

The claimant, an instructional assistant for the employer’s school system, received reasonable assurance of re-employment to her regular full-time job in the 2020-21 academic year. However, she worked two other jobs for the employer during her base period. As there is no indication she had reasonable assurance for these other jobs, her base period wages from these two positions may be used to establish the claimant’s monetary eligibility for benefits in the period between academic years.

**Board of Review
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Issue ID: 0046 8889 55

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 her position with the employer on June 16, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 26, 2021. 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 25, 2021. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant, an instructional assistant for a public-school system, had been given reasonable assurance of re-employment in the next academic year, and, thus, she 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 additional evidence about the claimant’s base period earnings. 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, an instructional assistant, was not entitled to any benefits during the summer 2020, because she had reasonable assurance of re-employment for the subsequent academic year for that position, 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 began working full-time for the employer on 2/13/06 as an instructional assistant. The employer provided the claimant a contract for each academic year in which she worked as an instructional assistant. During the 2019-2020 academic year, the claimant worked full-time as an instructional assistant. The academic year ended on 6/16/20.
2. During the term of her employment, the claimant worked as an instructional assistant between academic years in the employer's summer program. The employer did not provide the claimant a contract for the summer program work. The claimant obtained the summer positions by applying when the employer notified employees of the availability of positions for the summer program. The employer typically issued such notices during the academic year. The employer typically runs its summer program for a period of six to eight weeks. The program begins on or about July 6th.
3. On 5/25/20, the claimant made an inquiry of the employer, asking whether the summer program would run. The employer told the claimant that it was awaiting guidance from the Governor in order to determine whether a summer program would be offered. On 6/16/20, the employer notified the claimant that it would not run a summer program during the summer of 2020.
4. On 6/29/20, the employer issued the claimant a letter offering her a position as an instruction assistant for the 2020–2021 academic year that was scheduled to begin on 9/1/20. The claimant was offered a rate of pay that was slightly higher than the rate paid during the 2019–2020 academic year. The claimant accepted the offer and subsequently returned to work for the employer.
5. The claimant filed an initial claim for unemployment insurance benefits, effective 6/7/20. The claimant established a base period that began on 4/1/19 and ended on 3/30/20. During the base period of her claim, the claimant earned and was paid \$3030.78 for her position with the employer's summer program. The claimant was paid biweekly and received the following gross wage amounts on the following pay dates:

7/25/19: \$949 8/8/19: \$1053.42 8/22/19: \$1028.36

6. During the 2018–2019 and 2019–2020 academic years the claimant worked as a door monitor for the employer. The door monitor position is considered separate from the claimant's position as an instructional assistant. The claimant did not receive reasonable assurance that she would be returning to the door monitor position in the 2020-2021 academic year. The claimant did not work as a door monitor for the employer in the 2020-2021 academic year. The claimant earned \$2850.64 as a door monitor during the base period of her 2020 claim. During the base period of her 2020 claim, the claimant was paid \$3013.43 for her work as a door monitor. The claimant was paid biweekly and received the following gross wage amounts on the following pay dates:

| | | |
|----------|------------|----------|
| 4/4/19 | 12.5 hours | \$180.88 |
| 4/18/19 | 11.25 | \$162.79 |
| 5/2/19 | 6.25 | \$90.44 |
| 5/16/19 | 11.25 | \$162.79 |
| 5/30/19 | 12.5 | \$180.88 |
| 6/13/19 | 11.25 | \$162.79 |
| 6/27/19 | 8.75 | \$126.61 |
| 9/5/19 | 3.25 | \$ 47.03 |
| 9/19/19 | 8.75 | \$126.61 |
| 10/3/19 | 12.5 | \$180.88 |
| 10/17/19 | 11.25 | \$162.79 |
| 10/31/19 | 11.25 | \$162.79 |
| 11/14/19 | 10.0 | \$144.70 |
| 11/27/19 | 11.25 | \$162.79 |
| 12/12/19 | 6.25 | \$ 90.44 |
| 12/26/19 | 11.25 | \$162.79 |
| 1/9/20 | 2.5 | \$ 36.18 |
| 1/23/20 | 12.5 | \$180.88 |
| 2/6/20 | 10 | \$144.70 |
| 2/20/20 | 11.25 | \$162.79 |
| 3/5/20 | 11.25 | \$162.79 |
| 3/19/20 | 1.25 | \$ 18.09 |
| 4/2/20 | 1.25 | \$ 18.09 |

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 conclusion is free from error of law. After such review, the Board adopts the review examiner’s consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 6 that finds the claimant earned \$2,850.64 as a door monitor during her base period as inconsistent with the evidence of record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant was not eligible for benefits from the week beginning June 21, 2020, because she had reasonable assurance of re-employment for the subsequent academic year.

As a non-professional employee of an educational institution, the claimant’s eligibility for benefits during the relevant period is properly analyzed under the following provisions of G.L. c. 151A, § 28A, which state, in relevant part:

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 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; provided that, if such individual was not offered an opportunity to perform such services for the educational institution for the second of such academic years or terms, such individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely because of a finding that such individual had reasonable assurance of performing services in the second of such academic years or terms;

(c) with respect to services described in subsections (a) and (b), benefits shall not be paid to any individual on the basis of such services for any week commencing during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess; . . .

If it is determined that a claimant had 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.

The review examiner properly concluded that the employer had provided the claimant with reasonable assurance of re-employment for the subsequent academic year in a letter issued to the claimant on June 29, 2020. *See Consolidated Finding # 4.* We believe that this conclusion is reasonable in relation to the record and consistent with applicable law. Therefore, pursuant to G.L. c. 151A, § 28A, the claimant is not entitled to any unemployment benefits based upon the wages she earned from her work as an instructional assistant during the 2019–2020 academic year.

However, the claimant's instructional assistant position was a 10-month, academic-year position, meaning she was free to take the summer off or pursue other full- or part-time work during the summer break. *See Consolidated Findings ## 1 and 2.* During her base period, the claimant worked for one of the employer's summer programs. *Consolidated Finding # 5.* Because the claimant's summer work was under a separate contract from her academic-year instructional assistant position, and there is no indication that she received reasonable assurance for her position in the summer program, her wages from that position may not be excluded under G.L. c. 151A, § 28A.

During her base period, the claimant also worked as a door monitor for the employer. *Consolidated Finding # 6.* This position was also distinct from her academic-year work as an instructional assistant, with different pay rates and hours. As this position was separate from the job for which the claimant received reasonable assurance, her based period wages from her work as a door monitor may not be excluded under G.L. c. 151A, § 28A.

Consolidated Findings of Fact ## 5 and 6 provide that the claimant earned a total of \$6,044.21 during her base period from services performed in positions distinct from the full-time instructional assistant position for which she received reasonable assurance. Therefore, the claimant is entitled to a weekly benefit amount during the period between academic terms based upon these earnings.

We, therefore, conclude as a matter of law that the claimant received reasonable assurance of re-employment for the subsequent academic period within the meaning of G.L. c. 151A, § 28A(b), in her full-time instructional assistant job, and she is disqualified from receiving benefits during the relevant period based upon wages earned in that position. We further conclude that G.L. c. 151A, § 28A(b), does not preclude the award of benefits based upon the claimant's other base period earnings.

The review examiner's decision is affirmed in part and reversed in part. For the week beginning June 21, 2020, the claimant is entitled to a weekly benefit amount based only upon \$6,044.21 in base period earnings, if she is otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 27, 2021



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
(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.

LSW/rh