

The claimant, a teacher and bus driver for the employer's school, received reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, for both positions in the 2020-21 academic year. However, he worked as an art teacher and bus driver for the employer's summer camp under a different contract during his base period. As he did not have reasonable assurance for either summer camp job, his base period wages from these positions may be used to establish the claimant's monetary eligibility for benefits.

**Board of Review
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Issue ID: 0054 1927 92

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 unemployment benefits with the DUA, which was denied in a determination issued on October 28, 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 March 25, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant, a teacher and bus driver for the employer's school, had been given reasonable assurance of re-employment in the next academic year, and, thus, he 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 evidence pertaining to the claimant's base period employment. Both parties attended the remand hearing. Thereafter, the review examiner issued his 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 the claimant was not entitled to benefits because he had reasonable assurance of re-employment for the subsequent academic year for both his teaching and bus driver positions, 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 are set forth below in their entirety:

1. The claimant worked for the employer, an educational institution, as a full-time Art Teacher and part-time Bus Driver from 1999 until 6/10/2020 when the school year ended.
2. In April 2020, the employer issued the claimant a letter of reasonable assurance as a full-time Art Teacher and part-time Bus Driver for the 2020-2021 school year which was to begin on 8/24/2020.
3. The claimant filed an unemployment claim which was established with an effective date of 7/5/2020.
4. The claimant did not work for any other non-school employer during the base period of his unemployment claim.
5. The claimant had worked [sic] the employer during summers in the past as an Art Teacher and Bus Driver for the employer's summer camp.
6. The claimant was not required to work either summer job to retain his position as an Art Teacher or Bus Driver during the academic year.
7. For both his work as an Art Teacher and Bus Driver, the claimant's contract or employment agreement for his work at the summer camp was distinct from his contract or employment agreement for his work during the academic year.
8. During the summer vacation period of 2019, the claimant worked an 8-week program earning \$13,813.76 as an Art Teacher and \$3,108 as a Bus Driver.
9. The claimant earned \$16,921.76 total during the 8-week summer program.
10. 2019 summer camp started on 6/17/2029 and ended on 8/9/2019.
11. The employer informed the claimant that he was not needed as an Art Teacher or Bus Driver for the 2020 summer camp due to low enrollment.
12. The employer is aware that a COVID-19 existed [sic] during 2020 program however they are unsure of the exact cause for low enrollment.
13. The employer's summer camp still operated for the full 8 weeks during the summer of 2020.
14. The claimant returned to work with the employer on 8/24/2020 as a full-time Art Teacher and part-time Bus Driver.

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 # 2, which characterizes the letter issued to the claimant as a "reasonable assurance" letter 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not entitled to benefits during the period on appeal.

Since the claimant is both a professional employee and 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: . . .

(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

(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.

During the hearing, the claimant testified that, upon receiving the employer's letter in April, 2020, he understood that he was returning to the same art teacher and bus driver positions in the fall. Upon review of the record in its entirety, we conclude that the letter was sufficient to provide the claimant with reasonable assurance of re-employment for his teaching and bus driver positions in the 2020–21 academic year. *See* Consolidated Finding # 2. Therefore, pursuant to G.L. c. 151A, § 28A, the claimant is not entitled to any unemployment benefits based upon the wages he earned from his full-time work as a teacher or his work as a bus driver during the 2019–20 academic year.

However, both of the claimant's positions were 10-month, academic-year positions, meaning that he was free to take the summer off or pursue other full- or part-time work during the summer break. Consolidated Findings ## 6 and 7. In addition to his academic year work for the employer, the claimant also worked as an art teacher and bus driver at the employer's summer camp. Consolidated Finding # 5. Because the claimant's work at the employer's summer camp was distinct from the teaching position and bus driver position for which he received reasonable assurance, his based period wages from these two summer positions may not be excluded under G.L. c. 151A, § 28A.

Consolidated Findings ## 8 and 9 provide that the claimant earned a total of \$16,921.76 during his base period from services performed at the employer's summer camp. As these wages are not excluded under G.L. c. 151A, § 28A, the claimant is entitled to a weekly benefit amount during the period between academic terms based upon these earnings.

We, therefore, conclude as a matter of law that the claimant received reasonable assurance of re-employment for the subsequent academic year within the meaning of G.L. c. 151A, § 28A(a) and (b), for his academic-year teaching and bus driver positions, and he is disqualified from receiving benefits during the relevant period based upon wages earned in both positions. We further conclude that these statutory provisions do not preclude the award of benefits based upon the claimant's other base period earnings.

The review examiner's decision is affirmed in part and reversed in part. For the period between June 14, 2020, and August 22, 2020, the claimant is entitled to a weekly benefit amount based only upon \$16,921.76 in base period earnings, if he is otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 19, 2022



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.

LSW/rh