

0026 5187 26 (Feb. 27, 2019) – School district’s offer of re-employment for a 10-month position, where it was offered to a 12-month employee, was not reasonable assurance under G.L. c. 151A, § 28A(b), because it was an offer under economic terms that were considerably less than his present position.

Board of Review
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Issue ID: 0026 5187 26

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 separated from his position with the employer in June, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 18, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on December 8, 2018. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant had reasonable assurance of re-employment for the next academic term and, thus, he was disqualified under G.L. c. 151A, § 28A. After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Both parties responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s conclusion, which decided that the employer had given the claimant reasonable assurance of re-employment under G.L. c. 151A, § 28A, is supported by substantial and credible evidence and is free from error of law, where the findings show that with its offer of re-employment, the employer had reduced the claimant’s position from 12 months to 10 months.

Findings of Fact

The review examiner’s findings of fact are set forth below in their entirety:

1. The claimant filed a claim for unemployment benefits effective June 10, 2018. The claimant worked for one employer, which was the instant employer,

during the base period of the claim, which extends from July 1, 2017 through June 30, 2018. During the 1st quarter of the base period (July 1st through September 30th), the claimant was paid gross wages in the amount of \$15,284.00. During the 2nd quarter of the base period (October 1st through December 31st), the claimant was paid gross wages in the amount of \$7,800.00. During the 3rd quarter of the base period (January 1st through March 31st), the claimant was paid gross wages in the amount of \$14,535.00. During the 4th quarter of the base period (April 1st through June 30th), the claimant was paid gross wages in the amount of \$26,116.34.

2. The claimant has worked full time as a bus driver for the employer, a school district, since the year 2014.
3. The claimant is paid \$30.00 an hour.
4. The claimant's immediate supervisor is the Assistant Transportation Manager.
5. The claimant's schedule is based on the activities assigned to him. The claimant works off island on Cape Cod's mainland.
6. The claimant initially worked for the employer on island in the years 2014 and 2015. The employer also provided the claimant with other work during the summer.
7. The claimant agreed to work on the mainland, if he received work during the summer. The previous Transportation Manager told the claimant he would give him work during the summer. The claimant worked for two years during the summer months for the employer off island.
8. On June 16, 2018, the Assistant Transportation Manager issued the claimant a letter, which informed him the employer did not have work available to the claimant during the summer months.
9. The claimant's last physical day of work for the employer during the 2017–2018 school year was June 19, 2018. The last day of school was June 22, 2018.
10. On June 22, 2018, the employer mailed the claimant a letter requesting his return to work during the following school year. The letter was mailed to the claimant's correct mailing address of: [Address A].
11. The claimant did not receive the letter sent to him on June 22, 2018.
12. The school reopened for the school year during the first week of September 2018.

13. The claimant returned to work for the employer as a full time bus driver for the 2018–2019 school year.

14. On August 18, 2018, the Department of Unemployment Assistance issued the claimant a Notice of Disqualification under Section 28A of the Law for the period beginning June 24, 2018 through September 1, 2018.

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 original conclusion is free from error of law. Upon such review, the Board adopts the review examiner’s findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we do not agree with the review examiner’s legal conclusion that the claimant is ineligible for benefits.

As a bus driver working for an educational employer, the review examiner properly considered whether the claimant is eligible for benefits under G.L. c. 151A, § 28A, which provides, in relevant part, as follows:

Benefits based on service in employment as defined in subsections (a) and (d) of section four A shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter, except that:

(a) with respect to service performed in an instructional . . . capacity for an educational institution . . .

(b) with respect to services performed in any other capacity for an educational institution, benefits shall not be paid on the basis of such services to any individual for any week commencing during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms

In the reasoning section of her decision, the review examiner noted that the claimant had, in fact, returned to his full time driving position in September, 2018. This is hindsight and immaterial to whether the claimant had reasonable assurance of re-employment at the time he was unemployed.¹

¹ If we agreed that the employer had provided reasonable assurance while he was unemployed over the summer of 2018, and it turned out that the claimant was not actually rehired in September, he would be entitled to retroactive benefits under 430 CMR 4.95. Since our decision concludes that the employer did not provide reasonable assurance, this fact is immaterial.

Although not in evidence and disputed by the claimant, the review examiner believed the employer's testimony that the employer mailed a letter to the claimant on June 22, 2018, offering him the opportunity to return to work for them as a full-time bus driver in the subsequent fall semester. *See* Finding of Fact # 10. "The review examiner bears '[t]he responsibility for determining the credibility and weight of [conflicting oral] testimony, . . .'" Hawkins v. Dir. of Division of Employment Security, 392 Mass. 305, 307 (1984), *quoting* Trustees of Deerfield Academy v. Dir. of Division of Employment Security, 382 Mass. 26, 31–32 (1980). Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996). Her finding that this letter was sent to the claimant is reasonable in relation to the evidence presented.

However, given the terms of the claimant's employment in the academic year ending in June, 2018, this letter did not satisfy the reasonable assurance requirements of G.L. c. 151A, § 28A. The U.S. Department of Labor (DOL) defines reasonable assurance to mean an offer of re-employment for the following academic year or term, or the remainder of the current academic year or term, under economic terms that are not considerably less. *See* Unemployment Insurance Program Letter (UIPL) No. 5-17 (December 22, 2016); and UIPL No. 4-87 (December 24, 1986). The DOL interprets "considerably less" to be anything less than 90% of the amount the claimant earned in the current academic year. UIPL No. 5-17, p. 5. Thus, the employer must not only offer the claimant an opportunity to return to work, the offered position must be with economic terms that meet this 90% threshold.

In the 2016–2017 and 2017–2018 school years, the claimant worked for the employer both during the regular academic year and during the summer. *See* Findings of Fact ## 6 and 7; and Exhibit 10.² This means that, unlike many school employees, he worked 12 months a year. A week before the June 22nd letter notifying the claimant that he could return to his bus driving position in September, the employer sent him the June 16, 2018, letter notifying him that he would not be working during the summer of 2018. *See* Finding of Fact # 8 and Exhibit 10. With this June 16th letter, the employer informed the claimant that it had reduced the terms of his employment from 12 months to 10 months, effective immediately. Since the findings show that the claimant had always worked full-time and nothing indicates that the claimant's hourly rate was going to change, this reduction constituted a 17% cut in pay.³ In short, the employer offered re-employment at 83% of the amount he had earned in the prior academic period. Therefore, the offer did not constitute reasonable assurance within the meaning of G.L. c. 151A, § 28A. *See* Board of Review Decision BR-116087 (Jan. 31, 2012) (claimant, who had been working a 25-hour, full-year position was offered re-employment in a 25-hour, 10-month position, was entitled to benefits).⁴

² Exhibit 10, a June 16, 2018, letter from the employer's Assistant Transportation Manager confirms that the claimant had been working year-round. While not explicitly incorporated into the review examiner's findings, Exhibit 10 is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

³ We arrive at 17% by dividing the 2-month reduction by the 12 months of his former economic terms. We have not relied upon copies of the claimant's paystubs submitted to the Board with his written comments, because these documents were not part of the original hearing record.

⁴ Board of Review Decision BR-116087 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

In rendering our decision, we note that, although the claimant is eligible for benefits in the summer of 2018, because his job was reduced to a 10-month position, he would not become eligible for benefits next summer on this ground, if the employer offers to rehire him under the same 10-month economic terms as his existing job.

We, therefore, conclude as a matter of law that, because the employer's offer of re-employment was under economic terms that were considerably less, the claimant did not have reasonable assurance during the summer of 2018 within the meaning of G.L. c. 151A, § 28A.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 24, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 27, 2019



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

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.

AB/rh