

The claimant was a full-time teacher for a private school. He received and signed a contract for a full-time teacher position at the same salary rate for the subsequent academic year and therefore had reasonable assurance of reemployment. He did not have sufficient other base period wages to be eligible for benefits based on those wages alone.

**Board of Review
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Issue ID: 0049 3792 37

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant filed a claim for unemployment benefits with the DUA, effective June 21, 2020, which was approved in a determination issued on December 1, 2020. The employer 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 awarded benefits in a decision rendered on April 21, 2021. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not have reasonable assurance of re-employment in the subsequent academic term and, thus, was not disqualified under G.L. c. 151A, § 28A. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 employer's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not have reasonable assurance of re-employment in the same or similar position for the 2020-2021 academic year because the employer was uncertain whether the claimant would be teaching in-person, remotely, or in a hybrid learning model, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant was hired in July 2019 as a full-time teacher for the employer, an educational institution. He works under a contract and is paid \$28,500 per school year over the course of ten months.

2. After he was hired, he also worked in the employer's summer school program from 07/08/19 through 08/08/19. He was paid a stipend of \$3,500 for his summer work.
3. That fall, the claimant also worked as a golf coach for the employer. He was paid a stipend of \$1,400 for his work.
4. The claimant was not required to work the summer school program to maintain his employment as a teacher.
5. On or about 03/13/20, the claimant began teaching remotely due to the COVID-19 pandemic. He worked remotely through the end of that school year. His last day was 06/18/20.
6. On 07/01/20, the claimant received an email from the employer indicating he would be sent a new contract shortly.
7. On 07/06/20, the claimant signed the contract and returned it to his employer confirming he would remain employed as a teacher during the 2020-2021 school year.
8. At the time of the signing of the contract, the employer did not know whether they would be returning to school in person, or in a hybrid or remote only capacity due to the restrictions made by the Governor relating to the COVID-19 pandemic.
9. The claimant anticipated working the summer school program again during the summer of 2020. In February 2020, prior to the pandemic, he signed a letter of intent confirming he would work during the summer, but it was later cancelled due to the COVID-19 pandemic.
10. According to DUA records, on 07/07/20, the claimant filed his claim effective 07/05/20.
11. In mid-August 2020, the employer learned they would be returning to school in a hybrid model for the upcoming school year.
12. The claimant returned to his regular school year teaching position on 08/31/20; however, classes were taught in a hybrid model at that time where teachers taught class on campus one week and remotely every other week due to the COVID-19 restrictions in the state.
13. On 04/06/21, the claimant returned to teaching in person classes on a regular basis when the Governor released the pandemic restrictions.

14. On 12/01/20, the DUA sent the claimant a Notice of Approval stating the claimant was hired to work a part-time schedule and that he was accepting all work and therefore entitled to benefits under Section 29(b) & 1(r).

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. Upon such review, the Board adopts the review examiner's findings of fact and deems 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 employer did not meet its burden to show that the claimant had reasonable assurance of re-employment in the same or similar position in the subsequent academic year.

Since the claimant is a 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: . . .

(a) with respect to service performed in an instructional, research, or principal administrative 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, or when an agreement provides instead for a similar period between two regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, 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;

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 found that the claimant did not have reasonable assurance of re-employment for the 2020–2021 academic year because the employer testified that they were unaware whether school would be conducted in-person, remotely, or in a hybrid teaching model. Because of this uncertainty, the review examiner reasoned that the employer had failed to show that the claimant had reasonable assurance that he would be returning to the same or similar position as he had in the 2019–2020 academic year.

In 2016, the U.S. Department of Labor (DOL) released updated guidance pertaining to the analysis of reasonable assurance. In its Unemployment Insurance Program Letter (UIPL) 5-17 (Dec. 22, 2016), the DOL set forth an initial set of criteria for determining whether a claimant is entitled to

benefits between academic periods. There must be a written, oral, or implied offer from a person with authority to offer employment, the offer is for a job in the same capacity (*i.e.*, professional or non-professional), and the economic conditions of the offer must not be considerably less than in the prior academic period. *Id.* at part 4(a), pp. 4–5.

The claimant was hired as a full-time teacher in July 2019. Finding of Fact # 1. The contract he received and signed on July 6, 2020 was for a full-time teaching position in the 2020–2021 academic year. Finding of Fact # 6 and 7. This contract also specified that the claimant would be re-hired for the full-time teaching position at the same rate of pay as the previous academic year.¹ Thus the employer communicated that the claimant would be returning to work in the same professional capacity and under the same economic terms as his position during the previous academic year. Whether the claimant would be teaching full-time in person, remotely, or in a hybrid learning model does not alter the capacity in which the claimant was hired, nor the economic conditions of the job offered. Consequently, we believe the employer met its burden to show that the claimant had reasonable assurance of re-employment for the 2020–2021 academic year and, therefore, the claimant may not use his wages from his full-time teaching position to establish monetary eligibility for benefits.

The claimant did perform additional work for the instant employer during his base period that was outside of the scope of his regular teaching contract. Findings of Fact ## 2 and 3. However, he only earned gross wages totaling \$4,900 for these two positions. Findings of Fact ## 2 and 3. As such, he would not be monetarily eligible for benefits based solely on those wages.²

We, therefore, conclude as a matter of law that, because the claimant received, signed, and returned a contract for a full-time teacher position during the 2020–2021 academic year at the same salary as the previous academic year, he had received reasonable assurance of re-employment for the subsequent academic year within the meaning of G.L. c. 151A, § 28A.

¹ 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).

² See G.L. c. 151A, § 24(a). 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. At the time the claimant filed his claim, the minimum earnings were \$5,100.00

The review examiner's decision is reversed. The claimant is not entitled to receive benefits for the week beginning July 5, 2020, through August 31, 2020, unless otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 28, 2021



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

If this decision disqualifies the claimant from receiving regular unemployment benefits, the claimant may be eligible to apply for Pandemic Unemployment Benefits (PUA). The claimant may apply at: <https://ui-cares-act.mass.gov/PUA/>. The claimant may also call customer assistance at 877-626-6800 (select the number for your preferred language, then press # 2 for PUA).

**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