



THE COMMONWEALTH OF MASSACHUSETTS

RECEIVED

APR 17 2008

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Office Hours: 8:45 a.m. to 5:00 p.m.

DEVAL L. PATRICK
GOVERNOR

TIMOTHY P. MURRAY
LT. GOVERNOR

SUZANNE M. BUMP
SECRETARY, LABOR AND
WORKFORCE DEVELOPMENT

**BOARD OF REVIEW
DECISION**

JOHN A. KING, ESQ.
CHAIRMAN

DONNA A. FRENI
MEMBER

SANDOR J. ZAPOLIN
MEMBER

In the matter of:

Appeal number: **BR-108064**

CLAIMANT APPELLANT:

EMPLOYING UNIT:

New Falmouth Woods, LLC
c/o ADP/UCS
P.O. Box 8000
San Dimas, CA 91773

S.S. #
Office # 41

EMP.

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 while the claimant performed part-time work, after separation from full-time employment. We review pursuant to our authority under G.L. c. 151A, § 41 and reverse.

Benefits were denied after the DUA review examiner determined that the claimant was not in partial unemployment as defined in G.L. c. 151A, §§ 1(r)(1) and 29(b). After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decisions, and the claimant's appeal, we remanded the case back to the review examiner to take additional evidence and to make further findings from the record. Thereafter, the review examiner conducted a remand hearing, which only the claimant attended, and issued his consolidated findings of fact. Our decision is based upon our review of the entire record, including the decision below and the consolidated findings.

The claimant, a highly educated and well compensated salesman who was unemployed at that time, began part-time work as a \$11.00 per hour groundskeeper for the instant employer on May 7, 2008. He filed a claim for unemployment benefits with the DUA but was disqualified in a determination issued by the agency on June 30, 2008. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, which both parties attended, a DUA review examiner affirmed the agency's initial determination and denied the claimant benefits in a decision rendered on September 23, 2008.

The issues on appeal are whether the claimant's part-time work for this employer is suitable employment, and whether he is in partial unemployment.

Findings of Fact

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

1. The claimant works for the instant employer as a Grounds Keeper for a golf course. The claimant began his work on May 7, 2008.
2. The claimant answered an advertisement by the employer that stated the availability of full and part-time positions.
3. During the hiring process that claimant informed the employer he was only available for work of one day a week and one weekend day every other week.
4. After the claimant was hired he was asked by the employer to work an additional day during the week, to which he accepted. Still later the claimant asked to work an additional day and the offer was accepted.
5. The claimant is not available to work on Monday or Friday as he conducts a search for work on those days.
6. If the claimant did not limit his availability he could work on Monday and Friday as well as the other days of the week.
7. The claimant's annual salary in the last full-time job he performed prior to his part-time job with the instant employer was \$75,000.00.
8. The claimant's pay on his part-time job was \$11.00 an hour with no fringe benefits. The claimant's salary history was \$100,000.00 to \$150,000.00 with a combined base salary and commissions on sales.
9. The claimant's experience in his field of work has been technical sales since 1988. The claimant has specialized in point of sale system with large retail stores. The claimant has a master's degree in Business and Marketing. Since 1971, he has worked with point of sale systems and has been trained by various employers in this field. The claimant's expertise has been in sales and point of sales systems.
10. Prior to his separation from his most recent full-time employer, the claimant worked as a Regional Sales Manager for nine months.

11. The claimant's work for the instant part-time employer did not require him to use the training and experience necessary to perform in his field of expertise as it was not needed. The claimant's work with the instant employer was the mowing and maintenance of a golf course.
12. The claimant is now seeking work in sales and similar occupations associated with point of sales systems
13. The claimant has an expectation of finding work in sales, however, given the current economy, he believes it will take some time.
14. The claimant does not expect that he will find the same job at the same rate of pay. The claimant is willing to accept a salary of less than \$75,000.00.

Ruling of the Board

The Board adopts the DUA review examiner's consolidated 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.

The review examiner denied benefits after analyzing the claimant's employment status under G.L. c. 151A, § 1(r)(1), which provides, in pertinent part, as follows:

[A]n 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 employed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. For the purpose of this subsection, any loss of remuneration incurred by an individual during said week resulting from any cause other than failure of his employer to furnish full-time weekly schedule of work shall be considered as wages and the director may prescribe the manner in which the total amount of such wages thus lost shall be determined.

The review examiner's conclusion was also based on G.L. c. 151A, § 29(b), which provides, in pertinent part, as follows:

An individual in partial unemployment and otherwise eligible for benefits shall be paid the difference between his aggregate remuneration with respect to each week of partial unemployment and the weekly benefit rate to which he would have been entitled if totally unemployed ...

The review examiner concluded that because the employer had full-time work available, and because the claimant limited his availability to three weekdays, he was not in partial unemployment and was not eligible for partial benefits under G.L. c. 151A, §§ 1(r)(1) and 29(b).

We remanded the case so that additional testimony could be taken regarding the suitability of the claimant's part-time employment. We analyze this aspect of the claimant's employment status under G.L. c. 151A, § 25(c), which provides, in pertinent part, as follows:

'Suitable employment' ... shall take into consideration whether the employment ... is one for which he is reasonably fitted by training and experience.

We find that the claimant's part-time employment for this employer is not suitable employment; he is in partial unemployment; and, thus, he is eligible for partial unemployment benefits.

The employer is a golf course. The claimant works for the employer as a part-time groundskeeper, earning \$11.00 per hour, without benefits.

The claimant has a master's degree in business and marketing. He has over 20 years of experience in technical sales, and 28 years of experience with "point of sale" systems. Prior to his separation from his most recent full-time employer, he worked as a sales manager for technical sales vendors, earning \$75,000 annually. His previous salary history as a full-time employee included positions where he earned \$100,000 to \$150,000 annually, combining base salary with commissions. He is seeking work in sales and similar occupations associated with "point of sale" systems, using the two weekdays he reserves from working for the instant employer to search for suitable employment. He is willing to accept a salary below \$75,000 and expects to find work in sales.

The claimant's part-time employment for the instant employer does not require him to use the training and experience necessary to perform in his field of expertise. His income from the instant employer is substantially less than he earned in his usual field of expertise. He expects to find re-employment in his field of expertise. Under these circumstances, it is reasonable for the claimant to devote two weekdays to his pursuit of full-time employment in his field of expertise.

We, therefore, conclude as a matter of law that the claimant's part-time stopgap benefit year work is not "suitable employment" as set forth in G.L. c. 151A, §25(c)¹. He is thus eligible for partial unemployment benefits under G.L. c. 151A, §§ 1(r)(1) and 29(b).

¹ Because we decide this case under the suitability provisions of G.L. c. 151A, § 25(c), we do not reach the issue of so-called "part-time availability". Therefore, the very substantial public policy questions surrounding the "part-time availability" regime created under 430 CMR 4:42 et seq. – which extend from its fundamental fairness to its mere administrative practicability – must wait for resolution on another day.

The DUA review examiner's decision is reversed. The claimant is eligible to receive benefits for the week ending May 24, 2008 and for subsequent weeks if otherwise eligible.



John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - February 27, 2009



Sandor J. Zapolin
Member

Member Donna A. Freni 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 – March 30, 2009