

Although the claimant's offer to work in his employer's summer program was rescinded due to COVID-19, the employer provided him with reasonable assurance of returning to his 10-month position in the next academic term. Under G.L. c. 151A, § 28A(b), he is disqualified from receiving benefits based upon those wages between academic terms and he does not have sufficient other school wages to meet the minimum monetary threshold to qualify for benefits over the same period.

**Board of Review
19 Staniford St., 4th Floor
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: 0052 4291 33

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 affirm in part and reverse in part.

The claimant filed a claim for benefits with the DUA, effective May 31, 2020. In a determination issued on September 24, 2020, he was denied benefits from May 31 through August 29, 2020, pursuant to G.L. c. 151A, § 28A. The claimant appealed the determination to the DUA hearings department. An initial hearing before a different review examiner resulted in a decision to award benefits. The employer appealed to the Board of Review, and we denied the appeal. However, due to an error in the manner in which that review examiner rendered her decision, the DUA was unable to remove an overpayment that existed on the claim.¹ Consequently, the Board issued an Order to Revoke Denial and Remand for Further Proceedings, which ordered a new hearing before a new review examiner.

The appeal before us is a result of the *de novo* hearing which followed. This hearing was attended by both parties on March 29, 2021, before the present review examiner. The claimant has appealed this decision, dated May 21, 2021, to deny benefits. We accept the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant, who was employed as a college athletic trainer, had reasonable assurance of re-employment in the same capacity for the next academic term, and, thus, he was disqualified under G.L. c. 151A, § 28A, for the period from May 31 through August 1, 2020. Our decision is based upon our review of the entire record but includes only the recorded testimony and evidence from the March 29, 2021, hearing, the review examiner's decision, and the claimant's appeal.

¹ The DUA's determination that resulted in an overpayment had disqualified the claimant pursuant to G.L. c. 151A, § 28A. The original hearing decision was incorrectly decided under a separate section of law, G.L. c. 151A, § 29(a) and (b).

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not entitled to any unemployment benefits during the period from May 31 through August 1, 2020, is supported by substantial and credible evidence and is free from error of law, where the record shows that he had base period earnings from two positions and received reasonable assurance for only one of them.

Findings of Fact

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

1. The claimant worked as a full-time Athletic Trainer for the employer, a college, beginning July 29, 2019.
2. The claimant's position of Athletic Trainer was a 10-month position, beginning in August and concluding at the end of May. The claimant's position was a full-time salaried position with full benefits. The claimant was paid an annual salary of \$45,000 in that position.
3. The claimant was paid in 22 payments over the 10-month period. The claimant was paid bi-weekly in the gross amount of \$2,045.45.
4. The claimant's benefits in the Athletic Trainer position continue throughout the summer based on the claimant's contribution during the 10-month period.
5. The claimant's position was not dependent upon enrollment or funding.
6. The claimant also worked as a Clinical Preceptor when classes began, starting in September 2019. The claimant would act as a mentor working with the athletic student trainers. The claimant received a stipend of \$3,063 per semester in that position.
7. In mid-March 2020, the claimant was working remotely due to COVID-19. The claimant was receiving his regular pay with the employer while working remotely.
8. In or around March 2020, the claimant was offered a position to work during the summer break period in the position of Athletic Training Coordinator for the employer's summer camps. The position began May 1, 2020, and concluded July 31, 2020. The hours varied in that position. The claimant was to [sic] paid a stipend of \$3000 in three equal monthly payments of \$1,000 per month. The claimant signed the employment letter for that position on April 8, 2020.
9. As an Athletic Training Coordinator, the claimant was responsible for ensuring that the camp staffing was covered. The claimant had the potential to earn more than the stipend amount as he could assign himself to work some of the camps,

at an hourly rate ranging from \$35 to \$50. There was no information in the employment letter about the claimant being able to earn any additional wages.

10. At or around the end of April 2020/beginning of May 2020, the claimant became aware that the summer camp would not be held because of COVID-19.
11. In May 2020, the Director notified the claimant of the start date for his position of Athletic Trainer for the 2020-2021 academic year. The claimant had also been notified by the employer that there would be no changes in salaries for the upcoming academic year.
12. The claimant's last day of work for the employer in the Athletic Trainer position was May 29, 2020.
13. The claimant was not offered any other work with the employer during the summer break period and did not receive any payment during that period.
14. The claimant filed his claim for unemployment benefits on June 1, 2020. The effective date of the claim is May 31, 2020.
15. On August 3, 2020, the claimant returned to work for the employer in the position of full-time Athletic Trainer being paid the same annual salary of \$45,000 and receiving the same benefits.
16. The claimant also returned to the position of Clinical Preceptor for the 2020-2021 academic year, being [sic] in September 2020, receiving the stipend of \$3,063 per semester.
17. On September 24, 2020, a Notice of Disqualification was issued under Section 28A of the Law indicating that "It has been established that you have performed services for an educational institution during the most recent academic year or term and there is a contract or a reasonable assurance that you will perform services for an educational instruction [sic] during the next school year or term. Therefore, you may not receive a benefit based on wages earned working for an educational institution for weeks commencing during the period between these academic years or terms." It further indicated that the claimant was not eligible to receive benefits for the period beginning 5/31/2020 and through 8/29/2020. The claimant filed an appeal to that determination.

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 and deems them to be supported by substantial and credible evidence. As discussed more fully below, we agree that the claimant is not eligible for any benefits during the period between academic terms.

The claimant seeks unemployment benefits during the period from May 31 through August 1, 2020, because the employer had offered him work as an Athletic Training Coordinator for its 2020 summer camps, but the offer was rescinded when the program was cancelled due to the COVID-19 public health emergency. *See* Findings of Fact ## 8–10.

The first question is whether the claimant was in unemployment, as that term is defined in the statute, during this period.² G.L. c. 151A, § 29, authorizes benefits be paid only to those in “total unemployment” or “partial unemployment,” as defined by G.L. c. 151A, § 1(r). Finding of Fact # 13 states that the claimant was not offered any work with the employer and did not receive any payment. During the hearing, when the claimant testified that the employer decided not to hold summer on-campus events, the review examiner actually asked the claimant if he had been offered any other work and he said, “no.” The question was not specific to the employer.³ Lacking anything else in the record to indicate that the claimant was otherwise employed between May 31 and August 1, 2020, we decline to remand this case again to address this undisputed issue and conclude that the claimant was in unemployment pursuant to G.L. c. 151A, §§ 29 and 1(r).

The second question we must decide is whether he is nonetheless disqualified under G.L. c. 151A, § 28A, because he worked for an educational institution during his base period. G.L. c. 151A, § 28A 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, 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 . . . 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

² On appeal, the claimant notes that the review examiner failed to render a decision under G.L. c. 151A, §§ 29 and 1(r), as the Board had directed in its Order. *See* Exhibit 9.

³ This portion of the hearing, while not explicitly incorporated into the review examiner’s findings, is part of the unchallenged evidence 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).

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 review examiner concluded that the employer had provided the claimant with reasonable assurance of re-employment for his 10-month Athletic Trainer position in the 2020–21 academic year. We agree that substantial evidence supports her conclusion that the claimant had reasonable assurance within the meaning of G.L. c. 151A, § 28A(b). It is based upon the fact that prior to the end of the 2019–20 academic year, the employer verbally notified the claimant of the start date in August for his Athletic Trainer position for the next academic year, and the employer had also communicated that his salary would not change. *See* Finding of Fact # 11. Moreover, the claimant returned to his full-time Athletic Trainer position at the same salary and benefits. *See* Finding of Fact # 15. Because he had reasonable assurance, the base period wages from this Athletic Trainer position may not be used to award benefits during the period between the 2019–20 and 2020–21 academic years.

We understand that the claimant is seeking benefits only because his summer employment was cancelled. However, this rescinded summer work does not change our analysis, because it was not part of his regular academic year job. The claimant was employed in a full-time, 10-month position during the 2019–20 academic year, and he was to return to that same position under substantially similar economic terms in the next academic year. *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, as the economic terms of the offer were substantially less than those of his present position). Moreover, nothing in the record suggests that the employer required him to work in the summer program as a condition of keeping his academic year position. This means 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 also consider that the claimant earned additional wages working for the employer during his base period as a Clinical Preceptor and he returned to perform the same services in the 2020–21 academic year. *See* Findings of Fact ## 6 and 16. During the hearing, the employer's Human Resource Director testified that whether or not the claimant performed these services in the 2020–

21 academic year was contingent upon a need for the employer to have him do it.⁴ The U.S. Department of Labor (DOL) has stated that, where an offer of re-employment includes a contingency, the contingency must be outside of the employer's control and the totality of circumstances must show that, notwithstanding the contingent nature of the offer, it is highly probable that the offered job will be available in the next academic period.⁵ Absent such proof, the employer does not meet its burden to demonstrate that it provided reasonable assurance of re-employment in that position for the next academic term.⁶

In this case, the employer did not present any further testimony or other evidence to indicate when the employer offered the Clinical Preceptor position to the claimant or what the nature of the contingencies were. Therefore, it has failed to establish that it provided reasonable assurance of re-employment for the Clinical Preceptor position and the wages from this position may not be excluded by G.L. c. 151A, § 28A.

However, to be monetarily eligible for benefits or, in this case, benefits independent of his full-time Athletic Trainer wages, the claimant must have been otherwise paid at least thirty times his 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).⁷

The claimant filed his claim on June 1, 2020, and he has a base period of April 1, 2019, through March 31, 2020. The only evidence before us about his wages for this position appears in Finding of Fact # 6, which indicates that the claimant was paid a stipend of \$3,063 per semester during the 2019–20 academic year (\$6,126 for two semesters), beginning in September, 2019. The parties agreed that the 2019–20 academic year ran approximately from September, 2019, through May, 2020. Of these nine months, six fall within the claimant's base period. Thus, in order to calculate the claimant's base period earnings for the Clinical Preceptor position, we attribute two-thirds of his \$6,126 stipend earnings to those six months. Based upon this calculation, the claimant earned only \$4,104.42 during his base period ($\$6,126 \times .67 = \$4,104.42$). These earnings fall below the minimum monetary threshold to qualify for regular unemployment benefits based only upon his Clinical Preceptor wages.

We, therefore, conclude as a matter of law that the claimant was in unemployment from May 31 through August 1, 2020, within the meaning of G.L. c. 151A, §§ 29 and 1(r). We further conclude that the employer provided the claimant with reasonable assurance of re-employment for his Athletic Trainer position pursuant to G.L. c. 151A, § 28A(b), for the 2020–21 academic year, and that he is not eligible for benefits based upon these wages during the summer of 2020. The claimant does not have sufficient other base period wages to qualify for benefits.

The portion of the review examiner's decision which concluded that the claimant is ineligible for benefits is affirmed. The claimant is denied benefits for the period from May 31 through August 1, 2020.

⁴ This portion of the Human Resource Director's testimony is also part of the unchallenged evidence in the record.

⁵ See DOL Unemployment Insurance Program Letter (UIPL) No. 5-17 (Dec. 22, 2016), 4(c), p. 6.

⁶ See Board of Review Decision 0016 2670 84 (Jan. 29, 2016).

⁷ 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 unemployment claim, the minimum amount was \$5,100.00.

We reverse only for administrative purposes because the review examiner incorrectly implemented her decision as a reversal in the UI Online record keeping system. Since the underlying determination denied benefits, it properly should have been an affirmance.



BOSTON, MASSACHUSETTS
DATE OF DECISION - June 9, 2021

Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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)**

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).

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