The claimant's collective bargaining agreement required the employer provide her with notice of re-employment in the subsequent academic year. No evidence of such notice is in the record. Under G.L. c. 151A, § 28A, the claimant did not have reasonable assurance of re-employment, and is therefore eligible for benefits based on her base period wages from the employer.

Board of Review
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Issue ID: 0049 3313 41

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 reverse.

The claimant filed a claim for unemployment benefits with the DUA, effective July 5, 2020, which was denied in a determination issued on September 18, 2020. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner affirmed the agency's initial determination in a decision rendered on January 20, 2021. 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 in the subsequent academic term, and, thus, 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, which concluded that the claimant was not eligible for benefits from the week beginning July 5, 2020, through August 29, 2020, because she had reasonable assurance of re-employment, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant began her employment with the employer, a city school department, beginning January, 2013.

2. The claimant worked full-time as a licensed practical nurse/paraprofessional during the academic year 2019–2020, which ended on June 22, 2020. The claimant was paid $24.19 per hour.

3. On March 16, 2020, due to COVID-19, the employer transitioned to remote learning.

4. On March 16, 2020, the claimant was notified she had been selected to participate in the 2020 Special Education School Year program as a paraprofessional which spanned July 6, 2020, through July 30, 2020. (Exhibit 14).

5. The claimant had worked the employer's 2019 Special Education School Year program as a paraprofessional Special Education School Year program which spanned July 8, 2019, through August 1, 2019.

6. The claimant earned about $1,500.00 working the 2019 Special Education School Year program which spanned July 8, 2019, through August 1, 2019.

7. The Special Education School Year program employment was not required as part of the claimant's 181-day licensed practical nurse/paraprofessional academic job.

8. On May 26, 2020, the claimant was notified the position of paraprofessional for which she had been selected for the 2020 Special Education School Year program, due to a transition to remote learning, had been eliminated. (Exhibit 15).

9. On June 22, 2020, the 2019–2020 school year ended.

10. For the duration of the claimant's employment, unless she received notification by July 1 she was not going to be offered a position for the next academic year, she was expected to return to work in the next academic year.

11. The claimant was not notified by July 1, 2020, she was not being offered employment for the 2020–2021 academic year.

12. The claimant's 2020–2021 academic year salary was contractually increased by 1%.

13. On July 6, 2020, the claimant filed her claim for unemployment insurance benefits with the Department of Unemployment Assistance (DUA), with an effective begin date of July 5, 2020 and an effective end date of July 3, 2021.

14. The claimant did not work the 2020 Special Education School Year program as a paraprofessional which spanned July 6, 2020, through July 30, 2020.

15. On August 28, 2020, the claimant returned to work.

16. The base period of the claimant's claim, the period during which wages paid to the claimant are used to calculate a weekly benefit amount (WBA), was July 1, 2019 through June 30, 2020.

17. The claimant was paid $38,489.68 in wages by the employer during the base period (July 1, 2019, through June 30, 2020) which included her licensed practical nurse/ paraprofessional and 2019 Special Education School Year program employment.

18. The claimant had no non-education wages in the base period (April 1, 2019, through March 31, 2020).

Ruling of the Board

In accordance with our statutory obligation, we review 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. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject Finding of Fact # 10 as inconsistent with the evidence of record. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant had reasonable assurance of re-employment in the subsequent academic year.

Since the claimant is a non-professional employee of an educational institution, we turn to the portions of G.L. c. 151A, § 28A, which state, 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: . . .
>
> (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; . . .

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).

In the present case, the review examiner concluded that the claimant had reasonable assurance of re-employment because it was understood that she would return to work in the next academic year unless she received notice from her employer on or before July 1st that she would not be re-hired. We disagree.

In its most recent guidance regarding what constitutes "reasonable assurance," the U.S. Department of Labor issued Unemployment Insurance Program Letter (UIPL) No. 5-17 (Dec. 22, 2016). Pursuant to § 4(a)(1) of this UIPL, "[t]he offer of employment may be written, oral, or implied, and must be a genuine offer, that is, an offer made by individuals with actual authority to offer employment. . . ."

In the present case, the claimant did not receive any notice from her employer regarding her re-employment in the 2020-2021 academic year. *See* Finding of Fact ## 11. While the review examiner concluded that the parties understood an implied offer of re-employment existed, he did not identify what evidence led him to this conclusion. Upon review of the record, the only reference to a July 1st deadline is contained within Article XIII of the claimant's collective bargaining agreement, which was admitted into evidence as Exhibit 12. This provision of the claimant's collective bargaining agreement instructs that a "Paraprofessional *will be notified* of his/her position for the ensuing school year as soon as the administration has determined the need for Paraprofessional, but in no case later that July 1st." (emphasis added).[1] As the collective bargaining agreement obligates the employer to provide the claimant with a renewed yearly offer of re-employment, it does not support the review examiner's conclusion that the parties had an ongoing implied understanding about the claimant's re-employment in subsequent academic years.

As the record does not contain any other evidence showing that the claimant had a written, oral, or implied offer of re-employment in the 2020-2021 academic year, the employer has failed to demonstrate that the claimant had reasonable assurance of re-employment.

We, therefore, conclude as a matter of law that the employer did not provide the claimant with reasonable assurance of re-employment to the claimant for the 2020–2021 academic year, pursuant to G.L. c. 151A, § 28A.

The review examiner's decision is reversed. The claimant is entitled to receive benefits based upon the wages earned from the employer for the week beginning July 5, 2020, through August 29, 2020, if otherwise eligible.

[1] This evidence, while not explicitly incorporated into the review examiner's findings, 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).

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 31, 2021

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, 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:
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