the claimant was drawing more per month than his analogous payroll contributions. We issue this decision because the review examiner's inference and finding # 9 are not the apt standards for deciding whether claimant's benefits are subject to the reduction in G. L. c. 151A, § 29(d)(6). The pension fund providing claimant's retirement allowance does not operate like a savings account. The review examiner's approach would lead to the wrong conclusion in some cases.

This case can be decided by reference to the statutes governing public employee pensions. By virtue of the Abolition of County Government statute enacted in 1999, employees of the Worcester County Sheriff's Department became employees of the Commonwealth. G. L. c. 34B, § 14(a). As such, the claimant's pension is administered by the State Employee Retirement System, pursuant to G.L. c. 32, § 3.

As a member of the State Employee Retirement System, the claimant's retirement allowance is regulated by G. L. c. 32, which also regulates all other public employee pension systems in the Commonwealth. The Supreme Judicial Court has held that pensions regulated under these provisions are subject to the 50% deduction now set forth in G. L. c. 151A, § 29(d)(6), because they include employer contributions. In Lynch v. Dir. of the Division of Employment Security, 372 Mass. 864 (1977), the Court set forth the controlling analysis:

[T]he plaintiff's retirement allowance consists of payments from an annuity toward which he contributed (G.L. c. 32, s. 22(2)(a)), and an annual pension, financed by his former employer, toward which he has made no contribution (G.L. c. 32, s. 22(3)(a)). See G.L. c. 32, s. 1, where retirement allowance is so defined. Thus, it is clear that part of the plaintiff's retirement allowance was financed by a base period employer and that, therefore, the deduction provided G.L. c. 151A, s. 29(d), must be made from the plaintiff's weekly unemployment benefit.

It is also apparent from the complex funding and oversight mechanisms established in G. L. c. 32, § 22, that the Commonwealth "maintains" the pension plan from which the claimant receives

his benefits, within the meaning of G. L. c. 151A, § 29(d)(6). As a matter of law, therefore, the claimant's pension is not based solely upon his own payroll contributions but also upon appropriations from his employer into a system maintained by his employer. Consequently, his benefits are subject to reduction, by application of G. L. c. 151A, §29(d)(6).

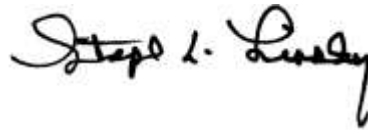
We conclude as a matter of law that the notice of redetermination and overpayment was correct.

The review examiner's conclusion is affirmed. The claimant's weekly benefit rate of \$416 shall be reduced by \$79, fifty percent of his pension.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 19, 2014



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ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

LH/rh