

**Employer’s written offer to re-employ the claimant in her paraprofessional position in the 2020-21 school year stated that it was contingent upon the pandemic and funding. Because the employer was uncertain at the time and throughout the summer whether students would come back for in-person learning, whether the claimant’s hours would be reduced, or that her services would even be needed, Board held the claimant was not provided with reasonable assurance of re-employment under G.L. c. 151A, § 28A, until the end of August, when they mailed her a contract.**

**Board of Review  
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**Issue ID: 0047 5467 37**

### 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 11, 2020. She filed a claim for unemployment benefits with the DUA, which was approved. However, in a determination issued on July 20, 2020, the claimant was denied benefits from June 21 through August 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 September 25, 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. 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 circumstances surrounding the employer’s May 29, 2020, offer of re-employment for the next school 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 that, because the employer had provided the claimant with its May 29, 2020, letter, she had reasonable assurance of re-employment in the subsequent academic year and was ineligible for benefits during the summer of 2020, 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 employment as a paraprofessional with the employer, an educational institution, on September 7, 2018.
2. The claimant earns \$17.00 per hour.
3. The claimant is still employed with the employer.
4. The claimant completed the 2019–2020 academic year with the employer. In the 2019–20 academic year, the claimant was employed in a full-time, 10-month, position.
5. The claimant worked 35 hours per week during the academic year.
6. The 2019–20 school year ended on June 11, 2020.
7. The employer does not guarantee employment to employees during summer vacation.
8. Typically, the employer asks their employees their availability and interest to teach during the summer.
9. The employer does not require the claimant to work in its summer program as a condition for keeping her academic year job.
10. The claimant's gross wages for her work in the 2019 summer program [were] \$2819.39.
11. The claimant notified the employer that she would be available and interested to teach during the summer.
12. The employer did not offer any work to the claimant for the summer of 2020.
13. The employer notified the claimant that due to newly required ratios as a result of COVID-19, the employer would not extend an offer to her for employment during the summer program.
14. The employer did not give the claimant a date to report to work for the summer of 2020.
15. On May 29, 2020, the employer informed the claimant via letter that she would be returning to work on August 31, 2020. The parties understood that this letter was an offer to re-employ the claimant as a paraprofessional in the 2020–21 academic year.

16. The claimant's rate of pay is guaranteed under a collective bargaining agreement.
17. The May 29, 2020, letter states, "This assurance is contingent upon continued school operations and could not apply in the event of any disruptions that are beyond South Shore Educational Collaborative's control such as pandemic, lack of school funding, etc."
18. The employer included this statement in its May 29, 2020, letter because due to the pandemic, COVID-19, the employer was uncertain about the future of the school.
19. At the time the employer issued its May 29, 2020, letter, the employer was uncertain that the claimant's paraprofessional services would be necessary at the beginning of the academic year. The factors that affected whether or not the claimant would be reemployed included re-enrollment and funding as a public entity.
20. At the time the employer issued its May 29, 2020, letter, the employer was uncertain that the claimant would return to work the same number of hours that she had worked in the 2019–20 school year. The employer's re-enrollment numbers and whether school was remote were some factors that affected whether the claimant would return to work with fewer hours than she had worked in the 2019–20 school year.
21. At the time this letter was issued, the employer was uncertain that the 2020–21 school year would begin on August 31, 2020 due to the ongoing pandemic, COVID-19. Factors such as re-enrollment, remote learning and funding affected whether the start of the 2020–21 school year would be delayed.
22. If reopening was delayed, paraprofessionals would not have been paid for the period between August 31, 2020, and the date they actually started performing services.
23. As of late July, 2020 to early August, 2020, the Department of Elementary and Secondary Education direction that school [sic] are to reopen for the 2020–21 school year, made it highly likely that the claimant would return to work under economic terms that were substantially similar to her 2019–20 position.
24. On August 10, 2020, the local Board of Directors for the employer voted to reopen the school on August 31, 2020.
25. During the week of August 23, 2020, the employer notified the claimant that she would return to work by sending her a contract of employment for the 2020–2021 school year beginning on August 31, 2020.

### 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. After such review, the Board adopts the review examiner’s consolidated findings of fact except as follows. The portion of Consolidated Findings # 18, which states that the employer was uncertain about the future of the school is misleading. Testimony from the employer’s Executive Director was limited to his uncertainties about the 2020–21 academic year. To the extent Consolidated Finding # 19 states that “funding as a public entity” was a factor that affected whether the claimant would be re-employed, this statement is misleading, as discussed in detail below. Additionally, we accept the portion of Consolidated Finding # 23, which described the Department of Elementary and Secondary Education’s (DESE) direction as making it “highly likely” that the claimant would return to work under economic terms that were substantially similar to her 2019–20 position, only insofar as it reflects the opinion of the employer’s Executive Director.

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we do not believe that the consolidated findings support the review examiner’s legal conclusion that the claimant was ineligible for benefits throughout the summer of 2020.

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;

(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.

In 2016, the U.S. Department of Labor (DOL) released updated guidance pertaining to the analysis of reasonable assurance. In its Unemployment Insurance Program Letter (UIPL) 5-17 (Dec. 22, 2016), the DOL set forth an initial set of criteria for determining whether a claimant is entitled to benefits between academic periods. There must be a written, oral, or implied offer from a person with authority to offer employment, the offer is for a job in the same capacity (*i.e.*, professional or non-professional), and the economic conditions of the offer must not be considerably less than in the prior academic period. *Id.* at part 4(a), pp. 4–5. Where an offer includes a contingency, further criteria require that the contingency must be outside of the employer’s control and the totality of circumstances must show that, notwithstanding the contingent nature of the offer, it is highly probable that the offered job will be available under substantially similar economic terms in the next academic period. *See Id.* at part 4(c), p. 6. Further, we have held that the employer has the burden to prove that it provided the claimant with reasonable assurance of re-employment. *See Board of Review Decision 0016 2670 84 (Jan. 29, 2016).*

In the present case, there is no dispute that the employer’s May 29, 2020, letter to the claimant was issued by a person with authority to offer employment, the offer was for the same para-professional position in the next school year, and because the claimant’s rate of pay is guaranteed under a collective bargaining agreement, it seemed that she would be returning under economic conditions that were not less than the prior academic year. *See Consolidated Findings ## 15, 16, and Exhibit 8.* On this basis, the review examiner determined that she had reasonable assurance of re-employment under G.L. c. 151A, § 28A, and was, therefore, ineligible for benefits during the summer period between academic years.

However, the May 29, 2020, letter included a contingency to re-employing the claimant. It stated that the assurance of returning was contingent upon school operations and possible disruptions beyond the employer’s control, such as the pandemic and school funding. *See Consolidated Finding # 17.* The COVID-19 pandemic was certainly a contingency beyond the employer’s control. We remanded to obtain more evidence in order to be able to assess whether the totality of circumstances at the time showed that, notwithstanding the contingent nature of the offer, it was highly probable that the offered job will be available in the fall under substantially similar economic terms.

As alluded to in Consolidated Findings ## 18–21, the employer’s Executive Director testified on remand that when the employer issued the May 29, 2020, letter to the claimant, it was not certain what would happen in the fall. He explained that, due to the COVID-19 pandemic, the school had been operating remotely since March 13, 2020, its enrollment had declined, and the employer did not know whether they would have to provide remote instruction again in the 2020–21 school year. He stated that the employer receives its funding from the public school districts that send it students and pay their tuition. Because parents or districts might not have sent students to the school in the fall, enrollment might again have dropped, which, in turn would have required a reduction in force. This could have particularly affected the claimant, who was assigned to work with medically fragile students.<sup>1</sup> Thus, the employer conceded that when it issued its May 29, 2020, offer of re-employment, it was uncertain that the claimant would be working the same number of hours as

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<sup>1</sup> It is common knowledge that individuals with existing medical issues may be more susceptible to serious health complications if they contract the COVID-19 virus.

she had in the 2019–20 school year, or that her paraprofessional services would even be necessary. *See Consolidated Finding ## 19–21.*<sup>2</sup> Moreover, it was also possible that the 2020-21 academic year start date would be delayed. *See Consolidated Finding # 21.* If the school’s opening had to be delayed, the claimant would not have been paid until she actually began performing services. *Consolidated Finding # 22.*

Under these circumstances, which existed at the time the employer issued its written offer of re-employment to the claimant in May, we cannot conclude that it was highly probable that the claimant’s offered job would be available under substantially similar economic terms in the next academic period.

Apparently, this changed after DESE directed the school to bring back as many students as possible for in-person learning, and, on August 10, 2020, the employer’s Board of Directors voted to do so. *See Consolidated Findings ## 23 and 24.* But, the claimant was not provided with written notice that she would be returning to work on August 31, 2020, until the week beginning August 23, 2020. *Consolidated Finding # 25.* At this point, it seemed, the uncertainties about the claimant’s 2020–21 academic year employment ended.

We, therefore, conclude as a matter of law that the employer did not meet its burden to show that it provided the claimant with reasonable assurance of re-employment in the 2020–21 academic year under substantially similar economic terms until the week beginning August 23, 2020. Until then, the claimant may not be disqualified from receiving benefits under G.L. c. 151A, § 28A.

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<sup>2</sup> The Executive Director testimony which we have paraphrased is not explicitly incorporated into the review examiner’s consolidated findings. However, 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).

The portion of the review examiner's decision which disqualified the claimant from June 21 through August 22, 2020, is reversed. The portion of the review examiner's decision which disqualified the claimant during the week beginning August 23, 2020, is affirmed. The claimant is denied benefits for the week beginning August 23, 2020. She is entitled to receive benefits for the period June 21 through August 22, 2020, if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 26, 2021**



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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.

**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](http://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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