

Because the employer was unsure 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 at the time it issued the claimant a reasonable assurance letter, the claimant did not have reasonable assurance of re-employment.

**Board of Review
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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 12, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 11, 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 October 28, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had reasonable assurance of re-employment for the subsequent academic year and, thus, 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 employer's plans for the 2020–21 academic year in light of the COVID-19 pandemic and the economic terms of the claimant's position. 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 eligible for benefits from the week beginning June 7, 2020, through August 29, 2020, because she had 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 consolidated findings of fact and credibility assessment are set forth below in their entirety:

1. The claimant has worked full-time as a driver for the employer, an educational collaborative, since 2016. She earns \$23.25 per hour. Her rate of pay is established by the collective bargaining agreement. The claimant is a member of the [Union A] union.
2. According to DUA records, the claimant filed her unemployment claim on 06/12/20 and it was effective 06/07/20. The claimant had no other employment during her base period.
3. The claimant's job is a 10-month position. She is not required to work in the summer to maintain her position.
4. The claimant completed working the 2019-2020 school year on or about 06/12/20. On average she worked 27-30 hours per week.
5. On 06/04/20, the claimant received a letter from the employer indicating she had reasonable assurance of returning to the same or similar position during the next school year. However, at that time, the employer was unsure as to when school would be starting or whether or how many bus drivers would be needed due to the COVID-19 pandemic and remote learning and hybrid learning situations.
6. Prior to the summer of 2020, the claimant typically drove campers during the summer season. For instance, during the summer of 2019, the claimant worked 163 hours for the period of 07/01/19-08/31/19 and her gross pay was \$3,538.73.
7. Each year, individuals bid for positions in the summer program; however, the 2020 summer camp was cancelled due to the COVID-19 pandemic.
8. On or about 08/17/20, the employer publicly released a Comprehensive Reopening Plan Fall 2020, providing for a hybrid learning option to open the 2020-21 school year. Under the plan, families could also elect remote learning options. The plan indicated that it would stop in-person learning in the event of school closure due to COVID-19. It also indicated that families were strongly encouraged to use alternate transportation, including walking, biking, and driving their own children to school during the pandemic.
9. If fewer children chose to ride the school bus, then the employer would likely have to reduce the number of hours of its school bus drivers. However, drivers were guaranteed 2 hours for every a.m. and p.m. shift under the contract.
10. Prior to the fall of 2020, the claimant has returned to the same or similar position each school year since 2016.
11. The start of the 2020-21 school year was pushed back two weeks due to the COVID-19 pandemic.

12. On 09/14/20, the claimant returned to work. Previously, she drove her bus in the [Town A], but she began driving for a neighboring town ([Town B]) because [Town A] was doing full remote learning. The claimant was working four days a week as opposed to previously driving five days a week because [Town B] was doing a hybrid model of school with one day off each week.
13. During the week ending 09/19/20, the claimant worked 38.5 hours and during the week ending 09/26/20, the claimant worked 38 hours. The claimant had training along with her driving duties those weeks.
14. Since 09/17/20, the claimant worked an average of 23 hours per week.
15. On 08/11/20, 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, s. 24 (a), she is not eligible to receive benefits for the period beginning 06/07/20 and through 8/29/2020.

Credibility Assessment:

Both parties agreed to the bulk of the facts of this case and their testimony is therefore deemed credible. The claimant typically worked 27–30 hours per week prior to the 2020–21 school year. Although the employer gave the claimant a letter of reasonable assurance in June 2020, they had no way of knowing if she would be driving her typical schedule or at all due to the COVID-19 pandemic. In August 2020, the employer produced a plan describing different scenarios which may occur due to the pandemic and strongly encouraging families to use alternate transportation methods due to the pandemic. During the 2020–21 school year, the claimant’s hours were reduced; she averaged 23 hours per week. She also had to drive a different route because the town where she typically worked was doing remote learning only. The town in which she was assigned to in the fall of 2020 was doing a hybrid model where she worked only four days a week instead of her regular five-day schedule.

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 and deems them to be supported by substantial and credible evidence. We further believe that the

review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not eligible for benefits during the entire period from the week beginning June 14, 2020, through August 29, 2020.

As a non-instructional employee of an educational institution, the claimant's entitlement to benefits for the period at issue in this case must be analyzed pursuant to G.L. c. 151A, § 28A, which provides, in relevant part, as follows:

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:

(a) with respect to service performed in an instructional, research, or principal administrative capacity for an educational institution . . .

(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

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).*

There is no dispute that the employer sent the claimant a letter on June 4, 2020, informing her that she had reasonable assurance of returning to the same or similar position during the next school year. Consolidated Finding # 5. 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 from the week beginning June 7, 2020, through the week beginning August 29, 2020. We disagree.

Because of the COVID-19 pandemic, at the time when the employer issued the June 4th letter, it was not sure when the next school year would start or how much work would be available for its bus drivers during the year. Consolidated Finding # 5. This fact establishes that the employer's June 4th offer of re-employment was contingent upon factors related to the COVID-19 pandemic. The pandemic is certainly a contingency beyond the employer's control. Therefore, we must consider whether the totality of circumstances at the time showed that it was highly probable that the job offered to the claimant would be available in the fall under substantially similar economic terms.

Generally, the claimant would work additional hours during the summer driving campers for the employer. Consolidated Finding # 6. However, the fact that employer's 2020 summer camp was canceled due to the COVID-19 pandemic suggests that the pandemic had the potential to impact the employer's need for bus drivers during the 2020–21 academic year. *See* Consolidated Findings ## 7 and 9. This uncertainty was also reflected in the employer's Comprehensive Reopening Plan, which limited the number of students allowed on a school bus¹, strongly encouraged families to use alternative forms of transportation, and implemented hybrid and fully remote learning options. Consolidated Finding # 8. All of these changes would decrease the number of students using buses, which in turn would impact the number of hours available to the employer's school bus drivers. *See* Consolidated Findings ## 8 and 9. Further, the employer was unsure whether the start of the 2020-2021 academic year would be delayed, meaning the claimant would not have had any work for a period of time. *See* Consolidated Findings ## 5, 11, and 12.

Under these circumstances, we cannot conclude that it was highly probable that the claimant's offered job would be available under substantially similar economic terms in the 2020–21 academic year, either at the time the employer issued its written offer of re-employment to the claimant in June, or during the rest of the summer.

Finally, we note that Finding of Fact # 4 states that the claimant's employment for the 2019–20 school year ended on or about June 12, 2020. Since she continued working through June 12, 2020, the week beginning June 7, 2020, is not a period between academic years, and G.L. c. 151A, § 28A does not apply to that week. But, since she was fully employed during the week beginning June 7, 2020, she is not eligible for unemployment benefits. For this reason, we agree with the review examiner's disqualification for this one week.

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).

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 within the meaning of G.L. c. 151A, § 28A.

The review examiner’s decision is affirmed in part and reversed in part. The claimant is denied benefits for the week beginning June 7, 2020. The claimant is entitled to receive benefits from the week beginning June 14, 2020, through August 29, 2020, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 18, 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

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