

Claimant's part-time summer school paraprofessional job offer was rescinded when the employer decided to offer a virtual summer program due to COVID-19. Because, at the end of the 2019-2020 school year, the employer had provided her with a letter of re-employment to her 10-month full-time job in the next academic year, she is disqualified from receiving unemployment benefits during the summer based upon the wages she earned in that position under G.L. c. 151A, § 28A. Although the claimant had non-school and other school wages that made her monetarily eligible for a reduced weekly benefit amount, she earned too much at her part-time pharmacy job over the summer to collect any unemployment benefits.

**Board of Review
19 Staniford St.
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: 0048 2336 68

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 separated from her position with the employer on June 19, 2020. She filed a claim for unemployment benefits with the DUA, which denied her benefits during the period July 5 through August 29, 2020, in a determination issued on July 10, 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 September 5, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had received reasonable assurance of re-employment in her regular full-time job for the subsequent 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 information about non-school wages and wages from other school employment received during her base period. 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 original decision, which concluded that the claimant was not entitled to any unemployment benefits during the period between the 2019–2020 and 2020–2021 academic years, 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 worked for the employer, a city school department, as a SPED PARAPROFESSIONAL, during the academic year 2019–2020, ending June 19, 2020. The claimant was paid \$19.88 per hour.
2. On June 18, 2020, the claimant was sent a letter offering her employment as a SPED PARAPROFESSIONAL during the next academic year, 2020–2021, beginning in August 2020.
3. On June 30, 2020, the claimant acknowledged receipt of the letter by return receipt from the United States Postal Service.
4. On June 30, 2020, the claimant filed her claim for unemployment insurance benefits with the Department of Unemployment Assistance (DUA), with an effective begin date of June 28, 2020, and an effective end date of June 26, 2021.
5. Professional Development training for the 2020–2021 academic year began on August 24, 2020.
6. On August 24, 2020, the claimant returned to work as a SPED PARAPROFESSIONAL at a contractual increased rate of pay.
7. The claimant had been hired to work summer school (July 6, 2020, through August 6, 2020) during the summer break.
8. Due to COVID-19, the summer break work scheduled for July 6, 2020, through August 6, 2020, was cancelled.
9. The claimant did not work summer school scheduled for July 6, 2020, through August 6, 2020, during the summer break.
10. The claimant also worked for a pharmacy part-time beginning on December 12, 2019.
11. The claimant remains employed part-time by the pharmacy.
12. The claimant worked for the pharmacy during the primary base period, April 1, 2019, through March 31, 2020.
13. The claimant's gross earnings with the pharmacy during the primary base period totaled \$2,290.33, as follows:

April 1, 2019	–	June 30, 2019	\$	0.00
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July 1, 2019	–	September 30, 2019	\$ 0.00
October 1, 2019	–	December 31, 2019	\$ 93.96
January 1, 2020	–	March 31, 2020	\$ 2,196.37

14. The claimant's gross earnings with the pharmacy during the alternate base period totaled \$6,850.43, as follows:

July 1, 2019	–	September 30, 2019	\$ 0.00
October 1, 2019	–	December 31, 2019	\$ 93.96
January 1, 2020	–	March 31, 2020	\$ 2,196.37
April 1, 2020	–	June 30, 2020	\$ 4,560.10

15. The claimant's gross earnings with the pharmacy for the period of July 1, 2020 through September 30, 2020, is as follows:

July 2, 2020	\$ 697.76
July 17, 2020	\$ 607.98
July 31, 2020	\$ 372.39
August 14, 2020	\$ 350.10
August 28, 2020	\$ 547.06
September 11, 2020	\$ 226.71
September 25, 2020	\$ 183.05

16. The claimant worked as a paraprofessional for the employer's 2019 summer school session with students in grades different than during the academic year.
17. The 2019 summer school employment was not required as part of the claimant's 2019–2020 academic professional job.
18. The dates of the claimant's 2019 summer school employment were July 1, 2019 through August 1, 2019.
19. The claimant's 2019 summer school employment was part-time, 20-25 hours per week.
20. The claimant's total gross wages paid for the 2019 summer school employment was \$1,851.55.

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 to clarify Consolidated Finding # 8. As written, the finding suggests that the employer cancelled the entire summer school program. That is unsupported by the record. An employer email to the claimant, dated July 8, 2020, stated that, due to COVID-19, the employer was "not

hiring paraprofessionals for the 2020 Virtual School Program.”¹ The employer changed its summer program to remote learning, and for this reason, withdrew the claimant’s offer of summer school work.

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree that the claimant is not entitled to be paid unemployment benefits during the summer of 2020.

As an academic employee of an educational institution, the claimant’s eligibility for benefits during the relevant period is properly analyzed under G.L. c. 151A, § 28A, which states, 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 . . . capacity for an educational institution, benefits shall not be paid on the basis of such services for any week commencing during the period between two successive academic years or terms . . . to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms:

(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.

¹ This email is Exhibit 10. Although this detail is not explicitly incorporated into the review examiner’s findings, it 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).

Consolidated Findings ## 1 and 2 show that, prior to the end of the 2019–2020 academic year, the employer presented the claimant with a written offer of re-employment in the same full-time SPED paraprofessional position for the next academic year to begin in August, 2020. There was no dispute that upon re-employment, the claimant would receive a contractual increase in pay. *See* Consolidated Finding # 6. The consolidated findings also provide that the claimant did return to her job, beginning on August 24, 2020. Consolidated Finding # 6.

Because the employer provided an offer of re-employment for the next academic year before the 2019–2020 academic year ended, and the offer was to re-employ the claimant at the same position at a rate of pay that was not substantially less than the prior academic period, we agree that the employer provided reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A. The claimant is not entitled to any unemployment benefits based upon the base period wages from that position during the period between the academic years, which is from the beginning of her claim, June 28, 2020, through August 22, 2020. After August 22, 2020, she returned to work for the employer.

On appeal, the claimant emphasizes that she is seeking benefits only for the weeks that she was scheduled to work in the 2020 summer school program. She asserts that she was hired and laid off.² She argues that because this is a separate program from her regular academic job, she should not be disqualified by G.L. c. 151A, § 28A.

We agree that this rescinded summer employment was not part of her regular academic year job. The claimant is employed in a full-time, 10-month paraprofessional position during the regular school year, and she was to return to that 10-month position in the fall. *Compare* Board of Review Decision 0026 5187 26 (Feb. 27, 2019) (G.L. c. 151A, § 28A does not preclude paying benefits, where the school district offered a 12-month school employee re-appointment to a 10-month position, because the economic terms of the offer were substantially less than those of his present position).

Consolidated Finding # 17 provides that the employer did not require the claimant to work in the summer school as a condition of keeping her academic year job. The claimant was free to search for other full- or part-time work during the break between school years or take the summer off. *Compare* Board of Review Decision 0022 1445 55 (Apr. 27, 2018) (where a 12-month educational employee must work reduced hours during the summer in order to keep her job, the disqualification under G.L. c. 151A, § 28A, does not bar payment of partial unemployment benefits during those weeks.)

We, therefore, conclude as a matter of law that the review examiner correctly concluded that G.L. c. 151A, § 28A, renders the claimant ineligible for unemployment benefits over the summer of 2020, based upon the wages she earned as a full-time paraprofessional for the employer during the 2019–2020 academic year.

² Because the claim effective date is June 28, 2020, this was, technically, a rescinded offer of benefit year part-time employment rather than a layoff.

However, because this academic year paraprofessional position was not the only work that this claimant performed during her base period, July 1 2019 through June 30, 2020,³ we remanded to find out whether she earned other wages which might qualify her for benefits independent of those excluded by G.L. c. 151A, § 28A. During her base period, she earned gross wages of \$1,851.55 working part-time in the 2019 summer school program. Consolidated Finding # 20. She also earned \$4,560.10 in non-school base period wages from a part-time pharmacy job. *See* Consolidated Findings ## 10–12, 14. Together, she earned wages of \$6,411.65 in her base period that are not excluded under G.L. c. 151A, § 28A.

To be monetarily eligible for benefits, or in this case, benefits independent of her full-time paraprofessional wages, the claimant must have been paid at least thirty times her weekly benefit rate in the base period and also must have been paid at least \$5,100.00 in the base period. *See* G.L. c. 151A, § 24(a).⁴ The benefit rate is equal to fifty percent of a claimant’s average weekly wage, rounded to the next lower full dollar amount. *See* G.L. c. 151A, § 29(a). The average weekly wage is defined as “an amount equal to one twenty-sixth of the total wages reported for an individual in the two highest quarters of his base period; provided that if wages reported include not more than two quarters in said base period, his weekly wage shall be deemed to be one thirteenth of the total reported for the highest quarter.” G.L. c. 151A, § 1(w).

Consolidated Findings ## 14 and 20 show that the claimant met the minimum monetary threshold of \$5,100.00, having earned \$6,411.65 outside of her full-time academic job. These findings also show that independently of her full-time school wages, the claimant earned \$6,756.47 in the two highest quarters of her base period. One twenty-sixth of this amount is \$259.86. Her benefit rate from these earnings is equal to 50% of this, rounded to the next lower dollar amount, \$129.00. Thirty times the weekly benefit rate of \$129.00 equals \$3,870.00. She earned more than this amount during her alternate base period. Thus, the claimant meets both requirements of G.L. c. 151A, § 24(a), and is monetarily eligible for regular unemployment benefits during the period between academic years based upon the wages she earned outside of her full-time school job.

However, during those summer 2020 weeks for which the claimant seeks benefits, she continued to work at the pharmacy. The next question is whether the claimant is entitled to partial unemployment benefits in any of those weeks. G.L. c. 151A, § 29(b), authorizes benefits to be paid to those in partial unemployment. Partial unemployment is defined at G.L. c. 151A, § 1(r)(1), which provides, in relevant part, as follows:

“Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded

³ The DUA’s UI Online system shows that the claimant elected to use an alternate base period. This is because she earned more qualifying wages in the partial last calendar quarter prior to filing her claim than in the primary base period, which is the prior four full calendar quarters preceding the claim.

⁴ 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 Commonwealth’s minimum wage.

The claimant's weekly benefit rate during the weeks at issue, from June 28 through August 22, 2020, is \$129.00. Under G.L. c. 151A, § 29(b), one-third of this amount is disregarded. In this case, the earnings disregard would be \$42.96. This means that if the claimant earned more than her weekly benefit rate plus her earnings disregard, or \$171.96 in any week, she earned too much to receive partial unemployment benefits.⁵

The only evidence before us includes biweekly income for the weeks at issue. *See* Consolidated Finding # 15. Dividing each biweekly paycheck in half to derive the claimant's weekly gross wage amounts during the weeks between June 28 through August 22, 2020, the claimant earned in excess of \$171.96 in each week. Consequently, although monetarily eligible for regular unemployment benefits, she earned too much in each week to be paid any benefits.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning June 28, 2020, through August 22, 2020.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS

DATE OF DECISION - October 29, 2020



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.

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⁵ The \$129.00 weekly benefit amount plus \$42.96 earnings disregard equals \$171.96.