

Employer provided reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A(b), for the claimant’s full-time assistant teacher position. However, the claimant also worked in her base period as an after-school aide and assistant teacher in the summer school program. Because these positions were separate from her full-time job, she did not have reasonable assurance of re-employment for these positions. During the period between academic years, she is entitled to a weekly benefit amount based upon the gross wages earned in those other jobs.

**Board of Review
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Issue ID: 0047 7437 53

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 18, 2020. She filed a claim for unemployment benefits with the DUA, effective June 7, 2020, which was denied in a determination issued on August 8, 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 4, 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 more information about the employer’s re-employment offer letter and the claimant’s wages in all of her positions. 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, which concluded that the claimant was not entitled to any unemployment benefits during the summer of 2020, 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 for the 2020–21 school year.

Findings of Fact

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

1. The claimant works three different jobs for the employer.
2. The claimant works full-time as an Assistant Special Education Teacher (Position 1). She has worked in this capacity since 2006. She earned \$31.67 per hour during the 2019-2020 school year and worked 32.5 hours per week and she earns \$32.30 per hour for 2020-2021 school year and works 33.75 hours per week.
3. The claimant's second position is working as an aide in the school's after-school program (Position 2). The position runs during the school year only. During the claimant's base period, April 1, 2019 – March 31, 2020, she worked in the program from 04/01/19-06/15/19 [sic] (first day of base period/last day of school) and then from approximately 08/26/19 [sic] through 03/07/20 (first day of school year/last day of program due to COVID-19 pandemic.)
4. Position 2 was not required for the claimant to maintain Position 1. She voluntarily works Position 2 to earn extra income. She earns \$21.00 per hour for this position.
5. The claimant's gross wages for Position 2 during her base period, April 1, 2019 – March 31, 2020, were \$5,494.20.
6. The after-school program was closed on 03/07/20 due to the pandemic, but the claimant continued to work Position 1 for the employer through the end of the 2020 school year.
7. On or about 06/17/20, the claimant received a letter from the employer indicating she had reasonable assurance of returning to her Assistant Special Education Teacher position (Position 1).
8. The claimant understood that the 06/17/20 was an offer to re-employ her in the same Assistant Special Education Teacher position in the next academic year.
9. When she received the 06/17/20 letter, the claimant understood that she would be paid the same or similarly because that was how it worked each year previously.
10. The claimant's third position with the employer is working as an aide in the summer school program (Position 3). Each year, individuals apply for positions in the summer program or are asked if they would like to return.
11. The claimant's gross wages for her work at the summer 2019 program were \$2,913.44. She earned \$22.08 an hour.

12. The employer does not require the claimant to work the summer position to maintain her school year position as an Assistant Special Education Teacher. She voluntarily worked the job for extra income.
13. The claimant was not offered Position 3 during the 2020 summer because the program was held virtually due to the COVID-19 pandemic and less staff were needed to run the program.
14. On 08/31/20 [sic], the claimant returned to her regular, school year position as an Assistant Special Education Teacher. She received a few more hours weekly for this position as she did in the previous school year.
15. On 08/31/20 [sic], the claimant did not return to Position 2 because the after-school program remained closed due to the pandemic. In March 2021, the claimant began working in the after-school program again when it was safe to reopen.
16. The claimant's gross earnings for the 2019-2020 school year were \$45,866.18. The claimant's gross earnings for the beginning of school year 2019-03/18/20 were \$30,734.79 and gross earnings for the beginning of the school year 2020-03/18/21 were \$26,800.42. This includes income for Positions 1&2 as they were paid together in the same check.
17. Even though the claimant worked more hours in Position 1 during this current school year, she earned less than last year because she did not work any hours in the after-school program until it reopened just recently.
18. On 08/08/20, the DUA sent the claimant a Notice of Disqualification stating that she had performed services for an educational institution during the most recent academic year or term and there is a contract or a reasonable assurance that she will perform services for an educational institution during the next school year or term. The Notice also stated that the claimant may not receive a benefit based on wages earned working for an educational institution for weeks commencing during the period between these academic years or term and inasmuch as she has no wages earned working for other than an educational institution or insufficient such wages to meet the eligibility requirements of M.G.L. chapter 151A, § 24(a), she is not eligible to receive benefits for the period beginning 06/28/2020 and through 8/29/2020.

Credibility Assessment:

The claimant worked three distinct positions for the employer. She was not offered her usual summer position due to COVID-19. She received reasonable assurance and returned to her regular position during the current school year. Her work in the afterschool program stopped in March 2020 due to the pandemic and then just recently resumed when it was safe to do so. Both party's testimony is considered credible because it was clear and consistent and supported by the paystubs in the

record and/or the earnings information the employer witness read off their computer system.

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. In Consolidated Findings ## 3, 14, and 15, the review examiner's dates for the end of the 2019–20 school year and beginning of the 2020–21 school year are incorrect. During the hearing, the parties testified that the 2019–20 academic year ended on June 18, 2020, and the 2020–21 academic year began on August 28, 2020.¹ As discussed more fully below, while we agree that the employer provided the claimant with reasonable assurance of re-employment for her full-time Assistant Teacher position, we disagree that the claimant is not eligible for any unemployment benefits during the period between the 2019–20 and 2020–21 academic years.

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

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

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, academic year teaching assistant position for the 2020-21 school year, which started on August 28, 2020. We agree that substantial evidence supports this conclusion. It is based upon the employer's June 17, 2020, letter and the fact that the claimant understood at the time that she would be returning to this position under substantially similar economic terms. *See Findings of Fact ## 7 and 8.* Moreover, the claimant returned to her full-time teaching assistant job on August 28, 2020. *See Finding of Fact # 14.* 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 an after-school aide and an assistant teacher in the 2019 summer school program. *See Consolidated Findings # 3, 10, and 11.* Because the services performed in these positions were not required as part of her full-time academic year assistant teacher position, they were not part of the employer's June 17, 2020, offer of re-employment. Thus, the wages earned in the base period from the employer as an after-school aide and as an assistant teacher in the 2019 summer school program were separate from the job for which the claimant received reasonable assurance. Therefore, they may not be excluded by G.L. c. 151A, § 28A.

The claimant's base period for her unemployment claim ran from April 1, 2019 through March 31, 2020. *See Consolidated Finding # 3.* Consolidated Findings ## 5 and 11 provide that, during her base period, the claimant earned \$5,494.20 in gross wages from her after-school position and \$2,913.44 in gross wages from her 2019 summer school position. G.L. c. 151A, § 28A does not preclude a weekly benefit amount during the period between the academic years based upon these earnings in the total amount of \$8,407.64.

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 assistant teacher job, and she is disqualified from receiving benefits during the relevant period based only 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 29, 2020, the claimant is entitled to a weekly benefit amount based only upon \$8,407.64 in base period earnings, if she is otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 22, 2021



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

**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