

The claimant, a teaching assistant for the employer’s school, 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. However, she worked two other jobs for the employer during her base period. As there is no indication she had reasonable assurance for these other jobs, her base period wages from these two positions may be used to determine the claimant’s entitlement to benefits in the period between academic terms.

**Board of Review
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Issue ID: 0048 4430 04

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 for the period between July 5, 2020, and August 29, 2020. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm in part and reverse in part.

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 the agency’s initial determination and denied benefits in a decision rendered on September 29, 2022. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant, a teaching assistant at the employer’s school, 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 about the claimant’s employment and the wages she earned during her base period. Only the claimant 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 benefits during the period between July 5, 2020, and August 29, 2020, because she had reasonable assurance of re-employment in the subsequent academic year for her full-time teaching assistant position and she was not required to work in her other position as a driver, 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 started working for the employer, a school for special needs students running from kindergarten to 22 years old, on a full-time basis.
2. The claimant was initially hired as a transportation driver.
3. A few months after the claimant started working for the employer, the claimant was promoted to a full-time teaching assistant for the employer.
4. The claimant also continued to work part-time on an as needed basis for the employer as a transportation driver after the claimant was promoted to full time teaching assistant. The claimant was not required to work part-time as a driver to maintain her full-time teaching assistant role. The driver role was optional work for the claimant.
5. The employer's traditional school year usually runs from the end of August until the end of June. The employer has a summer recess period in between school years. The claimant was not required to work summers for the employer to maintain her full-time teaching assistant position with the employer's establishment.
6. Prior to the [summer] 2020, the claimant worked every summer for the employer full time in a combination of driver and teaching assistant roles with the exception of one summer the claimant decided not to work due to personal obligations.
7. The claimant was hired to work onsite at the employer's school facility.
8. During the 2019–2020 school year, the claimant worked as a full-time teaching assistant for the employer. The claimant worked 32 hours per week in this role. In this role, claimant was scheduled to work Monday through Friday from 7:50 a.m. until 2:20 p.m. For this school year, the claimant's annual salary as a teaching assistant was \$31,220.10. During this school year, the claimant initially worked onsite for the employer. After March 14, 2020, through the end of the school year, the claimant worked remotely full time for the employer as a teaching assistant and receiving her full time pay as a teaching assistant until the end of the employer's 2019–2020 school [sic].
9. The claimant worked remotely effective March 14, 2020, as the employer temporarily closed onsite schooling and transitioned to a remote learning model due to [COVID]-19 pandemic closure requirements.
10. During the employer's 2019-2020 school year, the claimant also worked as part-time driver for the employer until March 14, 2020. In this role, the claimant was paid \$28.52 per hour. In this role, the claimant usually worked 2 hours per day Monday through Friday for a total of 10 hours per week. After March 14, 2020, the employer did not have any more work available for the claimant due

to the [COVID]-19 pandemic and school closure requirements. The claimant was not paid as a driver after March 14, 2020.

11. Prior to filing an initial claim for unemployment benefits, the claimant's last date of work for the employer as a teaching assistant was on June 19, 2020. This was the last day of the employer's 2019–2020 school year.
12. The claimant did not work for the employer during the summer 2020.
13. The claimant file an initial unemployment claim effective the week beginning June 21, 2020. The employer is the only base period employer.
14. The Department of Unemployment Assistance (DUA) monetary records correctly list the claimant's ba[s]e period wages with the employer as follows:

2 nd Quarter 2019	3 rd Quarter 2019	4 th Quarter 2019	1 st Quarter 2020
\$11,590.28	\$15,808.21	\$9,4986.64	\$10,819.09

Total: \$47,704.22

15. On July 2, 2020, the employer mailed the claimant a Letter of Reasonable Assurance authored by the Executive Director for the claimant to return to work for the employer as a Teaching Assistant for the employer's 2020-2021 school year.
16. In the July 2, 2020, letter, the employer wrote the following:

“We are pleased to notify you that you have reasonable assurance of being employed by [Employer] for the 2020-2021 School Year.

This notification is not intended to create a contract of employment. Rather the intent is to let you know that [employer] fully expects to employ you full-time, 5 days per week for the 2020-2021 School Year. You shall expect to receive your official employment offer for the 2020-2021 School Year program no later than July 30th, 2020.

Conditions: Your employment offer will be contingent upon adequate funding and sufficient enrollment. At this time, we are confident that these conditions will be met.

Please sign one copy of this letter, and return it to the Director of Human Resources, [name omitted], before Friday, July 10th, 2020. You may do so via email at [email address omitted] or mail it to the [omitted] Offices: [Location]. Additionally, please be sure to keep a copy of this offer for your personal

- records. If you have any questions, please feel free to contact [omitted] at: [Phone Number] or [email address omitted].”
17. On July 7, 2020, the claimant signed the [Letter] of Reasonable Assurance dated July 2, 2020.
 18. The employer never provided the claimant with a letter of reasonable assurance for the driving position as this is optional work.
 19. The employer’s 2020–2021 school year started on August 31, 2020. The claimant started working again for the employer at time as a full-time teaching assistant and continued with remote work.
 20. The claimant did return to her part-time driving role for the employer after March 2020 as the employer decided to reorganize the employer’s establishment and create a separate transportation department.
 21. On October 14, 2020, the DUA issued the [sic] a Notice of Disqualification denying the claimant benefits under Sections 28A (a), (b) & (c) of the Law from the week beginning July 5, 2020 through the week ending August 29, 2020. On the Notice of Disqualification, the DUA wrote “Inasmuch as you have 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) you are not eligible to receive benefits for the period beginning 7/5/2020 and through 8/29/2020.” The claimant appealed the Notice of Disqualification.
 22. The claimant’s total gross base period earnings were \$47,704.22. The claimant’s gross base period earnings only from her work as a transportation driver were: \$7,112.29.
 23. The claimant’s gross base period earnings from her work as a full-time teaching assistant were: \$32,710.90.
 24. The claimant performed work for the employer during the summer of 2019. During the summer 2019, the claimant only worked for the employer as Teaching Assistant. During this summer, the claimant did not work for the employer as a driver.
 25. The claimant’s gross earnings from her work with the employer during the summer of 2019 were \$6,017.65.
 26. The employer’s summer session 2019 started on July 8, 2019, and ended on August 9, 2019.
 27. The employer did operate its summer session during the summer of 2020.

28. The employer's summer session 2020 stated on July 7, 2020, and ended on August 7, 2020.
29. The employer's 2020 summer session was impacted by the COVID-19 public health emergency. The employer's summer 2020 session initially started remote [sic]. The Department of Elementary and Secondary Education subsequently advised to prioritize all special education students causing the employer to bring back some students and staff while also maintaining a remote learning model for other students and staff. The employer held remote [learning] for the 1st week of the summer 2020. The employer subsequently brought back some students and staff during the 2nd week of the summer 2020 session. The employer had fewer students participating in the summer 2020 session compared to past summer sessions.
30. The claimant did not work for the employer during the 2020 summer session.
31. The employer's establishment reviewed the employer's records to compile the claimant's gross wages during her base period on a summary sheet. The employer's records correctly list the following gross wages for the claimant only as a transportation driver during base period quarters as follows:

<u>2nd Quarter</u>	<u>3rd Quarter</u>	<u>4th Quarter</u>	<u>1st Quarter</u>
2019	2019	2019	2020
\$2,879.76	\$536.90	\$1,820.44	\$1,875.19

32. The employer's earnings records summary sheet lists the claimant's earnings as follows as a driver from July 5, 2019, through September 27, 2019:

July 5, 2019	\$166.14
July 19, 2019	
August 2, 2019	
August 16, 2019	
August 30, 2019	\$0.00
September 13, 2019	\$85.56
September 27, 2019	\$285.20

33. The employer's earnings records summary list the claimant's earnings as follows as a teaching assistant from July 5, 2019, through September 27, 2019, under the ESY (Extended Session Year) as:

July 5, 2019	
July 19, 2019	\$1,254.77
August 2, 2019	\$2,395.70
August 16, 2019	\$2,367.18
August 30, 2019	
September 13, 2019	

Credibility Assessment:

During the remand hearing session, the claimant contended that during the summer 2019 session, she worked for the employer as both a driver and a teaching assistant. However, the employer's contention to the contrary is assigned more weight where the employer's earnings records summary list entries for the claimant in the driving position on July 5, 2019, and the next entry is not listed until September 13, 2019. It is more likely the claimant did not work for the employer as a driver in the summer 2019 where the employer's earnings records summary list entries for the claimant in the driving position on July 5, 2019, and the next entry is not listed until September 13, 2019.

The overall testimony of the employer is assigned more weight than the overall testimony of the claimant where the employer's testimony was more specific compared to the testimony of the claimant during the hearing.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Although the document referred to in Consolidated Findings ## 15, 16, and 17 is titled "Letter of Reasonable Assurance," the question of whether this document provided the claimant with reasonable assurance under G.L. c. 151A, § 28A, is not a factual finding. It is a legal conclusion, which at this stage of the proceedings is left to the Board of Review. *See Dir. of Division of Employment Security v. Fingerman*, 378 Mass. 461, 463–464 (1979) ("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."). We further note that the reference to a letter of reasonable assurance in Consolidated Finding # 18 is a factual finding that the employer did not provide the claimant with a similarly titled document for her position as a driver, not a legal conclusion pursuant to § 28A.

In adopting the remaining findings, we deem 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 period between July 5, 2020, and August 29, 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; 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. . . .

Before a claimant may be disqualified from receiving benefits pursuant to G.L. c. 151A, § 28A, there must be sufficient evidence to show that the employer provided reasonable assurance of re-employment. The burden to produce that evidence lies with the employer. *See* Board of Review Decision 0016 2670 84 (Jan 29, 2016). If it is determined that a claimant had reasonable assurance, her base period earnings from that position are excluded when calculating the claimant's weekly benefit rate for the period between academic years.

On July 2, 2020, the employer provided the claimant with a letter stating that the employer would continue to employ the claimant in a full-time capacity during the 2020–21 academic year. Consolidated Finding # 15. We believe that the substance of this letter is sufficient to show that the employer provided the claimant with an offer of re-employment in the same full-time teaching assistant position for the subsequent academic year. Therefore, pursuant to G.L. c. 151A, § 28A, the claimant's base period earnings from her work as an instructional assistant during the 2019–20 academic year may not be used in determining her weekly benefit amount.

However, the claimant's teaching assistant position was a 10-month, academic-year position, and she was not required to work for the employer during the summer in order to retain her academic year job. Consolidated Findings ## 5, 8, and 33. She was free to take the summer off or pursue other full- or part-time work during the summer break. During her base period, the claimant also worked for the instant employer as a teacher's assistant in the employer's extended school year program. Consolidated Findings ## 14, 24, and 33. As the claimant's summer work was distinct from her academic year work, and as the employer's July 2nd letter references only the claimant's academic-year position, the record does not support a conclusion that the claimant was given reasonable assurance of re-employment for her summer teaching assistant position. *See* Consolidated Findings ## 5, 8, 15, and 24. Therefore, her base period wages from this summer position may not be excluded under G.L. c. 151A, § 28A.

Additionally, the claimant worked part-time as a driver for the employer during her base period. This position was also distinct from the claimant's academic year work as a teaching assistant. Consolidated Finding # 4. As there was no dispute that the employer did not provide the claimant with reasonable assurance of re-employment for her part-time driver position, her base period

wages from this job also may not be excluded under G.L. c. 151A, § 28A. See Consolidated Finding # 18.

Consolidated Findings ## 22, 25, 31, and 33 provide that the claimant was paid wages totaling \$13,129.94 during her base period for her work as a part-time driver and her work as a teaching assistant during the employer's summer program. As the claimant did not have reasonable assurance of re-employment for either position, she is entitled to a weekly benefit amount based upon her earnings from those positions.

We, therefore, conclude as a matter of law that the claimant received reasonable assurance of re-employment for the subsequent academic year within the meaning of G.L. c. 151A, § 28A(b), in her full-time teaching assistant job, and she is disqualified from receiving benefits during the relevant period based upon wages earned in that position. We further conclude that G.L. c. 151A, § 28A(b), does not preclude the award of benefits based upon the claimant's other base period earnings.

The review examiner's decision is affirmed in part and reversed in part. For the weeks between July 5, 2020, and August 29, 2020, the claimant is entitled to a weekly benefit amount based only upon \$13,129.94 in base period earnings, if she is otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 5, 2023



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