

A rescinded offer of part-time summer school employment due to COVID-19 did not qualify the claimant for regular unemployment benefits during the period between academic years, because the employer had provided her with reasonable assurance of re-appointment to her regular, full-time 10-month paraprofessional position in the fall. This summer work was not part of her full-time job. She is disqualified under G.L. c. 151A, § 28A.

**Board of Review
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Issue ID: 0048 9472 75

CORRECTED DECISION

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, effective June 28, 2020, which was denied in a determination issued on July 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 the agency's initial determination and denied benefits in a decision rendered on August 15, 2020. 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, she was disqualified under G.L. c. 151A, § 28A. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision is supported by substantial and credible evidence and is free from error of law. His decision concluded that, notwithstanding the loss of a summer school job, the claimant is ineligible for benefits between the 2019-2020 and 2020-2021 academic years, because she received reasonable assurance within the meaning of G.L. c. 151A, § 28A, to return to her full-time paraprofessional position, and this has the monetary effect of prohibiting unemployment benefits based upon school wages earned during her base period.

Findings of Fact

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

1. The effective date of claim is June 28, 2020. The claimant's base period runs from April 1, 2019, to March 31, 2020. The claimant's base period wages were from one school employer.
2. The claimant has no immediately preceding claim (last claim was in 2011).
3. The claimant worked for the employer, a municipal public school, on a full-time (36.25 hrs/wk) basis as a Paraprofessional. The claimant was employed since February 28, 2011.
4. In 2019, the claimant worked in the summer program, which is dissimilar from her position during the academic year (namely that it was part-time (21 hrs/wk), in a different school building, under a different supervisor, with a separate application process, *etc.*). The summer program typically runs for five weeks immediately following the Fourth of July holiday.
5. In or around March of 2020, the claimant applied for employment in the summer program.
6. On April 9, 2020, the claimant received notice that she was approved to work the summer program, which ran from July 6, 2020, to August 6, 2020.
7. On June 5, 2020, the claimant received a notice of cancellation of the summer program due to the pandemic.
8. On June 18, 2020, the claimant received notice that she will return to her usual position in the next academic school year beginning on August 26, 2020.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact except as follows. Finding of Fact # 7 indicates that the summer program was cancelled. This is inaccurate, as the parties indicated that because the employer decided to offer the summer program remotely, the claimant's paraprofessional services were simply not needed.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we

¹ See Exhibit 6, the employer's June 5, 2020, letter to the claimant, which states, "the previously offered summer school position will not occur due to a change in programming as a result of the COVID-19 pandemic," and the claimant's appeal, which asserts that the employer decided to proceed with the summer program remotely with teachers, while paraprofessionals were cut. 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).

agree with the review examiner's legal conclusion that the claimant is ineligible for regular 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.

The parties do not dispute 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 position at substantially similar economic terms for the next academic year, which began in late August, 2020. *See* Finding of Fact # 8. Pursuant to G.L. c. 151A, § 28A, the claimant is not entitled to any unemployment benefits based upon the wages she earned in that position during the period between the academic years, from the beginning of her claim, June 28, 2020, through the week ending August 29, 2020, when she returned to work for the employer. *See* Findings of Fact ## 1 and 8.

On appeal, the claimant emphasizes that she is seeking benefits only for the five weeks that she was scheduled to work the summer school program, July 6 through August 6, 2020, part-time work which was cancelled due to COVID-19.² *See* Findings of Fact ## 6 and 7. She argues that this is a separate program from her regular academic job. We agree. 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).

Nothing in the record suggests that the employer required 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 the award 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.

We note that the academic year paraprofessional position was not the only work that this claimant performed during her base period, April 1, 2019, to March 31, 2020. *See* Finding of Fact # 1. During this period, she earned wages working part-time in the 2019 summer school program. Finding of Fact # 4. Because these 2019 summer school wages were not earned in the position for which she has received reasonable assurance, they are not excluded. They may be used in conjunction with any non-school base period wages toward monetary eligibility for reduced unemployment benefits during the 2020 summer period.

However, the claimant did not have any non-school base period employment and she worked only part-time in the 2019 summer school for five weeks. *See* Findings of Fact ## 1 and 4. Her paystubs from the 2019 summer program show that she earned gross wages of only \$1,857.59.³ Since her 2019 summer school wages do not meet the current minimum threshold of \$5,100 in qualifying base period wages, she is not eligible for any regular unemployment benefits between the 2019–2020 and 2020–2021 academic years. *See* G.L. c. 151A, § 24(a).

The review examiner’s decision is affirmed. The claimant is denied regular unemployment benefits for the weeks beginning June 26, 2020, through August 29, 2020.

² Technically, the claimant was not laid off, as summer school had not begun when the employer notified her that her paraprofessional services would not be needed. *See* Findings of Fact 6 and 7. Since the claim is effective June 28, 2020, this is a rescinded offer of benefit-year, part-time work.

³ During the hearing, the claimant’s attorney noted his intention to upload onto UI Online copies of her paystubs. Though not formally entered as exhibits, the employer’s agent stated that the employer had no objection to these records being part of the record. The earnings in these uploaded paystubs coincide with the finding that she worked part-time for five weeks during the 2019 summer program. *See* Finding of Fact # 4.

Because the claimant's offer of summer school employment was rescinded due to COVID-19, she 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.



BOSTON, MASSACHUSETTS

Paul T. Fitzgerald, Esq.
Chairman

DATE OF DECISION - * October 8, 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.

AB/rh