The claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2), because the employer stopped providing work. Under G.L. c. 151A, § 28A, she did not have reasonable assurance of re-employment in her instructional assistant position, which was her primary base period employment, so she is entitled to benefits during the period between the two academic years. Since the claimant had reasonable assurance of re-employment in a substitute position that she held during the last few weeks of school, the wages from this job should be excluded when calculating her benefit rate.

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Issue ID: 0026 1141 26

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 21, 2018. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by the claimant and the employer's agent, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on November 14, 2018. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant was laid off due to a lack of work and thus, was not disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain additional evidence pertaining to the claimant's employment status for the 2018–2019 academic year. 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 decision, which concluded that the claimant was qualified for benefits under G.L. c. 151A, § 25(e)(2), 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 assessment are set forth below in their entirety:

1. The claimant worked full-time as a kindergarten instructional assistant (IA) for the employer, a public school system ([Employer A]), from August 28, 2017 through April 13, 2018.

2. The claimant was hired at a rate of $18.71 an hour for 27.5 hours a week through the 2017-2018 school year of 180 days. A new contract was ratified during the claimant's employment and her rate was then $19.08 per hour. Per the contract, the claimant also received benefits of health and dental insurance, 15 paid sick leave days, 3 paid personal days, up to 3 days of bereavement leave, paid holidays, paid delayed start days, paid "no school" days for days not being made up at the end of the year, and the opportunity for an additional $150 as a perfect attendance award for each half of the school year (possible total of $300). The claimant was also paid a stipend equivalent to twice her hourly rate if, while an IA, she acted as a substitute for a teacher. The contract set the rate for the 2018-2019 school year at $19.47 an hour.

3. On March 23, 2018, the claimant's principal ([Principal A]) sent an email to all IAs requesting meetings to discuss the following school year — 2018–2019.

4. The claimant subsequently met with the principal and was told that due to reduced enrollment, her position was being eliminated and she would not have a position for the following school year.

5. The claimant started looking for another job and interviewed with a different public school system ([Employer B]) on April 4, 2018.

6. On April 5, 2018, the claimant was offered a position as a long-term substitute at a rate of $175 a day filling in for a [Employer B] 1st grade teacher who was out on leave. The position was to last to the end of the school year and would give the claimant a better opportunity of employment with [Employer B] in the fall of the following school year.

7. The claimant accepted the position and, by accepting, acknowledged that she was "committing to [[Employer B]] for the duration of the assignment and are certifying that you will not accept other employment."

8. On April 6, 2018, the claimant gave [Principal A] her notice and told her that she would continue to work for [Employer A] until the last day of school prior to the start of April vacation (April 13, 2018).

9. On April 19, 2018, the claimant received word from her [Employer B] principal that the teacher she was going to be substituting for had decided to return earlier than originally planned. The claimant would now have a long-

term substitute position only until June 1, 2018, rather than until the end of the school year.

10. The claimant contacted her former principal, [Principal A], at the [Employer A] and told her the situation. Unbeknownst to the claimant, [Principal A] let other [Employer A] principals know that the claimant would be available after June 1, 2018.

11. The claimant received an email on May 31, 2018 from a different [Employer A] principal ([Principal B]) informing her of [a] substitute position that had just opened up for the last few weeks of the school year.

12. The claimant spoke with [Principal B] and accepted the position with the understanding that, although she would technically be a day-to-day substitute, she would be doing so until the end of the school year.

13. Although the [Employer A] does not maintain a "priority" list of substitutes, the position offered to the claimant by [Principal B] would essentially place the claimant in a priority position. Whereas day-to-day substitutes would receive a call through the "ASOP" system (an automated substitute system) the night before, or on the morning of the school day when work was available, the claimant would be expected to be at [Principal B]'s school every day through the end of the school year. She would be paid the usual $93 per day that the [Employer A] paid substitutes. This was a flat rate and did not include any benefits.

14. The claimant worked the long-term substitute position for [Employer B] until June 4, 2018.

15. The claimant then worked *per diem* for [Employer A] from June 5, 2018 until the end of the school year, on or about June 22, 2018, with the exception of two and a half days due to the claimant being ill and business needs of the school.

16. There was no work available to the claimant at [Employer A] after June 22, 2018, due to the school year ending. The claimant was not offered work at [Employer A] for the 2018-2019 school year.

17. The claimant filed a claim for unemployment insurance benefits on July 3, 2018, with an effective date of July 1, 2018.

18. On or about July 1, 2018, the [Employer A] mailed a letter (the July 1, 2018 letter) to the address they had on file for the claimant. That address was the claimant's parents' address where the claimant no longer lived. The claimant had not updated her address with the [Employer A] because she was no longer working for it.

19. The July 1, 2018 letter invited the claimant to return to a "daily sub" position for the 2018–2019 school year. There was no guarantee of employment. The claimant would be added to the school's substitute list and be called when, and if, daily employment was available. When a daily assignment was available, the claimant would be paid the daily substitute rate of $93 a day with no benefits.

20. The claimant's mother received the letter and informed the claimant that a letter had come from [Employer A]. The claimant's mother did not share the exact contents of the letter, only that it was in reference to her interest in working for [Employer A] in the 2018–2019 school year. The claimant told her mother she liked the [Employer A] and would be interested.

21. On or about July 18, 2018, the claimant's mother signed the claimant's name and mailed the July 1, 2018 letter back to [Employer A] having checked off, "I would like to renew my status as a daily sub." The claimant had no knowledge that her mother had done so and, therefore, had no knowledge that the [Employer A] expected her to be available as a day-to-day substitute for the 2018-2019 school year.

22. The claimant spent the summer of 2018 looking for a full-time job.

23. The claimant's mother sent the letter back because she knew the claimant had not yet secured full-time employment for the 2018–2019 school year and was still looking for work.

24. On July 21, 2018, the Department of Unemployment Assistance (DUA) issued a Notice of Disqualification to the claimant stating she had left work to seek new employment and that such leaving was voluntary without good cause attributable to the employer. The disqualification was effective July 1, 2018 and continued indefinitely. The claimant appealed that determination.

25. Sometime during the week of August 21, 2018, the claimant was offered a full-time teaching position by a public school system (the [Employer C]) to begin [on] August 28, 2018.

26. On August 28, 2018, the claimant began her full-time teaching position at the [Employer C].

Credibility Assessment:

During the remand hearing, the employer appeared and testified for the first time in this matter. The testimony of the claimant and the employer witness during remand hearing is largely free of disagreement or conflict, with the exception of the following.

While the employer witness offered credible testimony during the remand hearing regarding many of the facts and circumstances surrounding the claimant's employment and her separation therefrom, she admittedly did not witness any of the conversations that the claimant had with her supervisor (the school principal, [Principal A]), who did not participate in any of the hearings in this case. The claimant directly and consistently testified that she was informed by her principal, [Principal A], that her position was being eliminated for the 2018-2019 school year. The employer asserts that the claimant was never told her position was being eliminated. In accepting the claimant's testimony as the credible testimony on this point, I note that in addition to the employer witness having no first-hand knowledge as to what the claimant was told about her position for the 2018-2019 school year (and therefore, being unable to definitively say that the claimant was not told her position was being eliminated), the claimant provided evidence that bolstered her testimony. Specifically, the claimant presented an email from [Principal A] dated March 23, 2018, which was sent to the claimant and the other kindergarten teachers and instructional assistants at her school, requesting meetings with each of them to discuss declining kindergarten enrollment and the effect that would have on their positions. The claimant credibly testified that she did in fact have a meeting with [Principal A] and it was at that meeting that she was informed that her position was going to be eliminated. I accept the claimant's testimony as the substantial and credible evidence regarding this matter.

I further find that the claimant provided direct and consistent testimony throughout both the initial and remand hearings with regard to the letter dated July 1, 2018 offering her day-to-day substitute work. I credit the claimant's testimony that she had never seen that letter prior to seeing a copy of it during the initial hearing. The claimant's testimony that the letter was sent to her parents' home, that her mother did not inform her of the contents of the letter, but more generally told her that the employer wanted to know if she was interested in working for it in the fall, and that the claimant was not aware that the letter had been returned to the employer indicating that the claimant was accepting the offer of a day-to-day substitute position was direct, consistent and credible.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner and determine: (1) whether the consolidated 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 consolidated findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

In her original decision, the review examiner determined that the claimant was eligible for benefits based on her separation from the employer in June, 2018. Specifically, the review examiner concluded that the claimant was discharged from her employment at that time due to a lack of work. However, since the claimant was employed as a teacher by the instant educational institution, and she was sent a letter on July 1, 2018, offering her work for the 2018–2019

academic year, we remanded the case to the review examiner for the additional evidence needed to determine whether the claimant had reasonable assurance of re-employment for the upcoming academic year. Thus, the primary issue before the Board is whether the claimant is disqualified 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;
> >
> > (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 order to determine the claimant's eligibility for benefits, we must look back at the claimant's entire base period employment history. In prior cases where a claimant has had a mix of different types of educational employment during the base period preceding a new academic term, the Board has considered all of these positions in determining whether the job offered in the upcoming academic term constitutes "reasonable assurance of re-employment," within the meaning of G.L. c. 151A, § 28A. As such, if there is no reasonable assurance of re-employment in the claimant's *primary* base period educational employment, then he or she has established his or her eligibility under § 28A. If there is nonetheless reasonable assurance of re-employment in the claimant's *secondary* educational job, then we exclude the wages from the secondary job when establishing the amount of the claimant's benefit rate and credit.

In Board of Review Decision BR-104694 (Feb. 29, 2008), we held that a physical education teacher who was laid off in June and not offered a comparable job in the fall was eligible under G.L. c. 151A, § 28A. In establishing the amount of the claimant's benefit award, however, we excluded the base period wages from a secondary job he held as a part-time basketball coach, because he had reasonable assurance of re-employment in that job in the next academic year.

In Board of Review Decision BR-104747 (Feb. 22, 2008), we ruled that a claimant who had worked as both a full-time teacher and a part-time substitute, but did not receive reasonable assurance of re-employment as a full-time teacher during the upcoming term, was eligible under

G.L. c. 151A, § 28A. We excluded from the calculation of his benefit entitlement the wages he earned as a substitute teacher during the base period, because the same work was offered to him for the subsequent academic year. During the base period in the case before us, the claimant had worked both as a full-time kindergarten instructional assistant (27.5 hours per week) and a substitute. Specifically, the claimant performed instructional assistant work during the first three quarters of the base period and a part of the last quarter, and only performed substitute teaching work during the last quarter. On July 1, 2018, during the summer break, the claimant was offered work as an on-call daily substitute for the employer during the 2018–2019 school year, but was not offered reappointment as a full-time instructional assistant.

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

Here, the claimant's base period position as an instructional assistant included guaranteed daily work, health and dental insurance benefits, and various types of paid time off. The offered substitute position was *per diem*, without guaranteed daily work or a benefits package. Thus, the employer's offer of re-employment as a *per diem* substitute was under economic terms and conditions that were substantially less than her former kindergarten instructional assistant job, where she earned the majority of her base period wages. She is, therefore, entitled to collect unemployment benefits based upon the base period wages she earned in the instructional assistant position.

However, the position offered for the next academic year was the same as the *per diem* substitute work the claimant performed at the end of her base period. Since the employer has offered reasonable assurance of re-employment for this position under substantially similar economic conditions, the claimant's base period substitute wages are excluded in the calculation of the weekly benefit amount paid during the summer period between academic terms.

We, therefore, conclude as a matter of law that the claimant is eligible for benefits under G.L. c. 151A, § 25(e). We further conclude that pursuant to G.L. c. 151A, § 28A, the calculation of the weekly benefit amount paid between academic terms shall exclude her base period substitute wages.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the weeks ending July 7, 2018, through August 25, 2018. The claimant's base period earnings from her substitute position with the instant employer should be excluded when calculating her weekly benefit rate for this period.

BOSTON, MASSACHUSETTS
DATE OF DECISION – March 28, 2019

Charlene A. Stawicki, Esq.
Member

Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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.

SVL/rh