School van driver, who was required to transport summer school students in order to keep her academic year job, was notified days before the 2020 summer program was to begin that her services were not needed. Though she had been offered her same academic year job back, the 2020-21 school year was delayed and she has not worked as many hours in the fall. Pursuant to G.L. c. 151A, § 28A(b) and 430 CMR 4.96(1), she may not be denied unemployment benefits in the summer of 2020. Under 430 CMR 4.98(1), she is entitled to retroactive benefits.

Board of Review
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Issue ID: 0047 7352 64

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 reverse.

The claimant separated from her position with the employer on June 18, 2020. She filed a claim for unemployment benefits with the DUA, effective June 14, 2020. In a determination issued on September 11, 2020, the DUA denied her benefits from June 21 through September 5, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner modified the agency's initial determination and denied benefits from June 28 through September 12, 2020, in a decision rendered on October 10, 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 claimant's summer employment, academic year dates, and communications for the 2020–21 school year. Only the claimant 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 not entitled to benefits under G.L. c. 151A, § 28A, during the summer of 2020, is supported by substantial and credible evidence and is free from error of law, where, due to COVID-19, the claimant did not perform services for the summer program, a usual requirement for her full-time job, and did not return to work in the fall under the same economic terms and conditions of employment.

Findings of Fact

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

1. The claimant filed an unemployment claim, effective 06/14/2020, with a benefit year end of 06/12/2021. During the base period (04/01/2019 to 03/31/2020), the claimant worked for the instant employer. The claimant had no other employers during the base period.

2. The Department of Unemployment Assistance (DUA) determined the claimant was monetarily eligible to receive weekly benefits in the amount of $429.00 with the use of the employer's base period wages.

3. The employer is a municipality. The claimant is a full-time van driver for the schools within the municipality.

4. The claimant began working for the employer in January, 2017, as a full-time van driver. The claimant worked in this capacity for the employer every school year. Every year during the first week of July, the claimant signed a letter (not an employment contract) for the upcoming school year. During the claimant's employment, each school year normally started the day after Labor Day.

5. During the 3rd quarter 2019, the claimant's total gross wages were $4,695.64. Approximately $3,000 of this was earned in the period between the end of the 2018 – 2019 and 2019 – 2020 school years.

6. During the claimant's employment, she worked for the employer's summer program transporting special needs students. The employer requires the claimant to work during the summer in order to keep her school year job. The claimant has worked part-time hours (approximately twenty-five (25) hours per week) between the first week of July and the second or third week of August for approximately five (5) weeks depending on her chosen summer route.

7. The claimant worked for the employer as a full time van driver during the 2019 – 2020 school year earning $20.75 per hour. The claimant's last day worked was in March 2020. The claimant was paid through 06/17/2020, when the 2019 – 2020 school year ended.

8. Before the claimant stopped working in March 2020, the scheduled end date of the employer's 2019 – 2020 school year was 06/18/2020. The claimant was scheduled to work through the end of the school year.

9. At the time the claimant separated from the employer on 06/17/2020, the employer's 2020 – 2021 school year was scheduled to begin on 09/08/2020, the day after Labor Day (09/07/2020). The 2020 – 2021 school year start date changed due to COVID-19 and was delayed.

10. On 06/10/2020, the employer provided the claimant with a letter notifying her that she would return to her special-needs driver position in the 2020 – 2021 school year. The claimant received this letter during the first week of July 2020 which stated, "At this time, we are writing to notify you that the [Town Public Schools] is offering you the following position for the school year 2020-2021: Title of Position: Special Needs Driver [Town Public School District] Hours Per Week: To be assigned by Transportation Coordinator Effective: Wednesday, September 2, 2020 Hours Per Day: To be assigned by Transportation Coordinator" The claimant checked "Yes I do accept employment, for the position noted above, with [Town Public Schools] for the 2020 – 2021 school year." The claimant returned this letter prior to the deadline date of 07/10/2020.

11. The employer offered a summer program in summer 2020 and required parents to transport the participating students due to COVID-19. The employer did not provide the claimant with anything in writing stating that she would transport students in its 2020 summer program. The employer did not provide the claimant with anything in writing cancelling her employment transporting students in its 2020 summer program.

12. On or about 07/02/2020, the claimant received a phone call from the head of transportation, who informed the claimant that she would not be transporting students and that parents would be required to drive the children to and from the summer 2020 program.

13. The 2020 – 2021 school year began on 09/16/2020.

14. School was not in session between the week beginning 06/28/2020 and the week ending 09/12/2020.

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We believe the portion of Consolidated Finding # 7, which states that the claimant was paid through June 17, 2020, is incorrect. The rest of this finding states that she was paid until the 2019–20 school year ended, and Consolidated Finding # 8 states that the school year ended on June 18, 2020, a date supported by the evidence in the record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's original conclusion that the claimant is ineligible for benefits.

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 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.

In this case, the consolidated findings provide that, although the claimant stopped working in March, 2020, she continued to be paid until the 2019–20 school year ended on June 18, 2020. Consolidated Findings ## 7–8. Thus, although the effective date of her claim is June 14, 2020, the claimant was not in unemployment during this first week because she was still being paid, and, therefore, she is ineligible for benefits in that week.

The review examiner's original decision disqualified the claimant from the week beginning June 28, 2020, through September 12, 2020, on the ground that she had reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A. This was based upon the fact that, in the first week of July, the claimant received a notice from the employer that she would be returning to her same van driver position in the next academic year, 2020–21. *See* Consolidated Finding # 10. Given the additional evidence provided after remand, we do not believe the claimant is disqualified by G.L. c. 151A, § 28A.

In order to retain her full-time academic year job, the employer requires the claimant to work part-time for five weeks transporting special needs students in its summer program. Consolidated Finding # 6. She did this in the summer of 2019. *See* Consolidated Finding # 5. In 2020, however, the employer did not provide any summer work, because, due to the COVID-19 pandemic, it required students' parents to transport their children to the program and the claimant's services

were not needed. Consolidated Findings ## 11 and 12. In Board of Review Decision 0022 1445 55 (Apr. 27, 2018), we considered whether a 12-month non-instructional educational employee, who was also required to work reduced hours for a summer program in order to keep her job, was disqualified from receiving benefits by G.L. c. 151A, § 28A(b). We held that, during the summer program weeks, G.L. c. 151A, § 28A(b), did not preclude the payment of partial unemployment benefits, because, unlike typical school employees who are not required to work, she did not have the option to take the summer off or to find alternate full-time work during the period between academic years.

Here, the claimant did not work any of the required part-time summer hours in the employer's 2020 summer program, which ran from July 6 through August 6, 2020. *See* Exhibit 3.[1] She was not notified of this, however, until on or about July 2, 2020. Consolidated Finding # 12. The 11th hour cancellation of the claimant's summer employment would have made it very difficult, if not impossible, to find other work during the summer of 2020. Under these circumstances, she is eligible for benefits during the five summer program weeks that she had previously been told that she had to work.

In Board of Review Decision 0022 1445 55, we further held that G.L. c. 151A(c) precluded the payment of any unemployment benefits in the weeks immediately before and after the summer program, as these were typical vacation weeks and the claimant had reasonable assurance of returning to her full-time position in the fall. Notably, the claimant in that case returned to her same position in the next academic year which began as anticipated at the end of August. The facts here are different.

In the present case, the employer's 2020–21 academic year was originally scheduled to begin on September 2, 2020. *See* Consolidated Finding # 10. In fact, the 2020–21 academic year start date was delayed until September 16, 2020. *See* Consolidated Findings ## 9 and 13. Further, the claimant reported at the remand hearing that she is working a lot fewer hours due to COVID-19.[2] We must decide whether these circumstances entitle the claimant to the payment of retroactive benefits, even though the claimant was provided with reasonable assurance of re-employment at the beginning of the summer.

With its June 10, 2020, letter notifying the claimant that she would be returning to her same position in the 2020–21 school year, the employer appeared to satisfy the requirements of G.L. c. 151A, § 28A(b), to provide reasonable assurance of re-employment. *See* Consolidated Finding # 10. The U.S. Department of Labor has stated that, in order to constitute reasonable assurance, the employer's offer of re-employment must offer economic conditions that are not considerably less than the prior academic period.[3] For non-professional school employees, the DUA has also

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[1] Exhibit 3 is the employer's completed Lack of Work Notification, completed by the employer's representative on July 2, 2020. Although not explicitly incorporated into the review examiner's findings, the dates of its 2020 summer program and the information about its anticipated academic year start date (see below) are 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).

[2] This testimony, provided during the November 24, 2020, remand hearing, is also part of the unchallenged evidence in the record.

[3] U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 5-17 (Dec. 22, 2016), 4(a).

promulgated regulations which we must consider. Specifically, an employer must provide the employee with an "opportunity to perform" "suitable services." 430 CMR 4.96(1). These terms are defined under 430 CMR 4.93, as follows:

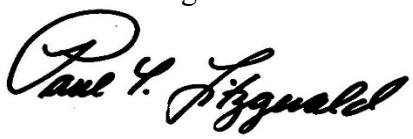
> Opportunity to Perform Services means a chance to actually perform services in the next ensuring academic year or term.
>
> Suitable Services as used in 430 CMR 4.96(1) means service in the same or substantially similar position *at the same or higher pay*, except as otherwise provided by a collective bargaining agreement. (Emphasis added.)

The evidence before us shows that the claimant started the academic year late and is working fewer hours than in the prior academic year. With a shorter academic year and fewer hours, we can reasonably infer that she is not earning as much money as she did in the 2019–20 school year. This means that she is not actually performing services at the same pay.[4] Under 430 CMR 4.98(1), she is entitled to retroactive benefits for any period originally excluded due to having initially been given reasonable assurance of re-employment.

We, therefore, conclude as a matter of law that pursuant to G.L. c. 151A, § 28A(b), and 430 CMR 4.96(1), the claimant may not be disqualified from receiving unemployment benefits for any weeks of unemployment in the period between the 2019–20 and 2020–21 academic years. We further conclude that pursuant to 430 CMR 4.98(1), she is entitled to retroactive benefits.

[4] Since the employer did not participate in the original or remand hearing, we decline to remand this case again to find out precisely how many hours she has worked and how much she is being paid now compared to the 2019–20 academic year.

The review examiner's decision is reversed. The claimant is entitled to receive benefits based upon the wages earned from the employer during her base period from the week beginning June 21 through September 12, 2020, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS Paul T. Fitzgerald, Esq.
DATE OF DECISION - January 8, 2021 Chairman

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

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.

AB/rh