

The claimant, an instructional assistant for the employer's school system, received reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A, for her regular full-time job in the 2020-21 academic year. However, she worked four other jobs for the employer during her base period. As there is no indication she had reasonable assurance for these other jobs, her base period wages from these two positions may be used to establish the claimant's monetary eligibility for benefits in the period between academic terms.

**Board of Review**  
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**Issue ID: 0055 2443 37**

### 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 23, 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 March 9, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant, an instructional assistant 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was not entitled to benefits from the week beginning June 28, 2020, because she had reasonable assurance of re-employment for the subsequent academic year for her full-time instructional assistant position, is supported by substantial and credible evidence and is free from error of law.

### Findings of Fact

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

1. The claimant began her employment with the employer, a town, full-time, as an instructional assistant, a union position, on September 1, 2015.
2. In October 2019, the claimant moved. The claimant informed the Administrative Assistant of her new address.
3. The claimant noticed the employer's online payroll deposits still had her old address.
4. In January 2020, the claimant told the Administrative Assistant her address had not been changed.
5. The Administrative Assistant told the claimant to notify Human Resources of her change of address.
6. The claimant did not notify Human Resources about her change of address.
7. The claimant worked as an instructional assistant during academic year 2019–2020, which began on September 1, 2019, and ended on June 21, 2020.
8. The claimant's employment was governed by a Collective Bargaining Agreement (CBA).
9. Pursuant to the CBA, the claimant's position was a 10-month position.
10. Pursuant to the CBA, the claimant was paid \$26.50 per hour.
11. The claimant also worked for the employer as a before school coordinator during the academic year 2019–2020, 5 days a week, 1.25 hours per day.
12. The claimant was paid \$16.00 per hour as a before school coordinator.
13. The claimant also worked for the employer as an after school lead instructor during the academic year 2019–2020, 5 days a week, 3.5 hours per day.
14. The claimant was paid \$22.00 per hour as an after school lead instructor.
15. During summer 2019, the claimant worked for 6 weeks, 4 days per week, 4 hours per day, for the employer's extended school year program.
16. The claimant was paid \$26.00 per hour working the employer's summer 2019 extended school year program.
17. During summer 2019, the claimant worked for 6 weeks, 5 days per week, 4 hours per day, for the employer's extended summer camp.

18. The claimant was paid \$21.00 per hour working the employer's summer 2019 extended summer camp.
19. The claimant was not required, as a condition of her 10-month instructional assistant position to work: (1) as a before school coordinator; (2) as an after school lead instructor; (3) the extended school year program; or (4) extended summer camp program.
20. On March 13, 2020, due to COVID-19, the employer transitioned to remote learning.
21. On March 25, 2020, the claimant filed her claim for unemployment insurance benefits with the Department of Unemployment Assistance (DUA) with an effective begin date of March 22, 2020, and an effective end date of March 20, 2021.
22. The base period of the claimant's claim, the period during which wages paid to the claimant are used to calculate a weekly benefit amount (WBA), was January 1, 2019, through December 31, 2019.
23. The claimant was paid \$51,121.33 in wages by the employer during the base period (January 1, 2019, through December 31, 2019).
24. The base period wages (January 1, 2019, through December 31, 2019) included all wages earned by the claimant in her positions: (1) instructional assistant; (2) before school coordinator; (3) after school lead instructor; (4) extended school year program; and (4) extended summer camp program.
25. The claimant had no non-education wages in the base period (January 1, 2019, through December 31, 2019).
26. On June 29, 2020, the employer mailed to the claimant a reasonable assurance of re-employment letter for the 2020–2021 academic year, which stated, in part:

Dear [Claimant],

The [Employer] appreciates your services during the 2019–2020 school year. Consistent with Mass General law 1514 section 28A, we consider you to have reasonable assurance of employment commencing in September 2020.

I am pleased to confirm your Instructional Assistant position and hourly rate effective the start of the school year, 2020–2021. Please note that it is your responsibility to review this information promptly and to report any discrepancies to the Human Resource Office at XXX- XXX-XXXX or [name.name@xxxxxxxx.k12.ma.us]. Please be aware that this assignment may be subject to change based on Special Education student populations or the individual education plans of students.

Your first day of work will be September 1, 2020. September 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> will be professional development days and the students will come to school on September 8, 2020.

School Location: [Name]  
School Hours to be worked daily: 6.00  
Hour rate: \$27.73 Step 6 FTE:1  
Annual Salary: \$30,613.92

Thank you again for your service this past school year. I wish you the best in the year ahead as you continue to serve the students of [Name].

Enjoy the summer!

[Name]  
Director of Human Resources  
Cc Personnel File

27. Human Resources mailed the June 29, 2020, reasonable assurance of re-employment letter to the address on record for the claimant, which was her old address.
28. In August 2020, the claimant received the June 29, 2020, reasonable assurance of re-employment letter in the mail at her new address.
29. The claimant each year was issued a reasonable assurance of re-employment letter.
30. The claimant returned to work for the next academic year each year she was issued a reasonable assurance of re-employment letter.
31. The claimant believed she would be returning to work for the 2020–2021 academic year.
32. Beginning March 13, 2020, the claimant suffered loss of income because remote learning precipitated by COVID-19 eliminated in-person work for the claimant as a (1) as a before school coordinator; and (2) as an after school lead instructor.
33. Due to COVID-19 and the need for fewer staff, the claimant did not work the summer 2020 extended school year program position or summer 2020 extended summer camp position.
34. The employer hired only one employee to work the summer 2020 programs, versus 40 employees for summer 2019, which had included the claimant.

35. The claimant suffered loss of income because she did not work the summer 2020 extended school year program position or summer 2020 extended summer camp position.
36. On September 1, 2020, the claimant returned to full-time in-person work for the employer.
37. On October 23, 2020, pursuant Massachusetts General Law Chapter 151A, § 28A (a), (b), (c), the DUA sent the claimant a Corrected Notice of Disqualification determining it had been established that she performed services for an educational institution during the most recent academic year or term and, therefore, she 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, and inasmuch as she had no wages earned working for other than an educational institution or insufficient such wages to meet the eligibility requirements of M. G. L. chapter 151A, § 24 (a), she was not eligible to receive benefits for the period beginning 6/28/2020 and through 8/29/2020.

### 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 original 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant was not eligible for benefits from the week beginning June 28, 2020, because she had reasonable assurance of re-employment for the subsequent 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;

(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.

On June 29, 2020, the employer mailed a letter to the claimant offering her re-employment for the 2020–2021 academic year in the same position and at a higher rate of pay. Finding of Fact # 26. However, the claimant did not receive this letter until August, because she disregarded the administrative assistant's instruction to update her address with the employer's Human Resources department. Findings of Fact ## 4–6, 27, and 28. On these facts, it is apparent that the claimant's failure to receive the letter offering her re-employment until August was her own doing.

As the employer timely sent a letter of reasonable assurance of re-employment for the next academic year to the most up-to-date address it had on file for the claimant, we conclude that the employer met its burden to show that it offered the claimant reasonable assurance of re-employment. *See* Board of Review Decision 0014 0843 50 (Jun. 30, 2015) (where the claimant's failure to update her address was the sole reason she did not receive the employer's timely offer of re-employment, she was still found to have reasonable assurance). We, therefore, concur with the review examiner's conclusion that, pursuant to G.L. c. 151A, § 28A, the claimant's base period earnings from her work as an instructional assistant during the 2019–2020 academic year cannot be used to establish her monetary eligibility for benefits.

However, the claimant's instructional assistant position was a 10-month, academic-year position, and she was not required to work in the summer school as a condition of keeping her academic year job. Findings of Fact ## 7, 9, and 19. She was free to take the summer off or pursue other full- or part-time work during the summer break. *See* Findings of Fact ## 7–9. During her base period, the claimant also worked for the employer's summer extended school year program and summer camp. Findings of Fact ## 15 and 17. Because the claimant's summer positions were under a separate contract from her academic year instructional assistant position, and there is no indication that she received reasonable assurance for either summer position, her wages from both programs may not be excluded under G.L. c. 151A, § 28A.

Additionally, the claimant worked as a before-school coordinator and after-school lead instructor for the employer. Findings of Fact ## 11 and 13. Both of these positions were also distinct from her academic-year work as an instructional assistant, with different pay rates and hours. As the

employer's June 29, 2020, letter applied only to the claimant's instructional assistant position, her based period wages from both her work as a before-school coordinator and after-school lead instructor may not be excluded under G.L. c. 151A, § 28A.

Based on the claimant's hourly rate and schedule for each of the four aforementioned positions, we can determine that the claimant's total base period earnings from these positions totaled \$21,865.33. *See Findings of Fact ## 11–18.* These total earnings also comport with the information that the parties provided about the claimant's schedule and wages for her full-time instructional assistant position. *See Findings of Fact ## 9, 10, 23, and 26.* As the claimant did not have reasonable assurance of re-employment for her positions at the employer's before-school, after-school, and summer programs, she is entitled to a weekly benefit amount based upon her earnings from those positions.

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), in her full-time instructional assistant job, and she is disqualified from receiving benefits during the relevant period based upon wages earned in that position. We further conclude that G.L. c. 151A, § 28A(b), does 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 week beginning June 28, 2020, the claimant is entitled to a weekly benefit amount based only upon \$21,865.33 in base period earnings, if she is otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 25, 2022**



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](http://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