

Because the employer was unsure whether students would come back for in-person learning at the time it verbally told the claimant bus driver that she would be returning to the same position, and the claimant's hours had already been eliminated 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
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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 reverse.

The claimant separated from her position with the employer on or about June 24, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 25, 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 October 7, 2022. 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 make additional findings of fact pertaining to the employer's plans for the 2020–21 academic year. 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 the employer had provided her with reasonable assurance of re-employment for the 2020–21 academic year at a meeting on July 20, 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. On April 9, 2018, the claimant started working for the employer, a municipal school district, as a Special Needs Transportation Driver (hereinafter driver).

2. The claimant works onsite at the employer's facility providing transportation for the students.
3. The claimant initially was hired by the employer as a substitute driver.
4. The claimant has always worked in the Employer's Special Education Department. The claimant was assigned as a driver for students in preschool through postgraduate school.
5. The claimant's supervisor is the Special Education Van Driver Coordinator.
6. The employer's traditional school year usually runs from September until June. The employer then has a summer recess period in between the traditional school years.
7. The Special Education students participate in the summer school sessions.
8. The claimant is not required to work during the summer to maintain her driver positions with the employer's establishment. The claimant working during the summer is optional work for the claimant.
9. Prior to the summer 2020, the claimant always opted to work during the summer school session for the employer as a driver.
10. During the employer's 2019–2020 school year, the claimant was initially working as a substitute driver for the employer.
11. In January 2020, the claimant was promoted to a full-time driver position. In this role, the claimant was working 30-35 hours per week for the employer. The claimant was usually scheduled to work Monday through Friday from 6 a.m. until 4 p.m. During this school year, the claimant was paid \$20.00 per hour in her full-time driving role.
12. In the role of full-time driver, the claimant is a union member with UFCW local 328. The employer maintains a collective bargaining agreement with the union outlining issues including returning to work notices.
13. Prior to filing an initial claim for unemployment benefits, the claimant's last date of work for the employer performing tasks was on March 17, 2020 or March 18, 2020. At this time, this was claimant's last date of work for the employer as the employer's school closed to onsite learning due to the [COVID]-19 pandemic. The claimant was not paid by the employer after her last date of work while the claimant was not performing tasks for the employer.
14. The claimant filed an initial unemployment claim effective the week beginning March 29, 2020. The employer is the only base period employer.

15. The Department of Unemployment Assistance (hereinafter DUA) records list the claimant’s gross paid wages from the employer’s establishment during the base period as follows:

January-March 2019	April-June 2019	July-September 2019	October-December 2019
\$772.50	\$937.50	\$375.00	\$3,622.50

16. On or about June 24, 2020, the employer’s traditional school year ended.
17. The claimant did not work for the employer during the summer 2020. The employer did not have a summer session available for the Special Education Department due to the [COVID]-19 pandemic. The claimant had informed the employer she was available to work during the summer 2020.
18. On July 20, 2020, the claimant’s supervisor notified the claimant during a meeting held with other staff members that the full-time drivers were going to return to work for the employer’s 2020-2021 school year. The employer also sent the claimant an e-mail notifying the claimant that she was going to return to work for the employer’s 2020–2021 school year.
19. On a questionnaire the claimant submitted to the DUA regarding her employment with the employer, the claimant selected “yes” to the following question: “Have you been notified that you will be returning to your same job at the start of the next school year, semester or term, or after school vacation?”
20. On a questionnaire the employer submitted to the DUA regarding the claimant, the employer selected “yes” to the following question: “Was the claimant notified that s/he will return to work in the same or similar position at the beginning of the next school year, semester or term, or after school vacation?” On this questionnaire, the employer also wrote “verbal/past practice” in response to the following question: “Date s/he was notified.”
21. The last week the claimant requested for unemployment benefits (as of the date of the hearing) was the week ending September 12, 2020. The claimant subsequently returned to full-time work for the employer as a bus driver for the 2020–2021 school year.
22. On November 25, 2020, the Department of Unemployment Assistance (hereinafter DUA) issued a Notice of Disqualification under Sections 28A (a), (b) & (c) of the Law in connection with the employer. On the Notice of Disqualification, the DUA wrote: “Inasmuch as you have 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, s. 24 (a) you are not eligible to receive benefits for the period beginning 7/19/2020 and through 9/12/2020.” The claimant appealed the Notice of Disqualification.

23. During the conversation that the claimant's supervisor gave the claimant assurances that the claimant would be returning to work for the employer in the 2020–2021 academic year in a meeting held on July 20, 2020, the claimant was specifically told that she would be returning to work her same position as a full-time Special Needs Transportation Driver. During this conversation, the claimant was not informed that she would be returning on a specific date. During this conversation, the employer indicated that the employer was unsure whether they would reopen for the 2020–2021 academic year with an in person, hybrid, or remote learning model. During this conversation, the employer stated that the employer was unsure about their re-opening plans at that time with regards to if the school year would start in-person and unsure about the date of the re-opening of the school year.
24. The claimant nor the employer have a copy of the follow-up email sent to the claimant by the employer explaining the employer's intention to eventually return to school in a full-time capacity. The claimant does not know on what date the claimant received this e-mail. This e-mail did inform the claimant that she would be returning to her full-time Special Needs Transportation Driver position for the 2020–2021 academic year. In this e-mail, the employer did not specifically discuss its plans for re-opening in the beginning of the 2020–2021 academic year. In this e-mail, the employer explained the employer was unclear about the re-opening plans for the 2020–2021 school year.
25. The employer did make announcements about its plans for the 2020–2021 academic year during the summer of 2020 in e-mails sent to staff on July 31, 2020, August 5, 2020, and August 27, 2020. The claimant was sent and received these e-mail announcements.
26. In the July 31, 2020 e-mail announcement, the employer's Superintendent wrote:

“Today we had to submit our Preliminary Reopening Plan Summary for the fall with DESE. That document will be posted on the website later today, but I wanted to share with you a summary of the three learning plans we had to submit as part of this process. This was created by the Teaching & Learning Task Force who was responsible for the creation of the three plans. It is attached below.

The district is still working on the Final Reopening Plan and that will be voted on by the School Committee next Thursday. That document will focus not only on academic programming but on a variety of topics including, but not limited to, safety protocols, transportation plans, protocols to address situations that could arise in and around our schools, lunch plans as well as plans for student support.

That plan will be shared with [worker] and her team and will be posted for review sometime prior to the SC meeting on Thursday.

Thank you and have a great weekend.”

27. In the July 31, 2020 e-mail announcement, the employer attached the employer’s Preliminary Reopening Plan Summary for the 2020–2021 school year which included a possible fully remote learning model, possible hybrid learning model option, and possible fully in-person learning model.

28. In the August 5, 2020 e-mail announcement, the employer’s Superintendent wrote:

“The following is a link to the district's draft Fall Reopening Plan. This plan will be reviewed at tomorrow's School Committee meeting. A final vote will be made by the SC on Monday, August 10 and at that point, it will be submitted to DESE.

MPSD Draft Fall Reopening Plan

In addition, we have put together a brief powerpoint that summarizes some of the key aspects of the plan. Fall Reopening Powerpoint

Thank you and have a good night.”

29. In the August 27, 2020 e-mail announcement, the employer’s Superintendent wrote:

“It seems hard to believe we are less than a week out from the start of the year for staff. Our year will begin on Monday, August 31st. So much has transpired since March 12 and I am so very excited to see you all. I think we have all missed each other and it will be wonderful to be around our friends and colleagues once again.

We realize there are still a lot of moving parts, and we fully understand and respect the fact that many of you still have questions or concerns. That's OK! Having concerns or a little angst is to be expected and I've been working with the MEA team to address many of those areas of note. Believe me, I have more than a few butterflies in my stomach on a daily basis. As we've been since last Spring, we are all in this together, and we will continue to work together to address the challenges that are before us, as we get ready to greet our students on September 16th.

We will be doing things a little differently on our first day. As it would take a pretty significant space to bring us all together, with appropriate physical distancing, as we would typically do on the first day for staff, I am asking you all to report directly to your individual schools on Monday, August 31st at 8:00

AM. At that time, you will be able to set up in your room or work space and watch an opening day video that you will be able to access on Canvas. This is a bit different than in the past, but I think we all understand that we will have to adjust our practices a bit this year. Also, so you can plan accordingly, we will look to have our ten (10) "training days" take place at each school from 8:00 AM to 2:30 PM each day.

After you complete the morning video, you will have your traditional school based training and meetings that will take place in person, in your home school. With everyone already in their home school, we won't have to worry about travel time back to your school so those school based meetings will start at 9:00 AM. Your principals will let you know where they will take place and what the rest of your day will be like.

As you know, our first 10 days are without students and we will have a great deal of time to go over safety protocols and precautions that are in place for each school. That will be our first priority and we will focus on that in the first few days of training. In addition, you will be spending a good amount of time on planning and training for digital instruction through the hybrid and remote models. The goal will be for up to three hours of training, collaboration and prep work on instructional strategies and course development beginning on September 2nd and running through the remainder of the training time. There will also be time built in for special education training and compliance work that we would typically do at the beginning of the year, as well as curriculum writing and content training in some departments. We will also be dedicating time to SEL-related training that will benefit you as well as our students. It will be great to have these two weeks to collaborate together so we can address any remaining issues that may be out there.

I fully understand that many of you may have concerns about being back to work, in-person, but please know the district has been working hard this summer to prepare the schools and to have safeguards in place for your return and for the hybrid model of instruction that we will start the year in.

Enjoy the last few days of summer and I look forward to seeing you next week.”

30. The employer did not indicate at any point in the summer that the claimant's position in the 2020–2021 academic year might be altered due to the impact of the COVID-19 pandemic.
31. The employer's 2020–2021 academic year began on August 31, 2020 for classroom staff, for students on September 16, 2020, and for bus drivers on September 16, 2020.
32. The employer re-opened school with an in-person learning model for its special education students for the 2020–2021 academic year.

33. On September 16, 2020, the claimant returned to working her full-time schedule as a Special Needs Transportation Driver for the 2020–2021 academic 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 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 had reasonable assurance of re-employment as of July 20, 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; 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. . . .

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, the applicable 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, e.g.*, Board of Review Decision 0016 2670 84 (Jan. 29, 2016).

During a meeting held on July 20, 2020, the employer informed the claimant that she would be returning to work as a full-time Special Needs Transportation Driver in the 2020–21 academic year. Consolidated Finding # 23. 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 19, 2020, through September 12, 2020. We disagree.

In the same July 20th meeting where the employer purportedly offered the claimant reasonable assurance of re-employment, it also informed the claimant that it was unsure whether it would be re-opening schools for in-person, hybrid, or remote learning. Consolidated Finding # 23. As the claimant’s hours had already been cut as a result of the impact of the COVID-19 public health emergency, we believe that this uncertainty requires us to consider whether, at the time of the meeting, the totality of the circumstances indicated that it was highly probable that the job offered to the claimant would be available in the 2020–21 academic year. *See* Consolidated Findings ## 13 and 17.

The consolidated findings show that, due to the COVID-19 public health emergency, the employer had cancelled its summer school program and remained unsure of its plans for reopening in the 2020–21 academic year at the time of the July 20, 2020, meeting. Consolidated Findings ## 17 and 23. Because the employer had been unable to offer the claimant work at the end of the 2019–20 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 2020–21 academic year. Accordingly, the employer did not meet its burden to show that it had provided the claimant with reasonable assurance of reemployment for the subsequent academic year as of July 20, 2020.

While the employer provided its staff with updates about its re-opening plans on July 31, 2020, August 5, 2020, and August 27, 2020, we believe that these updates did not contain sufficient information to conclude that it was highly probable the claimant would be returning to work for the employer under the same economic circumstances for the 2020–21 academic year. *See* Consolidated Findings ## 25–29. Even as of the final August 27, 2020, letter, the employer was still anticipating that students would be learning in a hybrid model, which suggests that the claimant’s bus driver services might not be full-time. *See* Consolidated Finding # 29.

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 driver position.

The review examiner's decision is reversed. From the week beginning July 19, 2020, through September 12, 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 - March 30, 2023



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, Esq. 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