**Because the employer was unsure whether students would come back for in-person learning at the time it issued the claimant a re-appointment letter, and the claimants hours had already been substantially reduced when the employer first transitioned to remote learning due to COVID-19, the claimant did not have reasonable assurance of re-employment. She may not be disqualified from receiving benefits over the summer under G.L. c. 151A, § 28A.**

**Board of Review**
**19 Staniford St., 4th Floor**
**Boston, MA 02114**
**Phone: 617-626-6400**
**Fax: 617-727-5874**



**Issue ID: 0054 8194 11**

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 reverse.

The claimant filed a claim for unemployment benefits with the DUA, effective March 22, 2020, which was denied in a determination issued on October 19, 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 in a decision rendered on January 12, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant, a paraeducator for a town school district, had reasonable assurance of re-employment in the subsequent academic term 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 information regarding the terms of the claimant's employment. Both parties attended the remand hearing. 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 had reasonable assurance of re-employment in the subsequent academic year because she received an offer letter from the employer on June 15, 2020, 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. In September 2019, the claimant started working fulltime for the instant employer, a town school district, as a paraeducator. The claimant is scheduled

to work for the instant employer Monday through Friday from 8 a.m. until 3 p.m. The claimant initially was paid $16.00 per hour by the instant employer.

2. The claimant also worked for the 2nd employer on a part-time basis. The 2nd employer is a farm. The claimant's hours at work with the 2nd employer were eliminated in March 2020.

3. The claimant filed an initial unemployment claim effective the week beginning March 22, 2020 (hereinafter 2020-01 claim).

4. The Department of Unemployment Assistance (hereinafter DUA) Monetary Records list the claimant's base period as running from the 1st Quarter 2019 through the 4th Quarter 2019.

5. The instant employer and the 2nd employer are base period employers on the 2020-01 unemployment claim.

6. The 3rd employer is also a base period employer on the 2020-01 claim. The 3rd employer is also a town school district. The claimant no longer works for the 3rd employer.

7. The DUA monetary records list the following paid gross wages for the claimant during her base period on the 2020-01 unemployment claim:

| Employer | 1st Quarter 2019 | 2nd Quarter 2019 | 3rd Quarter 2019 | 4th Quarter 2019 |
|---|---|---|---|---|
| Instant Employer | $0.00 | $0.00 | $1,799.04 | $6,270.84 |
| 2nd Employer | $0.00 | $1,862.91 | $4,667.44 | $1,823.39 |
| 3rd Employer | $3,682.25 | $0.00 | $0.00 | $0.00 |

8. The claimant worked fulltime for the instant employer until June 14, 2020. This was the claimant's last day of work for the instant employer as it was the end of the 2019–2020 school year.

9. The instant employer provided the claimant with reasonable assurance to return to work for the employer as a fulltime paraeducator for the 2020–2021 school year.

10. On June 15, 2020, the instant employer provided the claimant with a letter providing the claimant with reasonable assurance to return to work for the instant employer as a fulltime paraeducator for the 2020–2021 school year. Prior to receiving the letter, the instant employer did not verbally inform the claimant she was going to return to school for the 2020–2021 school year. Prior to receiving the letter, the claimant assumed she was going to return to work for the instant employer for the 2020–2021 school year.

11. On August 26, 2020, the claimant returned to fulltime work for the instant employer as a paraeducator for the 2020–2021 school year. The claimant's currently [sic] rate of pay is $17.56 per hour.

12. On June 15, 2020, the instant employer [issued] the claimant a letter providing her with reasonable assurance of re-employment for the 2020–2021 academic year.

13. The June 15, 2020 reasonable assurance letter contained contingencies relating to the claimant's re-employment during the 2020–2021 academic year. The contingencies listed were: "The appointment is subject to the rights of the [employer] and/or the status of the Commonwealth of Massachusetts, and/or the Association's collective bargaining agreement, and is contingent upon funding as well as the needs of students."

14. On March 16, 2020, the instant employer initially shut down during the 2019-2020 academic year as a result of the COVID-19 pandemic. During the middle of March 2020, the instant employer started a remote learning model.

15. Before the instant employer closed schools due to the COVID-19 pandemic, the claimant worked 37 hours per week for the instant employer.

16. The claimant's schedule changed after the instant employer closed due to the COVID-19 pandemic. The claimant was working remotely Monday through Friday for 45 minutes in the morning and 45 minutes in the afternoon. The claimant was working approximately 10 hours per week. The claimant was issued the same amount of pay from the employer even though her hours were reduced.

17. During the summer of 2020, the instant employer's Superintendent of Schools announced changes to the instant employer's plans for the 2020–2021 academic year by sending e-mail notification to staff. The claimant nor the instant employer know the exact dates of the e-mail notifications.

18. In the e-mails, the instant employer notified staff that the school was not coming back to onsite schooling 5 days per week but in a hybrid learning model combining remote learning and onsite learning. The instant employer notified the staff that there was going to be three cohorts of learning where the student and staff would have remote learning on certain days of the week and onsite learning the other days of the week. Wednesday was remote learning for all students and staff. The cohorts then each had two additional days of remote learning and two days of onsite learning.

19. Initially, the schools were completely using remote learning at the beginning of the 2020–2021 school year. The instant employer eventually transitioned over to the hybrid learning model.

20. These changes did not impact the number of hours the claimant worked per week during the 2020–2021 academic year. The claimant took advantage of selecting other duties that make her hours whole for the 2020–2021 school year.

21. On October 19, 2020, the Department of Unemployment Assistance (hereinafter DUA) issued a Notice of Disqualification excluding the claimant's wages with the instant employer under Section 28A, (a), (b) & (c) of the Law. On the Notice of Disqualification, the DUA wrote in part: "Inasmuch as you have sufficient other base period wages earned working for other than an educational institution to meet the eligibility requirements of M. G. L. chapter 151A, s. 24 (a), you qualify for a benefit based on those earnings for weeks commencing during the period between academic years or terms. You are eligible to receive benefits based on wages earned working for other than an educational institution at a weekly rate of $280.00 for the period beginning with the week ending 6/14/2020 and through 8/22/2020." The claimant appealed the Notice of Disqualification.

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact except to note as follows. The portions of Consolidated Findings ## 9, 10, 12, and 13 which indicate that the employer provided reasonable assurance or re-employment are not factual findings. This is a legal conclusion reserved to the Board. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) ("Application of law to fact has long been a matter entrusted to the informed judgment of the board of review."). 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 had reasonable assurance of re-employment for the 2020-2021 academic year.

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 . . . .

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.

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. Where an offer includes a contingency, further criteria require that 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 under substantially similar economic terms in the next academic period. *See* Id. at part 4(c), p. 6. Further, we have held that the employer has the burden to prove that it provided the claimant with reasonable assurance of re-employment. *See* Board of Review Decision 0016 2670 84 (Jan. 29, 2016).

There is no dispute that the employer sent the claimant a letter on June 15, 2020, informing her that she had reasonable assurance of returning to the same or similar position during the next school year. *See* Consolidated Finding # 12. On this basis, the review examiner determined that the claimant had reasonable assurance of re-employment under G.L. c. 151A, § 28A, and was, therefore, ineligible for benefits from the week beginning June 14, 2020, through August 22, 2020. We disagree.

The letter sent by the employer on June 15, 2020, enumerated several contingencies that could impact the economic terms of the claimant's position in the 2020-2021 academic year, including student need, funding, and "the status of the Commonwealth of Massachusetts." *See* Consolidated Finding # 13. As the claimant had already seen a substantial cut in hours resulting from the impact of the COVID-19 pandemic, we believe these contingencies require us to consider whether, at the time the claimant received this letter, the totality of the circumstances indicated that it was highly probable that the job offered to the claimant would be available in the 2020–2021 academic year. *See* Consolidated Findings ## 15 and 16.

At the remand hearing, the employer conceded that, due to the COVID-19 pandemic, it continued to change its plans for the 2020–2021 academic year throughout the summer of 2020.[1] It sent staff several updates throughout the summer, confirming that the employer did not have a finalized plan

[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).

for the 2020–2021 academic year at the time it issued the June 15, 2020, letter to the claimant. *See* Consolidated Finding # 17. Because the employer's plans for the 2020–2021 academic year were uncertain at the time, and the claimant's hours had been cut by nearly 75% at the end of the 2019–2020 academic year as a result of the pandemic, we conclude that the totality of the circumstances indicate that it was not highly probable that the claimant would be returning to the same position and under the same economic circumstances for the 2020–2021 academic year.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant received reasonable assurance of re-employment for the subsequent academic year within the meaning of G.L. c. 151A, § 28A(b), to her full-time paraeducator position.

The review examiner's decision is reversed. From the week beginning June 14, 2020, through August 22, 2020, the claimant is entitled to a weekly benefit amount based upon all of her base period earnings, if she is otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - September 27, 2021**

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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