

The claimant received reasonable assurance to return to her teaching assistant position in the next academic year. Under G.L. c. 151A, § 28A(b), she was precluded from collecting benefits between academic years based upon the base period wages earned in that position. But § 28A(b) did not preclude the payment of unemployment benefits based upon wages earned in part-time work for the employer that was separate from this teaching assistant job.

**Board of Review
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Issue ID: 0046 9505 10

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 19, 2020. She filed a claim for unemployment benefits with the DUA but was denied benefits for the period June 21 through August 22, 2020, in a determination issued on October 29, 2020. 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 5, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had been given reasonable assurance of re-employment in the next academic year, and, thus, she was disqualified under G.L. c. 151A, § 28A. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not entitled to any benefits during the period between the 2019–20 and 2020–21 academic years pursuant to G.L. c. 151A, § 28A, is supported by substantial and credible evidence and is free from error of law, where the claimant had school employment that was separate from the position for which she received reasonable assurance of re-employment.

Findings of Fact

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

1. On September 20, 1999, the claimant started working for the employer, a Town School District, on a part-time basis.

2. On December 1, 2000, the claimant was hired by the employer as a fulltime teaching assistant. In this role, the claimant is scheduled to work Monday through Friday from 9 a.m. – 3 p.m.
3. The claimant's primary job role with the employer is as a teaching assistant.
4. The claimant's position as a teaching assistant is a 10-month contracted position.
5. On September 2, 2016, the claimant also started to work for the employer's School Department as an on-call custodian. In this role, the claimant is paid \$20.63 per hour.
6. The claimant's work as a custodian is not guaranteed by the employer.
7. In 2016, the claimant worked 20 hours as a custodian. In 2017, the claimant worked 160 hours as a custodian. In 2018, the claimant worked 175 hours as a custodian. In 2019, the claimant worked 250 hours as a custodian.
8. The claimant worked as a custodian for the employer during the summers of 2016, 2017, 2018, and 2019.
9. The claimant also works sometimes as a bus monitor for the employer. In the role of bus monitor, the claimant is paid \$16.41 per hour.
10. The claimant also works sometimes as a substitute teacher for the employer. In the role of substitute teacher, the claimant is paid \$97.89 per day.
11. During the employer's 2019-2020 school year, the claimant was paid an annual salary of \$27,741.63 working for the employer in her role of teaching assistant.
12. On June 9, 2020, the employer's Superintendent of Schools mailed the claimant [sic] letter, titled Reasonable Assurance of Employment, informing the claimant that the employer will need the claimant's services again for the 2020-2021 school year in her role of teaching assistant. In the letter, the employer wrote that the school year will begin on September 1, 2020.
13. Prior to filing an initial claim for unemployment benefits, the claimant's last date of work for the employer in her role of teaching assistant was on June 19, 2020. This was the claimant's last date of work as the employer's 2019-2020 school year ended.
14. During the summer months of 2020, the employer did not have any work available for the claimant in her role of custodian.

15. The claimant filed an initial claim (hereinafter 2020-01 claim) for regular unemployment benefits effective the week beginning June 21, 2020.
16. The employer is the only base period employer on the claimant's 2020-01 unemployment claim.
17. The Department of Unemployment Assistance (hereinafter DUA) monetary records list that the claimant was paid the following gross wages working for the employer during her base period:

2 nd Quarter 2019	3 rd Quarter 2019	4 th Quarter 2019	1 st Quarter 2020
\$8,493.62	\$12,166.41	\$10,451.76	\$10,227.07

Total \$41,338.86

18. The paid wages of \$41,338.86 listed in the DUA monetary record for the base period represent a combination of the claimant's wages from her teaching assistant position, bus monitor position, substitute teaching position and custodian position.
19. The claimant was paid wages of \$7,951.75 by the employer during the 3rd quarter 2019 and into the 4th quarter of 2019 for performing her job role as a custodian for the employer. The employer subsequently separately reported these wages to the DUA. The DUA monetary records list these wages during the 4th quarter 2019.
20. The employer's 2020-2021 school year started on August 28, 2020. On September 1, 2020, the claimant returned to work for the employer in her fulltime role of teaching assistant.
21. On October 29, 2020, the DUA issued a Notice of Disqualification excluding the claimant's base period wages to establish an unemployment claim under Sections 28A, (a), (b) & (c) of the Law from June 21, 2020 through August 22, 2020. The claimant appealed the Notice of Disqualification.

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 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. As discussed more fully below, while we agree that the claimant received reasonable assurance of reemployment for her regular, full-time position in the next academic term, that reasonable assurance does not disqualify her from receiving benefits with a reduced weekly benefit amount over the summer based upon her other base period school employment.

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 concluded that, prior to the end of the 2019–20 school year, the employer had provided the claimant with reasonable assurance of re-employment in her full-time, 10-month teaching assistant position for the 2020–21 academic year, starting September 1, 2020. We agree that substantial evidence supports this conclusion. It is based upon the employer's June 9, 2020, letter and it is not in dispute. *See* Finding of Fact # 12 and Exhibit 12. Moreover, the claimant returned to her full-time teaching assistant job on September 1, 2020. *See* Finding of Fact # 20. Under G.L. c. 151A, § 28A(b), the claimant is not entitled to unemployment benefits during the period between the 2019–20 and 2020–21 school years based upon her base period earnings from this teaching assistant position.

However, the claimant performed other work for the employer during her base period as a substitute teacher, bus monitor, and custodian on a part-time, as needed basis. *See* Findings of

Fact # 8–10. Because the wages earned in the base period from the employer as a substitute teacher, bus monitor, and custodian were separate from the job for which the claimant received reasonable assurance, they may not be excluded by G.L. c. 151A, § 28A.

Findings of Fact ## 17 and 18 show \$41,338.86 in total gross wages paid to the claimant from the employer during her base period for all of her positions. Although Finding of Fact # 11 provides that \$27,741.63 was the claimant’s salary for work performed as a teaching assistant in the 2019–20 school year, that does not exactly align with her base period. The claimant’s base period of earnings for calculating her unemployment benefits is from April 1, 2019, through March 31, 2020. *See* Finding of Fact # 17. However, Exhibit 18 includes Employee Check History Reports of the claimant’s earnings from the employer during each quarter of her base period. It shows that the employer paid total gross wages to the claimant for her work as a substitute teacher, bus monitor, and custodian in the amount of \$13,318.97.¹ As there is no suggestion that the employer provided reasonable assurance for the 2020–21 school year in any of these positions, G.L. c. 151A, § 28A, does not preclude a weekly benefit amount during the period between the academic years based upon these earnings.

We, therefore, conclude as a matter of law that that the claimant received reasonable assurance of re-employment for the subsequent academic period within the meaning of G.L. c. 151A, § 28A(b), for her full-time paraprofessional job, and she is disqualified from receiving benefits during the relevant period based upon wages earned in that position.

The review examiner’s decision is affirmed in part and reversed in part. For the week beginning June 21, 2020, through August 22, 2020, the claimant is entitled to a weekly benefit amount based only upon \$13,318.97 in base period earnings, if she is otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 30, 2021



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

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

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may contact the PUA call center at (877) 626-6800 and ask to speak to a Tier 2 PUA Supervisor.

¹ This figure is derived from Exhibit 18. While not explicitly incorporated into the review examiner’s findings, it 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).

**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.

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