

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW
Government Center
19 Staniford Street
Boston, MA 02114



Tel. 626-6400
Office Hours:
8:45 a.m. to 5:00 p.m.

**DECISION
OF
BOARD OF REVIEW**

In the matter of:

Appeal number: **BR-248440**

APPELLANT: (claimant)

RESPONDENT: (employer)

[REDACTED]

[REDACTED]

Office #02

On January 21, 1999, in Boston, Massachusetts, the Board reviewed the written record and a recording of the testimony presented at the hearing held by the Deputy Director's representative on November 2, 1998.

On December 22, 1998, the Board allowed the claimant's application for review of the Deputy Director's decision in accordance with the provisions of section 41 of M.G.L. c. 151A, the Massachusetts Employment and Training Law.

The Board has reviewed the entire case to determine whether the Deputy Director's decision was founded on the evidence in the record and was free from any error of law affecting substantial rights.

The claimant's appeal is from the Deputy Director's decision which concluded that:

Because the claimant is presently on a leave of absence and not separated from the part time employer a constructive deduction under the provisions of Section 29(b) does not apply. Because the claimant is not presently working the part time hours for which she was hired a partial deduction in accordance with the provisions of Section 29(b) cannot be applied.

Since January 1998 the claimant has worked part time hours only for the instant employer. For health reasons the claimant requested a leave of absence from the part time hours, and the leave of absence was granted. Because at this time the claimant is not able to work the part time hours for which she was hired the amount she could have earned for this employer must be deducted as a lost time charge in accordance with the provisions found under Section 29(a) and Section 1(r)(1) and 430 CMR 2.02.

Section 1 – The following words and phrases as used in this chapter shall have the following meanings, unless the context clearly requires otherwise:

(r) "Unemployed" and "Unemployment", an individual shall be deemed to be unemployed and in unemployment if either in "partial unemployment" or in "total unemployment" as defined in this subsection.

- (1) "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; 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 commissioner may prescribe the manner in which the total amount of such wages thus lost shall be determined.

In accordance with the regulation found under 430 CMR 2.02:

Lost Time

The cash value of time lost for reasons other than failure to furnish full-time work shall be determined by multiplying the average hourly earnings for the week by the number of hours lost. If it is not possible to ascertain the average hourly earnings for the week of such "lost time", such lost earnings shall be computed 4% of the benefit rate for each hour lost.

The redetermination under the provisions of Section 71 was necessary, but is modified as to the amount of the overpaid benefits.

The claimant is subject to a lost time charge of \$85.00 for the week ending August 15, 1998 and for an indefinite number of weeks thereafter; until she has met the requirements of the Law.

The claimant is overpaid \$85.00 for the week ending August 15, 1998, \$85.00 week ending August 22, 1998, and \$85.00 week ending August 29, 1998. The total overpayment amount is \$255.00.

M.G.L. c. 151A §§ 1(r)(1)(2), 29(b), 25(e), in part, 71 and 430 CMR 2.02, 4.76, and 4.78(2) are pertinent and provide as follows.

Section 1. The following words and phrases as used in this chapter shall have the following meanings, unless the context clearly requires otherwise:

- (r) "Unemployed" and "Unemployment", an individual shall be deemed to be unemployed and in unemployment if either in "partial unemployment" or in "total unemployment" as defined in this subsection.
- (1) "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; 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 commissioner may prescribe the manner in which the total amount of such wages thus lost shall be determined.

- (2) "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 received no remuneration, and in which, though capable of and available for work, he is unable to obtain any suitable work. Services rendered in consideration of remuneration received for relief, support, or assistance, furnished or provided by any agency of the commonwealth, or of a political subdivision thereof, charged with the duty of furnishing aid or assistance, shall not be construed as wage-earning services. An individual who is not entitled to vacation pay from his employer shall be deemed to be in total unemployment during the entire period of any general closing of his employer's place of business for vacation purposes, notwithstanding his prior assent, direct or indirect, to the establishment of such vacation period by his employer.

Section 29(b). 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; provided, however, that earnings up to one-third of his weekly benefit rate shall be disregarded. In no case shall the amount of earnings so disregarded plus the weekly benefit rate equal or exceed the individual's average weekly wage. Such partial benefit amount shall be rounded to the next lower full dollar amount if it includes a fractional part of a dollar.

Section 25. No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for -

- (e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of the individual's weekly benefit amount after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . .

An individual shall not be disqualified from receiving benefits under the provisions of this subsection, if such individual establishes to the satisfaction of the Commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Section 71. The commissioner may reconsider a determination whenever he finds that (1) an error has occurred in connection therewith; or (2) wages of the claimant pertinent to such determination but not considered in connection therewith have been newly discovered; or (3) benefits have been allowed or denied or the amount of benefits fixed on the basis of misrepresentation of fact; provided, however, that with respect to (1) and (2) no such redetermination shall be made after one year from the date of the original determination; and provided further, that with respect to (3) no such redetermination shall be made after four years from the date of the original determination; and provided, further, that the time limitations specified above shall not apply with respect to an award of back pay received by an individual for any week in which unemployment benefits were paid to such individual. If the commissioner reconsiders a determination under this section, parties entitled to notice of the original determination shall be afforded an opportunity for an interview before the commissioner or his authorized representative for the purpose of presenting evidence or refuting opposing positions before such a determination can be made.

430 CMR 2.02:**Lost Time**

The cash value of time lost for reasons other than failure to furnish full-time work shall be determined by multiplying the average hourly earnings for the week by the number of hours lost. If it is not possible to ascertain the average hourly earnings for the week of such "lost time", such lost earnings shall be computed at four percent of the benefit rate for each hour lost.

430 CMR 4.76:**Reduction of Benefits**

- (1) The claimant will be subject to a constructive deduction from his/her weekly benefit amount, as calculated in 430 CMR 4.78, if he or she leaves subsidiary part-time work either prior to or after the establishment of an eligible claim for unemployment benefits or leaves newly obtained part-time work obtained within the benefit year of the claim for any reason which would result in a disqualification from benefits under M.G.L. c. 151A, § 25(e).
- (2) The constructive deduction from the weekly benefit amount will remain in effect for the period of unemployment next ensuing and until the individual has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of his weekly benefit amount.

430 CMR 4.78:**Constructive Deduction Calculation**

- (2) The constructive deduction shall be computed by applying the earnings disregard standards provided for in M.G.L. c. 151A, § 29(b) to the average partial earnings as calculated above.

The Deputy Director's representative held a hearing on November 2, 1998. Only the claimant appeared. Whereupon, the Deputy Director's representative made her findings of fact as follows:

1. The claimant last worked for the employer during the week ending August 8, 1998 according to the records. At that time she was working as a week end advocate seven hours per week earning \$12.25 per hour.
2. The employer is a shelter program for abused women and children.
3. The claimant herself suffered in an abusive marriage, prior to starting work for the instant employer.
4. The claimant had been the program director from December 28, 1996 until being laid off on December 30, 1997.
5. The claimant went back to the agency on a part time basis on January 21, 1998.
6. On March 6, 1998 the claimant was approved for benefits under Section 30, while in attendance at school on a full time basis.
7. The claimant began suffering back flashes, anxiety, problems with concentration, she was unable to eat and unable to sleep while working part time and attending school on a full time basis. The claimant began seeing a physician for depression, and she was put on medication.

8. The claimant tried to continue on the job, but her depression became worse even with the medication.
9. The claimant spoke about the problems she was having on the job with her employer, and the employer agreed that she should take a period of time away from the job to see if her condition improved. The claimant is on a leave of absence from the part time position, and is scheduled to meet with the employer in December 1998 to discuss whether or not she will return.
10. The claimant continued to work on a regular part time basis working seven hours per week, from the week ending January 24, 1998 through the week ending August 9, 1998 according to the records.
11. On October 6, 1998 the claimant was mailed a Notice Of Redetermination And Overpayment disqualifying her under the provisions of Section 29(a) and Section 1(r) for the week ending August 15, 1998 and for an indefinite number of weeks thereafter. Because the claimant had already been paid benefits for the week ending August 15, 1998 through the week ending August 29, 1998 she was determined to be overpaid in the amount of \$873.00.

After reviewing the record, the Board adopts the findings of fact made by the Deputy Director's representative as being supported by substantial evidence. The Board concludes, as follows:

The claimant was unable to continue working as a weekend advocate beyond the week ending August 8, 1998. The claimant, who suffers from depression, could not carry out the responsibilities of the part time position which she had held since mid January 1998 because of her emotional difficulties. The employer recognized the limitations of the claimant and agreed that she "should take a period of time away from the job to see if her condition improved."

In reviewing this decision, the Board is guided by the principals enumerated in the cases of Emerson v. Director of the Division of Employment Security, 393 Mass. 351 at 353(1984) and Director of the Division of Employment Security v. Kathy Fitzgerald, 382 Mass. 159(1980).

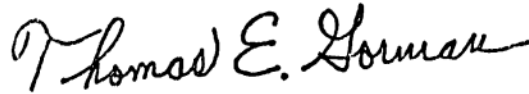
The Board concludes that when the employer suggested the claimant "should take a period of time away from the job," an involuntary separation was, in essence, effected thereby not subjecting the claimant to disqualification under the provisions of Section 25(e)(1) of the Law, cited above. The Court noted "the severance need not in every case be legally complete, it may be a severance sub modo as indicated." Fitzgerald, at 164.

Since the claimant did leave part time employment, the claimant is not disqualified from receiving all unemployment benefits. The Deputy Director shall apply a constructive deduction under the provisions of 430 CMR 4.76 and shall reduce the claimant's benefits by considering the earnings disregard contained in 430 CMR 4.78(2) and provided by Section 29(b) of the Law, cited above.

The provisions of Section 1(r)(1)(2) of the Law and 430 CMR 2.02 are not applicable to the facts in this case.

Since it will be incumbent upon the Deputy Director to calculate the earnings disregard based on the claimant's part time earnings and, thereafter, apply the earnings disregard, the overpayment established by the Deputy Director under the provisions of Section 71, cited above, shall be modified in accordance with the resultant new monetary calculations.

The decision of the Deputy Director is modified. The claimant is entitled to benefits , if otherwise eligible, commencing with the week ending August 15, 1998. However, the claimant is subject to a constructive deduction with an earnings disregard application. The constructive disqualification shall remain in effect for the week ending August 15, 1998 and until the claimant has had at least eight weeks of work and in each of said weeks has earned an amount equivalent to or in excess of her weekly benefit amount. The overpayment shall be modified after the constructive deduction and earnings disregard amount are applied to the weeks which are now deemed overpaid.



Thomas E. Gorman
Member

BOSTON, MASSACHUSETTS

DATE OF MAILING -

FEB 04 1999



Kevin P. Foley
Member

RESPONDENT I.D. #024-70-9086

APPELLANT I.D. #72420560

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

LAST DAY -

MAR 08 1999

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