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

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Office Hours:
8:45 a.m. to 5:00 p.m.

DECISION OF BOARD OF REVIEW

In the matter of:

Appeal number:

EMPLOYEE APPELLANT:

EMPLOYING UNIT:

On October 29, 1998, in Boston, Massachusetts, the Board reviewed the written record and the recordings of the testimony presented at the hearing held by the Deputy Director's representative on September 10, 1998.

On October 26, 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 claimant's appeal is from the Deputy Director's decision which concluded that:

The claimant is not in partial, or total unemployment, as the terms are defined in section 1(r) of the law and interpreted by DET. He is therefore, not entitled to benefits under section 29(a) or 29(b) of the Law.

The law states that if an employee is working less then a full time schedule, due to the employer's failure to offer full time employment, he or she is entitled to partial benefits.

The claimant however, works as what DET refers to as an "on call" employee. This means that there is a verbal, written or implied agreement that the employee will work on an as needed basis. The employee is not promised any certain number of hours of work in a week. An "on call" employee may be directly associated with the employer. If an employee is an "on call" employee, by DET's definition, he or she is normally considered to be in full employment in any week that he or she is offered any hours of work.

There are two exceptions to this policy. If the "on call" employment is established during the benefit year (after the claim is filed) then the claimant may be considered to be in partial unemployment and may be entitled to partial benefits under section 29(b) of the law.

If the "on call" employment was established during the base period (the weeks of employment upon which the claim is based) and, at the time it was established it was subsidiary to the claimant's principle employment, then the claimant may be considered to be [sic] partial unemployment under section 29(b) of the law and, again may be entitled to partial benefits. The principle employment may be part or full time employment but, may not be on call employment. If employment is established to be subsidiary "on call" employment is one benefit year, it will continue to be treated as subsidiary employment in subsequent benefit years even if the "on call" employment is the only employment in the subsequent base period. The subsidiary nature of the "on-call" employment can only be changed if the nature of the employment relationship changes. For example, if the claimant becomes a regular part time or full time employee. If an "on call" employee works a full time schedule during the 8 weeks preceeding his or her claim his or her contract of hire will be considered to have changed, and the claimant will be considered to be a full time employee by DET.

The record in the present case indicates that the claimant's employment was established on September 13, 1996 as "on call" employment, under DET's definition of "on call." Although he had another job at that time with which he had a longer history and which paid him more during the base period of his 5th sequence claim, this other employment can not be treated as principle employment because [sic] was also "on call" employment. Furthermore, when the claimant agreed to make the present employer his "Priority Hotel" he in effect made it is [sic] principle employer. There is no evidence that the nature of the claimant's employment contract changed after his 5th sequence claim was filed.

Based on the above facts and reasoning, the claimant was not in partial, or total, unemployment the week of August 8, 1998 and was thus, not entitled to partial unemployment benefits.

The claimant is not entitled to partial, or total, unemployment benefits for the week ending August 8, 1998 and until he meets the requirements of the law.

M.G.L. c.151A, §§ 1(r)(1)(2) and 29(a)(b) are pertinent and provide as follows:

Section 1. The following words and phrases as used in this chapter 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. (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 receives 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(a), An individual in total unemployment and otherwise eligible for benefits . . . shall be paid for each week of unemployment . . .(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.

The Deputy Director's representative held a hearing on September 10, 1998. The claimant appeared. The employer was represented. Thereafter, the Deputy Director's representative made the following findings of fact:

1. The claimant has worked for the employer, a hotel, as a Roll Call Banquet Server, from September 13, 1996 until the present.
2. Banquet Servers are paid a gratuity based on the cost of a function. The total gratuity for the function is split between all the servers. There is no set number of hours per a function.
3. Full Time Banquet Servers are not guaranteed a certain number of hours. They are assured only that they will be assigned work first. Non-full time servers will only be booked after the Full Time Servers are fully scheduled for their available hours.

4. Roll Call Banquet Servers are called upon as needed after the Full Time Servers are fully booked. They are not guaranteed a certain number of hours of work a week. They are required to make the employer their primary employer. They must accept all jobs offered. They may not book off to accept a better paying job at another hotel. If they do so they will be removed from the Roll Call List.

5. The employer will call in other employees, who are not directly associated with the hotel, if there are not enough Roll Call Servers to meet their needs. In the industry these unaffiliated employees are called "on call" employees.

6. The schedule for all Banquet Servers is posted in writing at the hotel. It is also put on a tape which is updated by 2:00pm each day and can be accessed by phone.

7. The claimant is required, as a Roll Call Server, to call the Banquet Schedule Tape between 2:00pm and 8:00pm each day to find out what his schedule is.

8. The claimant's 5th sequence claim began August 3, 1997. He worked for three hotels during that base period. The present employer, who paid him wages of $2913.81. A second hotel, where he worked as an on call Banquet Server since November 29, 1995 and, where he was paid $4668.96 during the base period. He also worked at a third hotel as an on call Banquet Server. This hotel paid him $1442.70 during the base period.

9. When the claimant began working for the employer on September 13, 1996 he agreed that he would make the employer his "Priority Hotel." This meant that he had to accept all jobs offered by the present employer and could not book off to work at one of the other hotels even if the other job was more attractive.

10. The claimant collected partial benefits during his 5th sequence claim.

11. The claimant filed a new claim on August 3, 1998. He had two base period employers for this claim. One was the present employer who paid him $5959.57 during the present base period. The other was the second hotel who paid him $312.29 during the present base period.

12. The claimant has accepted all work offered by the employer.

13. The claimant worked the weeks ending August 8, 1998, August 15, 1998 and the week ending August 29, 1998. He was not offered any work the week ending August 22, 1998.

After reviewing the record, the Board adopts the findings of fact made by the Deputy Director as being supported by substantial evidence. The Board concludes, however, that the Deputy Director's decision is based on an error of law and modifies that decision for the following reasons:

The claimant has worked for the employer in an on-call capacity as a Roll Call Banquet Server since September 13, 1996, through the present time. On August 3, 1998, the claimant filed a new claim for benefits. This instant employment was the claimant's primary base period employer. The claimant accepted this employment with an implied understanding that he had no guarantee of any certain amount of hours and that his services would be needed only after the full time servers are fully booked. The claimant has accepted all the work that the employer has offered him but there are some weeks, where there is no work available.

Inasmuch as the claimant accepted this employment to work on an on-call as-needed basis and since there has been no change in the claimant's agreement of hire, the Board concludes that the claimant is not in partial unemployment within the meaning of Section 1(r)(1) for any week in which the employer is able to provide the claimant with work even if the hours are less than regular full time hours. Therefore, the claimant is not entitled to partial benefits under the provisions of Section 29(b) of the Law, during such weeks.

The Board further concludes, however, that the claimant is in total unemployment under the provisions of Section 1(r)(2) of the Law for any weeks that the employer is unable to provide the claimant with any work and that therefore, under these circumstances the claimant is entitled to benefits under Section 29(a) of the Law.

The Board modifies the Deputy Director's decision in accordance with the above findings. The claimant is not entitled to partial benefits for any week in which the employer is able to provide the claimant with work. However, the claimant is entitled to benefits, if otherwise eligible for any weeks in which the employer is unable to provide him with any work. Consequently, the claimant is entitled to benefits the week ending August 22, 1998, if otherwise eligible.

Thomas E. Gorman

BOSTON, MASSACHUSETTS
DATE OF MAILING - NOV 13 1998

Thomas E. Gorman
Member

Kevin P. Foley
Member

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

LAST DAY - DEC 14 1998

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