

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.
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: 0031 4194 94

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 separated from the employer at the end of the school year on June 21, 2018, and filed a claim for unemployment benefits on July 16, 2018. On January 7, 2020, the DUA issued a determination finding the claimant ineligible for benefits for the period of June 23, 2019, through July 13, 2019, 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 June 24, 2020. 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 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, 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 opened a claim with an effective date of July 15, 2018.
2. The base period of the claim is from July 1, 2017 through June 30, 2018.
3. The claimant is still employed by the employer.
4. Since 2011, the claimant works as a part time crossing guard for the instant employer, a school district in a town.
5. Since about 2016, the claimant began part time hours for the instant employer as a cafeteria worker as well.
6. In Spring of 2018, the employer did not provide the claimant with a written or oral offer that the claimant would be performing services as a cafeteria aide in the upcoming 2018–2019 academic year, under the same terms and conditions of employment as the 2017–2018 academic year.
7. The 2017-2018 school year ended for cafeteria aides on June 21, 2018.
8. In Spring of 2018, the employer did provide the claimant with a written offer that the claimant would be performing services as a crossing guard in the upcoming 2018-2019 academic year, under the same terms and conditions of employment as the 2017-2018 academic year.
9. The 2017-2018 school year ended for crossing guards on June 21, 2018.
10. The employer continued to employ the claimant as a part time crossing guard at a pay rate of \$15.34 per hour working 1.5 hours per day 180 days per year during the 2018–2019 academic year.
11. For the Third Quarter of 2017 (7/1/17 through 9/30/17): The claimant's gross wages as a cafeteria aide were \$3,353.61. The claimant's gross wages as a crossing guard were \$516.18.
12. For the Fourth Quarter of 2017 (10/1/17 through 12/31/17): The claimant's gross wages as a cafeteria aide were \$4,495.98. The claimant's gross wages as a crossing guard were \$1,338.75.
13. For the First Quarter of 2018 (1/1/18 through 3/31/18): The claimant's gross wages as a cafeteria aide were \$5,142.54. The claimant's gross wages as a crossing guard were \$1,070.00.
14. For the Second Quarter of 2018 (4/1/18 through 6/30/18): The claimant's gross wages as a cafeteria aide were \$5,184.78. The claimant's gross wages as a crossing guard were \$1,307.60.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 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. However, as discussed more fully below, we believe that the consolidated findings support a conclusion that the claimant had reasonable assurance of re-employment as a crossing guard, but not as a cafeteria aide.

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:

(b) with respect to services performed in an 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

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 cannot 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 July 1, 2017, through June 30, 2018) and the corresponding academic year (September of 2017, through June of 2018), 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 2017–2018 and the 2018–2019 school years.

Our analysis in this regard follows that of a prior case appealed to the Board, Board of Review Decision 0022 2773 83 (May 21, 2018). In that case, a claimant held two positions for an employer school district during the academic year. She received reasonable assurance to return to her position as a substitute teacher for the upcoming academic year, but she did not receive a notice of reasonable assurance that she would return to work as a home hospital tutor for the upcoming academic year. There, we concluded that while the claimant's wages as an on-call substitute

teacher were properly excluded when calculating her weekly benefit rate, her home hospital tutor wages should not be excluded. We reach a similar conclusion here.

We first address the claimant's position as a crossing guard. Prior to the end of the 2017–2018 school year, the claimant received a written offer to perform services as a crossing guard in the upcoming 2018–2019 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 a crossing guard, and her base period earnings from this position should be excluded when calculating her weekly benefit rate for the weeks of June 23, 2019, through July 13, 2019. Based on the consolidated findings, the claimant earned gross wages of \$4,232.53 as a crossing guard from July 1, 2017, through June 30, 2018. *See Consolidated Findings ## 11–14.*

Next, we turn to the claimant's position as a cafeteria aide, which constituted the majority of her base period earnings. The review examiner found the claimant never received any indication that she would be re-employed in this position for the upcoming 2018–2019 school year. In fact, the claimant was notified on June 13, 2018, that she would not return to this position with the employer, since the employer had eliminated its school food service department. *See Remand Exhibit # 3* (attachment to claimant's appeal to the Board). Therefore, the claimant did not have reasonable assurance of re-employment as a cafeteria aide, and her base period earnings from this position can be included when calculating her weekly benefit rate for the weeks of June 23, 2019, through July 13, 2019. Based on the consolidated findings, the claimant earned gross wages of \$18,176.91 as a cafeteria aide from July 1, 2017, through June 30, 2018. *See Consolidated Findings ## 11–14.*

We, therefore, conclude as a matter of law that the claimant received reasonable assurance of re-employment only to return to work in the next academic year as a crossing guard, and she is ineligible for benefits based upon the base period wages for this position pursuant to G.L. c. 151A, § 28A(b).

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 crossing guard wages in calculating her weekly benefit rate for the weeks of June 23, 2019, through July 13, 2019, is affirmed. The portion of the review examiner's decision that excluded the claimant's cafeteria aide wages in calculating her weekly benefit rate for the weeks of June 23, 2019, through July 13, 2019, is reversed.



BOSTON, MASSACHUSETTS

DATE OF DECISION - October 29, 2020

Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS
STATE 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.

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.

JPCA/rh