

The claimant, an instructional assistant for the employer's school system, received reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A, for her regular full-time job in the 2020-21 academic year. While she did not have reasonable assurance for her work with the employer's summer program, those base period wages were not sufficient to establish monetary eligibility for benefits between terms.

Board of Review
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Issue ID: 0047 9265 25

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 affirm.

The claimant filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 14, 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 overturned in part, the agency's initial determination and denied benefits in a decision rendered on March 24, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant, a special education aide for a public-school system, 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 pertaining to the claimant's earnings during the summer of 2019. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 for the period between June 21, 2020, and August 29, 2020, because she had reasonable assurance of re-employment for the subsequent academic year for her full-time special education aide position, 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 employer is a town. The employer operates schools.

2. The claimant began her employment with the employer in 2015.
3. The employer's 2019–2020 school year ran from September 2019 to 6/18/2020.
4. The claimant worked as a full-time special education aide for the employer in the 2019–2020 school year. The claimant worked in the employer's elementary school.
5. The employer's Assistant Director of Human Resources created a letter. The letter is dated 6/17/2020. The letter reads, in part, "This letter provides notice of reasonable assurance of continued employment with [the employer] when the school term resumes in the 2020-2021 school-year. Consequently, you are not eligible for unemployment insurance benefits."
6. The employer never told the claimant that there was any possibility that it would not allow her to come back to work for the 2020–2021 school year due to the COVID-19 pandemic.
7. The claimant returned to work in her normal full-time special education aide role when the 2020–2021 school year started on 8/30/2020. The employer did not decrease the claimant's pay.
8. The employer ran a special education program for the summer of 2019. The claimant worked in this special education program in the summer of 2019.
9. The claimant worked thirty hours per week in the special education program in the summer of 2019. The program ran from July into the first week of August. The program was five weeks.
10. The employer paid the claimant on an hourly rate for the work she performed in the special education program in the summer of 2019. The employer paid the claimant \$17.80 per hour.
11. The employer paid the claimant \$2,474.20 gross for the work she performed in special education program in the summer of 2019.
12. The employer ran a special education program for the summer of 2020. The employer did not invite the claimant to work in that program due to limitations related to COVID-19.

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. As discussed more fully below, we conclude the claimant did not have sufficient base period wages to be eligible 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 states, 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 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 initially denied the claimant benefits on the grounds that the June 17, 2020, letter that the employer sent to the claimant was sufficient to provide the claimant with reasonable assurance of re-employment for the subsequent academic year. *See Consolidated Findings ## 5 and 6.* We believe that this conclusion is reasonable in relation to the record and consistent with applicable law. Therefore, pursuant to G.L. c. 151A, § 28A, the claimant is not entitled to any unemployment benefits based upon the wages she earned from her work as a special education aide during the 2019–20 academic year.

However, the claimant's special education aide position was a 10-month, academic-year position, meaning that she was free to take the summer off or pursue other full- or part-time work during the summer break. *See Consolidated Findings ## 4 and 8.* In addition to her academic year work, the claimant also worked for one of the employer's summer programs during her base period. Consolidated Findings # 8 and 9. Because the claimant's summer work was under a separate contract from her academic-year instructional assistant position, and there is no indication she received reasonable assurance for her position in the summer program, her wages from that position may not be excluded under G.L. c. 151A, § 28A.

Following remand, the review examiner found that the claimants gross base period earning from the employer's summer program totalled \$2,474.20. Consolidated Finding # 11. While these wages are not excluded under the provisions of G.L. c. 151A, § 28A, they are insufficient by themselves to establish the claimant's monetary eligibility for benefits.¹

We, therefore, conclude as a matter of law that the claimant received reasonable assurance of re-employment for the subsequent academic period within the meaning of G.L. c. 151A, § 28A(b), in her full-time special education aid job, and she is disqualified from receiving benefits during the relevant period.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning June 21, 2020, through August 29, 2020.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 27, 2022



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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:

¹ G.L. c. 151A, § 24(a), states that a claimant must have earned \$2,000.00 in the base period. However, this amount has been changed, as required under the statute, based on changes to the minimum wage. The minimum amount of wages necessary to meet the monetary threshold at the time the claimant filed her unemployment claim was \$5,100.00.

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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