

The employer provided the claimant bus driver with an offer letter that may have been sufficient to constitute reasonable assurance for the 2020-21 academic year. However, the start of the academic year was delayed and the claimant's hours were reduced from the previous year as a result of the pandemic. Since she did not return to the same position under the same economic terms, she is entitled to retroactive benefits pursuant to G.L. c. 151A, § 28A(b).

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0047 7652 42

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 his position with the employer in June, 2020 following the end of the 2019-20 academic year. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 23, 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 in part, and reversed in part the agency's initial determination and denied benefits for the period between June 28, 2020, and September 12, 2020, in a decision rendered on September 22, 2021. 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, he 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. 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 because he had received reasonable assurance of re-employment for the subsequent academic year, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant has worked as a Bus Driver for the employer, a school, from 3/8/20 through the present. He has not separated from this employment.

2. The claimant was hired to work on average of 20 hours a week, earning \$20.07 an hour.
3. The claimant filed a new claim for unemployment benefits on 3/16/20.
4. Buses were shut down in March of 2020 to the end of June, 2020, due to the pandemic. The claimant did not work when the buses stopped, but he did receive full pay until the end of the school year.
5. Bus Drivers were welcomed back at a meeting over the summer. The claimant was invited to bid on his bus route. The Drivers need to bid on their routes for each school year. Routes are issued according to seniority.
6. The claimant's position as a Driver could not be outbid but the claimant could have been pushed out of his particular route. The claimant is not made aware of his route until the bid is approved.
7. Summer work is separate from the work during the regular school year. The claimant never received any guarantees from the employer for summer work.
8. Due to a hybrid schedule, the claimant was not required to work on Wednesdays as the bus was not needed during these days. He did receive retroactive payment for the Wednesdays he had not worked. As of November 2020, the claimant began driving the bus 5 days a week as the district he was driving for went back to in person learning.
9. The claimant did return to work as of 9/17/20 in the same position for the 2020-2021 school year. He received a small increase in pay for the 2020-2021 school year.
10. The claimant had no other employment during his base period.

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 findings of fact and deems 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 during 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 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.

The review examiners original decision disqualified the claimant from receiving benefits on the ground that he had reasonable assurance of re-employment for the subsequent academic year. However, upon review, we do not believe the claimant is disqualified from receiving benefits by G.L. c. 151A, § 28A.

While the claimant would normally return to work at the end of August, the start of the 2020–2021 academic year was delayed until September 17, 2020.¹ When the claimant did return to work, the employer's decision to implement a hybrid learning system meant that he was unable to work on Wednesdays. *See* Finding of Fact # 8. In light of these facts, we must decide whether these circumstances entitle the claimant to the payment of retroactive benefits, even though the claimant may have been provided with reasonable assurance of re-employment at the end of the previous academic year.

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.² The DUA has also promulgated regulations for non-professional school employees which are applicable to this case. Specifically, an employer must provide the

¹ The employer's testimony in this regard 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).

² U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 5-17 (Dec. 22, 2016), 4(a).

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 ensuing 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 record before us shows that the claimant started the academic year late and was working fewer hours than in the prior academic year through at least the first two months of the 2020–21 academic year. *See* Findings of Fact ## 8 and 9. Additionally, the claimant’s earnings statements from both the 2019–20 and 2020–21 academic year, which were admitted into the record as Exhibit 9, reflect a substantial decrease in the average number of hours the claimant worked in any given week, as well as a corresponding decrease in the claimant’s average weekly compensation.³ Therefore, the claimant was not offered the opportunity to perform suitable services in the 2020–21 academic year within the meaning of 430 CMR 4.96(1). *See* Board of Review Decision 0047 7352 64 (Jan. 8, 2021). Under 430 CMR 4.98(1), he 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), he is entitled to retroactive benefits.

³ Exhibit 9 is also part of the unchallenged evidence introduced at the hearing and placed in the record.

The review examiner's decision is reversed. The claimant is entitled to receive benefits based upon the wages earned from the employer during his base period from the week beginning June 28 through September 12, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 23, 2021



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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