

**Board of Review**  
**19 Staniford St., 4<sup>th</sup> 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: 0011 5387 80**

## **BOARD OF REVIEW DECISION**

### Introduction and Procedural History of this Appeal

The claimant appeals a decision by Allison Williams, a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from his position with the employer on June 16, 2013. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 31, 2013. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on November 29, 2013. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons and, thus, was disqualified, under G.L. c. 151A, § 25(e)(1). 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 to allow the claimant, who was unable to attend the hearing, the opportunity to testify and present evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. 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 voluntarily retired from his position as a firefighter is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

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

1. The claimant worked as a Firefighter for the employer, a municipality, from 2/16/86 until he separated from the employer on 6/16/13.
2. The claimant worked full time.

3. The claimant had suffered a significant loss of hearing. He has been seen by a doctor since September of 2011 for this issue.
4. On or about 12/12/12, the claimant's doctor provided him a letter dated 11/19/12 which indicated that the claimant was unable to perform his duties as a firefighter as a result of his loss of hearing and that it would be potentially dangerous for him and his fellow firefighter if he continued to work.
5. The claimant presented this letter to the Fire Chief on the same day. The claimant discussed his options with the Chief given the claimant's doctor's findings.
6. Since the claimant could no longer perform his duties as a firefighter he was informed by the Chief that he could either retire or the Department would need to involuntarily retire him.
7. The claimant asked the Chief if there was any benefit to him retiring as oppose to the Department involuntarily retiring him and he was told by the Chief to ask the retirement board.
8. The claimant asked the retirement board if there was any benefit for him to retire as opposed to being involuntarily retired and he was told there was no difference.
9. The claimant filed for disability on or about this time and went off the job using his sick time.
10. When his sick time was used up on 6/12/13 the claimant gave verbal notice to the employer on 6/13/13 that he was retiring as of 6/16/13.
11. The claimant had not received any discipline prior to his leaving.
12. As of July 2013, the claimant has been collecting a monthly pension of \$3,547.47.
13. The claimant has also applied for a disability pension through the City which is still pending.
14. The claimant had no choice but to retire because of his loss of hearing.

**Credibility Assessment:** Although the employer witness, the Fire Chief contended that he did not tell the claimant he had to retire, the claimant's testimony that the options given to him by the Chief were to either retire or be involuntarily retired by the Department is deemed credible since the Fire Chief acknowledged at the hearing that if the claimant did not retire the Department would have had to involuntarily retire him.

## Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether these consolidated 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 consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant left his employment voluntarily.

G.L. c. 151A, § 25(e)(1), provides, in pertinent part, as follows:

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . the period of unemployment next ensuing . . . 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 . . . No disqualification shall be imposed if such individual establishes . . . that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

In her original decision, the review examiner found that the claimant left work in order to retire. As a result, the review examiner ultimately concluded the claimant had voluntarily separated from his employment for neither good cause attributable to the employer nor for urgent, compelling, or necessitous reasons. As noted above, we remanded this matter back to the review examiner in order to permit the claimant, who had been absent from the first hearing, to present evidence. Following this remand hearing, the review examiner issued consolidated findings, which indicate that the claimant's separation from employment was the result of a severe medical condition. These consolidated findings raise the question whether claimant left work for urgent, compelling, and necessitous reasons.

Our standard for determining whether a claimant's reasons for leaving work are urgent, compelling, and necessitous has been set forth by the Supreme Judicial Court. We must examine the circumstances in each case, and evaluate "the strength and effect of the compulsive pressure of external and objective forces" on the claimant to ascertain whether the claimant "acted reasonably, based on pressing circumstances, in leaving employment." Reep v. Comm'r of Department of Employment & Training, 412 Mass. 845, 848, 851 (1991).

The claimant here has met his burden. The additional testimony and evidence presented at the remand hearing reflects that the claimant was unable to perform his duties as a firefighter as a result of his significant hearing loss, which would have made it potentially dangerous for him to continue performing firefighting work. The review examiner found that the claimant had no choice but to retire as a result of his hearing disability. Under the circumstances, we conclude that the claimant had urgent, compelling, and necessitous reasons for leaving his employment.

We note that the Supreme Judicial Court has rejected the notion that a claimant must have requested a transfer or a leave of absence in order to be eligible for unemployment benefits, under G.L. c. 151A, § 25(e)(1). The claimant "simply must prove that [he] has made a

reasonable attempt to correct the situation or that such an attempt would have been futile.” Guarino v. Dir. of Division of Employment Security, 393 Mass. 89 (1984). Here, given the nature of the claimant’s medical condition as described in the record, we conclude that attempts to preserve his employment as a firefighter would have been futile.

We, therefore, conclude as a matter of law that the claimant’s reasons for separating from his employment were of such an urgent, compelling and necessitous nature so as to make his separation involuntary.

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week ending June 16, 2013, and for subsequent weeks if otherwise eligible.<sup>1</sup>



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 12, 2014**



Judith M. Neumann, Esq.  
Member

**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.

AM/rh

---

<sup>1</sup> We note that the DUA is currently investigating an issue regarding the claimant’s receipt of a pension. We further note that the claimant has applied for a disability pension through the employer. While we conclude in our decision today that the claimant is entitled to unemployment benefits based on the issue before us, under G.L. c. 151A, § 25(e)(1), we must note that the claimant’s receipt of a pension and/or disability payments may impact his eligibility for unemployment benefits.