

The claimant had reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A, in her bus monitor position for the 2020-21 academic year. As she returned to this position with the same schedule and same salary, she is not entitled to benefits over the summer based upon the wages earned in that position. Although the claimant had other base period work, she did not earn sufficient base period wages from this work to be monetarily eligible for benefits.

**Board of Review
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Issue ID: 0053 3592 96

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 15, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 15, 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 and denied benefits in a decision rendered on December 10, 2020. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant, a bus monitor for a public school system, 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 findings of fact pertinent to the claimant's base period earnings. 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 claimant was not entitled to any benefits during the summer of 2020, because she had reasonable assurance of re-employment for the subsequent academic year for that position, 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 are set forth below in their entirety:

1. The claimant worked for the employer, a city, as a full-time Bus Monitor from 2000 until 6/25/2020.
2. The employer worked [sic] closed for summer vacation from 6/25/2020 until 8/31/2020.
3. On 6/15/2020, prior to the summer vacation period, the claimant received an offer of reasonable assurance for her same position as a full-time Bus Monitor beginning 8/31/2020.
4. The claimant did not work for any other non-school employer during the base period of her unemployment claim.
5. The claimant had worked the employer during summers in the past bidding on shifts available, however the claimant was not offered any summer shifts for which she bid from 6/25/2020 through 8/31/2020.
6. During the 2019 summer, the claimant worked an 8-week program earning a total of \$2,774.28 gross
7. The claimant returned to work with the employer during the last week of August on 8/31/2020.
8. The claimant returned to work in the same capacity for the 2020–2021 school year working 30 hours a week.
9. The claimant has previously worked 30 hours a week during 2019–2020 school year.
10. The claimant’s hours did not change over the course of the 2020–2021 school year.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner’s consolidated findings of fact except as follows. The portion of Consolidated Finding # 3, which characterizes the offer received by the claimant as “reasonable assurance” 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). In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner’s legal conclusion that the claimant was not entitled to any benefits during the summer of 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;

(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 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.

Because the employer provided the claimant with a written offer on May 15, 2020, to return to her same position in the 2020–21 school year under the same economic conditions, we conclude that the claimant received reasonable assurance of re-employment in the next academic year. *See* Consolidated Finding # 3. Therefore, pursuant to G.L. c. 151A, § 28A, the claimant is not entitled to any unemployment benefits based upon the wages she earned from her work as a bus monitor during the 2019–20 academic year.

The claimant's teaching assistant position was a 10-month, academic-year position, meaning that she was free to take the summer off or pursue other full- or part-time work during the summer break. *See* Consolidated Findings ## 2 and 5. Because the claimant's summer work was under a separate contract from her academic-year bus monitor position, and there is no indication that she received reasonable assurance for her summer work, her wages from that position may not be excluded under G.L. c. 151A, § 28A. However, as the claimant earned gross wages totaling

\$2,774.28, her non-excluded base period wages are insufficient to establish her monetary eligibility for benefits under G.L. c. 151A, § 24(a). See Consolidated Finding # 6.

We, therefore, conclude as a matter of law that the claimant received reasonable assurance of re-employment for the subsequent academic period within the meaning of G.L. c. 151A, § 28A(b), for her full-time bus monitor job. We further conclude that she does not have sufficient non-excluded base period wages to be monetarily eligible for benefits based upon her other job.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning June 21, 2020, through August 29, 2020.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 30, 2021



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)**

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