

The claimant is a 12-month educational employee, who was required to work fewer hours during the summer of 2020. She was not precluded from receiving benefits under G.L. c. 151A, § 28A(b) during that period. However, pursuant to G.L. c. 151A, § 28A(c), she is not eligible for benefits during her customary two-week vacation period before her summer assignment.

Board of Review
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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, effective June 21, 2020, which was denied in a determination issued on November 20, 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 31, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant 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 about the claimant's terms of employment and summer work schedule. Only the claimant 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 for the subsequent academic year and therefore was not entitled to benefits even though her summer work hours were reduced, 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 filed an initial claim for unemployment benefits effective June 21, 2020. The claimant worked for one employer, which was the instant employer, during the base period of the claim.
2. The claimant has worked part time as a bus monitor for the employer, a town, since 2013.
3. The claimant is a union member.
4. The claimant works with special needs children.
5. The claimant is scheduled to work 21.5 hours during the school year.
6. The claimant was on a leave of absence during the 2019/2020 school year because of an injury she sustained to her shoulder in August 2019.
7. The last day of school for the 2019/2020 school year was June 18, 2020.
8. On June 23, 2020, the claimant was medically cleared to return to work.
9. On June 19, 2020, the claimant signed a letter from the employer, which notified her she was expected to return to work in her position for the 2020/2021 school year.
10. The claimant is required to work during the summer months in accordance with the collective bargaining unit. After the last day of school, the claimant has a break for approximately two weeks. Each year Drivers and Bus Monitors who work with the special needs children return to work after the fourth of July holiday when the students return to school. Special needs students attend school during the summer. In years prior to 2020, the claimant worked 21.5 hours a week during the summer months.
11. The claimant was scheduled to return to work on July 5, 2020.
12. The claimant's schedule of hours was reduced by the employer because schools were closed due to the pandemic.
13. The claimant returned to work on July 10, 2020.
14. The claimant worked a total of 9 hours on July 13 and 14, 2020.
15. The claimant worked a total of 8 hours on July 20 and 21, 2020.
16. The claimant worked a total of 7 hours on July 27 and 28, 2020.
17. The claimant did not work during the week beginning August 2, 2020.

18. The claimant worked a total of 6.25 hours on August 10 and 11, 2020.
19. The claimant did not work during the 3 weeks beginning August 13, 23 and 30, 2020.
20. The claimant worked 4.5 hours on September 10, 2020, and 2.75 hours on September 11, 2020.
21. The claimant worked 4 hours on September 14, 2020.
22. When the claimant certified her weekly unemployment benefits during the summer months of 2020, she reported her gross earnings.
23. On September 15, 2020, school resumed for all students.
24. During the week beginning September 23, 2020, the claimant resumed her 21.25 schedule of hours.
25. On November 20, 2020, the Department of Unemployment Assistance issued the claimant a Notice of Disqualification under Section 28A of the Law beginning June 21, 2020, through the week ending September 12, 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 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 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 for the entire period from June 21, 2020, to September 12, 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

In her original decision, the review examiner concluded that the claimant had reasonable assurance of re-employment based on the letter she signed and returned to the employer on June 19, 2020. *See Consolidated Finding # 9.* We would agree with the review examiner's analysis, if the claimant were a typical 10-month academic year school employee who had the option to take the summer off or to find alternate work during the break between school years. However, the claimant is not a 10-month employee, and she does not have that option. *See Consolidated Finding # 10.*

Where a 12-month educational employee must work reduced hours during the summer in order to keep her job, the disqualification under G.L. c. 151A, § 28A(b), does not bar the award of partial unemployment benefits during those weeks. *See Board of Review Decision 0022 1445 55 (April 27, 2018).* Because the claimant's collective bargaining agreement obligates her to work during the summer months and the employer provided fewer hours of work in the summer of 2020, we conclude that the provisions of G.L. c. 151A, § 28A(b), do not disqualify the claimant from receiving benefits during those weeks. *See Consolidated Finding # 10.*

In this case, the claimant sought benefits during the entire period from the week ending June 21, 2020, through September 12, 2020, including a two-week period between the end of the academic year and the start of the summer program. *See Consolidated Findings ## 7 and 11.* As the claimant is not required to work during this period, we presume this two-week break constitutes a customary vacation period. *See Consolidated Finding # 10.* The claimant performed services in the period immediately before this two-week break, and she had reasonable assurance that she would again perform services as a bus monitor in the period immediately following this break. Therefore, in accordance with the provisions of G.L. c. 151A, § 28A(c), the claimant is not entitled to benefits during this customary two-week vacation period before the start of the summer session.

We, therefore, conclude as a matter of law that the claimant is not disqualified from receiving unemployment benefits under G.L. c. 151A, § 28A(b), during the weeks of her mandatory summer assignment. We further conclude that the claimant is disqualified for the two-week customary vacation period between the end of the academic year and the start of the summer assignment pursuant to G.L. c. 151A, § 28A(c).

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to benefits from the week beginning July 5, 2020, through September 12, 2020, if otherwise eligible. The claimant is denied benefits from the week beginning June 21, 2020, through July 4, 2020.

N.B.: The record indicates that the claimant may have limited her availability to part-time work during the period between July 5, 2020, and September 12, 2020. For this reason, we are asking the agency to investigate the claimant's eligibility for benefits under the provisions of G.L. c. 151A, § 24(b) during this period.

BOSTON, MASSACHUSETTS
DATE OF DECISION - [September 2, 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