

Where the claimant held two distinct positions for the employer school system, and was given reasonable assurance as to one position but not the other, only the wages from the position for which she had reasonable assurance should be excluded when calculating her benefit rate for the period between academic years.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0022 2773 83

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 we affirm in part and reverse in part.

The claimant previously filed a claim for unemployment benefits effective August 28, 2016. The claimant separated from the employer on June 28, 2017, the end of the school year. She then reopened her existing unemployment claim effective June 18, 2017. On August 18, 2017, the DUA issued a determination finding the claimant ineligible for benefits for the period of June 25, 2017, through August 26, 2017, pursuant to G.L. c. 151A, § 28A. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on December 15, 2017. 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 in the subsequent academic year and, thus, 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 remanded the case to the review examiner to obtain further evidence regarding the claimant's two different positions with the employer, and whether reasonable assurance existed for both positions. Both parties attended the remand hearing, conducted via telephone over two dates. Thereafter, the review examiner issued his 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, which states that the claimant had reasonable assurance of re-employment for the subsequent academic year, 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 are set forth below in their entirety:

1. The claimant worked during the 2016–2017 school year as a union, on call as needed, [substitute] [teacher] at a rate of approximately \$145.00 per day. When working as a substitute [teacher] the claimant could work anywhere from zero to five days per week Monday through Friday.
2. The claimant also performed separate tutoring work that is funded from a different educational stipend fund managed by the same City Department of Education. When working as a [tutor] the claimant worked anywhere from zero to 35 hours per week and she was paid at a rate of approximately \$44.00 per hour.
3. On 06/16/17, the claimant was given a letter of reasonable assurance to work as a substitute teacher for the 2017–2018 year.
4. The employer never sends out reasonable assurance letters for tutoring work assignments.
5. The claimant hoped that she would work [sic] also be invited to perform other tutoring tasks during the next school year but on 09/13/17 she was informed by the employer that the employer could no longer use substitute teachers as [tutors] because of stipend and pension plan concerns.
6. On 09/15/16, the claimant filed a claim for unemployment benefits effective 08/28/16. This employer was the only base period employer.
7. On 08/31/17, the claimant was mailed a Notice of Determination of Eligibility under Section 28A. This notice informed the claimant that she was not eligible for benefits since she had performed services for an educational institution during the most recent academic year and had reasonable assurance that she would perform services for an educational institution during the next school year. The claimant requested a hearing.
8. For the 3rd Quarter (July through September) of 2015, the claimant's wages for substitute teaching were \$707.58 and for tutoring, they were \$4,300.80.
9. For the 4th Quarter (October through December) of 2015, the claimant's wages for substitute teaching were \$2,583.21 and for tutoring, they were \$1,299.20.
10. For the 1st Quarter (January through March) of 2016, the claimant's wages for substitute teaching were \$2,040.45 and for tutoring, they were \$8,420.55.
11. For the 2nd Quarter (April through June) of 2016, the claimant's wages for substitute teaching were \$1,457.66 and for tutoring, they were \$5,698.29.
12. The 2016–2017 school year for substitute teachers ended on 06/28/17.

13. The 2016–2017 school year for home hospital tutors ends two weeks earlier on 06/14/17.
14. The claimant was expected to return as a substitute teacher for the 2017–2018 school year under the same terms and conditions that she worked during the 2016–2017 school year.
15. The claimant was never notified that she would be returning as a home hospital tutor for the 2017–2018 school year.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the 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 believe the consolidated findings support a conclusion that the claimant had reasonable assurance of re-employment as a substitute teacher but not as a home hospital tutor.

As an academic employee of an educational institution, the claimant's eligibility for benefits during the relevant period is properly analyzed under G.L. c. 151A, § 28A, which states, 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, benefits shall not be paid on the basis of such services for any week commencing during the period between two successive academic years or terms . . . to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms

It is well established that, in order to constitute a bona fide offer of reasonable assurance that would disqualify a claimant for benefits between academic years, the economic terms and conditions of the offered position can not be substantially less in the upcoming academic year than they were in the previous academic year. *See* U.S. Dept. of Labor Unemployment Insurance Program Letter (UIPL) No. 5-17 (Dec. 22, 2016) and UIPL No. 4-87 (Dec. 24, 1986).

If it is determined that a claimant has reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A, the claimant's base period earnings from that position are excluded when calculating the claimant's weekly benefit rate for the period between academic years. During the claimant's base period (from October, 2015, through June, 2016) and during the most recent academic year

(September, 2016, through June, 2017), the claimant held two distinct positions for the employer and was paid separately for the two positions. Thus, it must be separately determined if the claimant had reasonable assurance of re-employment as to each position during the period between the 2016–2017 and the 2017–2018 school years.

We first address the claimant’s position as an on-call substitute teacher. Prior to the end of the 2016–2017 school year, the claimant received a formal letter of reappointment for the upcoming 2017–2018 school year. It was undisputed that the economic terms and conditions of the offered position would be the same as in the previous school year. Therefore, the claimant had reasonable assurance of re-employment as an on-call substitute teacher and her base period earnings from this position should be excluded when calculating her weekly benefit rate for the weeks of June 25, 2017, through August 26, 2017.

Next we turn to the claimant’s position as a home hospital tutor, which constituted the majority of her base period earnings. The findings state that the claimant never received any indication that she would be re-employed in this position for the upcoming 2017–2018 school year. In fact, the claimant was later notified that she would not be allowed to return to this position. Therefore, the claimant did not have reasonable assurance of re-employment as a home hospital tutor and her base period earnings from this position can be included when calculating her weekly benefit rate for the weeks of June 25, 2017, through August 26, 2017.

The review examiner's decision is affirmed in part and reversed in part. The portion of the review examiner's decision that excluded the claimant's on-call substitute teaching wages in calculating her weekly benefit rate for the weeks of June 25, 2017, through August 26, 2017, is affirmed. The portion of the review examiner's decision that excluded the claimant's home hospital tutoring wages in calculating her weekly benefit rate for the weeks of June 25, 2017, through August 26, 2017 is reversed.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 21, 2018



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.

JRK/rh