**The employer provided the claimant with an offer letter that may have been sufficient to constitute reasonable assurance within the meaning of G.L. c. 151A, § 28A, for the 2020-21 academic year. However, the claimant's hours were reduced from the previous year as a result of the pandemic. Even though the employer offered her additional hours in a different position, these hours were insufficient to match her pay from the previous year. Because she did not return to the same position under the same economic terms, she is entitled to retroactive benefits.**

**Board of Review**
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**Chairman**
**Charlene A. Stawicki, Esq.**
**Member**
**Michael J. Albano**
**Member**

**Issue ID: 0054 7291 79**

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 reverse.

The claimant separated from her position with the employer in June, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 6, 2020. The claimant 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 denied benefits for the period between June 21, 2020, and September 5, 2020, in a decision rendered on July 19, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant 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 subsidiary findings of fact relevant to the claimant's work in the 2020–21 academic year. 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 the claimant was not entitled to benefits under G.L. c. 151A, § 28A, during the summer of 2020, because she had received a letter offering her reasonable assurance of re-employment for the subsequent academic year, 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 began employment with the employer in September 2016.

2. The claimant worked as a bus driver until September 16, 2020.

3. The claimant separated from the employer in April 2021.

4. As a bus driver, the claimant was a full-time, 10-month (180 days) employee of the employer.

5. In March 2020, the employer switched to distance learning due to school closures as a result of COVID-19 mandates and restrictions.

6. The employer continued to pay wages to the claimant through the end of the 2019–2020 school year.

7. On June 17, 2020, the employer issued a letter of reasonable assurance to the claimant notifying of her re-employment in the next academic year 2020–2021.

8. The claimant returned to work in September 2020 as a school bus driver for the 2020–2021 school year. The claimant's schedule was reduced from full-time (8 hours per day) to 20 hours per week as a bus driver due to lack of work as a result of COVID-19 related restrictions.

9. In September 2020, the employer offered 20 additional work hours to the claimant, as a meal assistant and hall monitor. The employer paid the claimant at the same rate of pay.

10. In September 2020, the claimant accepted the additional hours offered by the employer.

11. As of September 16, 2020, the claimant was promoted to Supervisor of Transportation. The claimant worked full-time at a rate of $72,202.72 per 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 # 7 which states that the letter provided by the employer constituted reasonable assurance of re-employment is not a factual finding. This is a legal conclusion, which, at this stage of the proceedings, is reserved for the Board. *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 eligible for 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;
>
> (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 examiners original decision disqualified the claimant from receiving benefits on the ground that she had reasonable assurance of re-employment for the subsequent academic year. Even if the claimant was provided with reasonable assurance of re-employment on June 17, 2020, the record shows that the claimant did not return to her full-time position as a bus driver. *See* Consolidated Finding # 8. We must decide whether these circumstances entitle the claimant to the payment of retroactive benefits even if she was provided with reasonable assurance of re-employment at the end of the previous academic year.

The U.S. Department of Labor has stated that, in order to constitute reasonable assurance, the employer's offer must be for employment in the same capacity and under economic conditions that are not considerably less than the prior academic period.[1] The DUA has also promulgated regulations for non-professional school employees which are applicable to this case. Specifically, an employer must provide the employee with an "opportunity to perform" "suitable services." 430 CMR 4.96(1). These terms are defined under 430 CMR 4.93, as follows:

[1] U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 5-17 (Dec. 22, 2016), 4(a).

> Opportunity to Perform Services means a chance to actually perform services in the next ensuring academic year or term.
>
> Suitable Services as used in 430 CMR 4.96(1) means service in the same or substantially similar position at the same or higher pay, except as otherwise provided by a collective bargaining agreement.

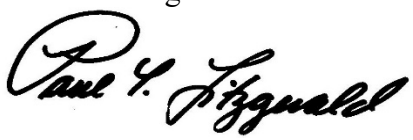
At the start of the 2020–21 academic year, the employer offered the claimant an additional twenty hours of work per week as a hall monitor and meal assistant, because her position as a bus driver had been reduced to 20 hours a week. *See* Consolidated Finding # 8. While the claimant was offered a total 40 hours a week beginning September 2020, she testified that she consistently worked more than 40 hours a week during the 2019–2020 academic year.[2] This testimony is corroborated by the claimant's paystub, which was admitted into evidence as Exhibit 6, showing the claimant received a bi-weekly paycheck for a total of 90.00 hours.[3] As the claimant was working fewer hours in September, 2020, we can reasonably infer that she was not earning as much money as she did in the 2019–20 school year. Therefore, she was not offered the opportunity to perform suitable services in the 2020–21 academic year. *See* Board of Review Decision 0047 7352 64 (Jan. 8, 2021). Under 430 CMR 4.98(1), she is entitled to retroactive benefits for any period originally excluded due to having initially been given reasonable assurance of re-employment.

We, therefore, conclude as a matter of law that pursuant to G.L. c. 151A, § 28A(b), and 430 CMR 4.96(1), the claimant may not be disqualified from receiving unemployment benefits for any weeks of unemployment in the period between the 2019–20 and 2020–21 academic years. We further conclude that pursuant to 430 CMR 4.98(1), she is entitled to retroactive benefits.

[2] 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).

[3] Exhibit 6 is also part of the unchallenged evidence before the review examiner.

The review examiner's decision is reversed. The claimant is entitled to receive benefits based upon the wages earned from the employer during her base period from the week beginning June 21 through September 5, 2020, and for subsequent weeks if otherwise eligible.



**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - December 30, 2021**

Paul T. Fitzgerald, Esq.
Chairman

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