

While the claimant elected to be paid wages from her academic year position throughout the 12-month calendar year, DUA shall attribute these wages the weeks in which they were earned. Accordingly, the review examiner erred in denying the claimant benefits during the summer of 2020 based on these wages. The claimant, an instructional assistant for the employer's school system, received reasonable assurance of re-employment to her regular full-time job in the 2020-21 academic year. However, because she worked four other jobs for the employer during her base period and also had base period wages from a second employer, her base period wages from these five positions may be used to establish the claimant's monetary eligibility for benefits between the two academic years.

**Board of Review
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Issue ID: 0060 1543 47

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 April 21, 2021. 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 November 6, 2021. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant was not in unemployment during the period between April 12, 2020, and December 26, 2020, and, thus, was disqualified under G.L. c. 151A, §§ 29 and 1(r). 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 evidence material to both the claimant's unemployment status and her eligibility for benefits under G.L. c. 151A, § 28A. 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 was not entitled to benefits because she continued to receive her regular pay for her full-time classroom aide position throughout the entire period between April 12, 2020, and December 26, 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 August 31, 2015, the claimant started working fulltime for the employer, a municipal school district, as a classroom aide. The claimant works at [sic] middle school.
2. In the role of Classroom Aide, the claimant is scheduled to work Monday through Friday from 7:20 a.m. until 2:10 p.m. The claimant works approximately 30 hours per week for the employer in this role.
3. In the role of classroom aide, the claimant is paid an annual salary of \$20,067.00. The claimant has elected to receive her salary in biweekly payments through the entire calendar year which is 26 payments. The claimant's gross bi-weekly salary payment is \$721.88.
4. In the role of classroom aide, the claimant initially only worked onsite at the employer's school facility.
5. The claimant also works in the part-time role of Home Services for children. In this role, the claimant works on Tuesdays, Wednesdays and Thursdays for 2 hours each day for a total of 6 hours each week. In this role, the claimant is paid \$25.00 per hour. In this role, the claimant is paid about \$250–\$300 on a bi-weekly basis. In this role, the claimant usually works directly at the student's home.
6. The claimant initially worked onsite for the employer's 2019–2020 school year until March 12, 2020.
7. On March 13, 2020, the claimant started to work remotely from home in her full-time role of classroom aide due to the government required onsite school closures as a result of the [COVID]-19 pandemic.
8. The claimant temporarily stopped working in her part-time role of Home Services effective after March 12, 2020 due to the employer not having work available in that role as the claimant could not be permitted inside the students home due to the COVID-19 pandemic. The claimant did not receive payment from the employer in this role while she was not working.
9. The claimant continued to work fulltime for the employer and receive her fulltime pay in the role of classroom aide remotely from home from after March 13, 2020 until June 16, 2020. The employer temporarily did not have any more work available for the claimant after June 16, 2020 for a period of time in this role as it was the end of the employer's 2019–2020 school year.
10. The claimant filed an initial unemployment claim effective the week beginning April 12, 2020. The claimant decided to file for unemployment benefits at this time due to the claimant not receiving her part-time pay from the employer in the position of Home Services. The claimant's weekly regular unemployment

benefit rate is \$226. The claimant's weekly earnings disregard amount is \$75.33.

11. The claimant did work part-time for the employer during the summer of 2020 in her role of Home Services as needed. The claimant worked on the following dates during the summer of 2020: June 23, 2020, July 1, 2020, July 7, 2020, July 9, 2020, July 14, 2020, July 23, 2020, July 28, 2020, July 30, 2020, August 4, 2020, August 6, 2020, August 11, 2020, and August 13, 2020.
12. The employer provided the claimant with reasonable assurance that the claimant was going to return to work for the employer's 2020–2021 school year as a fulltime classroom aide.
13. The claimant returned to fulltime work for the employer on August 26, 2020 which was the start of the employer's 2020-2021 school year. The claimant returned to onsite work for the employer at this time. The students were initially learning remotely while the staff was working in person.
14. The last week the claimant requested for unemployment benefits (as of the date of the hearing) was the week ending December 26, 2020. The claimant stopped requesting benefits after this week due to the claimant subsequently returning to her part-time role of Home Services.
15. The claimant received her fulltime pay from the employer from her job position of fulltime classroom aide from the week beginning April 12, 2020 through the week ending December 26, 2020 even during the weeks the claimant did not work for the employer during the summer months due to the school recess period.
16. On September 8, 2020, the claimant returned to her part-time role of Home Services for the employer on an as needed basis. The claimant initially returned to this role working remotely and then the claimant resumed working onsite at the students' home in September 2021.
17. The claimant has always been able and available to work for the employer.
18. The claimant worked full-time, 30 hours a week for the employer as a classroom aide. The claimant transitioned to remote work on March 13, 2020. The claimant continued to work 30 hours a week when the employer transitioned to remote learning. The claimant continued to be paid her same wages when the employer transitioned to remote learning.
19. The employer provided the claimant with an offer of reemployment for the 2020–2021 academic year. The offer was written. On May 27, 2020, the employer provide[d] the claimant with this offer. The claimant received the offer on or about May 27, 2020. The offer was from the Superintendent of Schools. The Superintend[ent] of Schools has the authority to guarantee the

claimant employment in the 2020–2021 academic year. The offer was for a full-time classroom aide position.

20. The salary for this job in the 2020–2021 academic year was not the same as the claimant’s salary for her work as a classroom aide in the 2019–2020 academic year. The salary was different. The salary was higher by 2% than the claimant’s salary in the 2019–2020 academic year.

21. This offer of employment did not contain any contingencies.

22. The May 27, 2020 letter from the Superintendent of Schools addressed to the claimant states:

“At the [employer] School Committee meeting on Wednesday, May 20, 2020, the Committee re-appointed you as the Classroom Aide at the [Middle School], for the 2020-2021 school year.”

Thank you for all you have done for our students during the 2019–2020 school year. I hope you enjoy a long summer!”

23. The employer did make announcements about its plans for the 2020–2021 academic year during the summer of 2020. On June 5, 2020 and August 5, 2020 the employer made announcements about its plans.

24. In a June 5, 2020 announcement addressed to the [City] Public Schools Community, the Superintendent of Schools wrote in part:

“The new normal for us is awaiting specific indication of what the “reopening” plan will be and when it will happen. As a district, we have been planning and strategizing regularly as we await further guidance from the State. On factor is for certain, no matter what the guidance or mandates are for the opening for the school in the fall, or even possibly summer programming in July, nothing will look the same as it has in the past. For instance, we know that any opening will require new procedures, significant investment in protective gear, limiting number of students or personnel in the building at any given time, and many other procedures that will affect our operations. Even childcare through [Program Name], if allowed to open, will look vastly different and will likely be restricted on the numbers of students they can service. We will do your best to keep families informed of these changes, as we are made aware of them from the State.”

25. On August 5, 2020, the employer announced the employer was going forward with a hybrid learning model for the 2020–2021 school year.

26. The employer did not indicate at any point during 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.

27. The claimant also worked part-time for the instant employer providing home services for students. This position was a 12-month position that the claimant would normally work throughout the entire year as needed. The claimant was not given an offer of reemployment for this part-time position at the end of the 2019-2020 academic year. The claimant worked approximately six hours a week in this part-time position and was paid gross wages of \$25.00 an hour.
28. The claimant's total gross wages from this part-time position providing home services for students between April 1, 2019 and March 31, 2020 were: \$4,055.00.
29. The claimant also worked other jobs for this employer and a 2nd employer during the period of April 1, 2019 and March 31, 2020. For this employer, the claimant sometimes worked as a substitute teacher, sometimes as a bus monitor, and during the summer program of 2019 as a summer aide.
30. In the role of substitute teacher for this employer, the claimant worked this role when a teacher was absent to "step up" in her role as the classroom aide. The claimant was paid an extra amount on top of her classroom aide salary when she worked as a classroom aide [sic]. The claimant's total gross wages for this role from April 1, 2019 and March 31, 2020 were: \$781.82.
31. In the role of bus monitor for this employer, the claimant sits on the bus with children. This role is part-time on an as needed basis. The claimant is paid \$15.00 per hour in this role. The employer does not provide the claimant with an offer of employment for this role. The claimant's total gross wages for this role from April 1, 2019 and March 31, 2020 were: \$210.00.
32. The claimant's total gross wages from April 1, 2019 and March 31, 2020 in her role of summer aide were: \$714.
33. On a spreadsheet calculated by the instant employer, the claimant's gross wages from April 1, 2019 until March 31, 2020 are broken down as follows:

Classroom aide:	\$17,404.58
Home Services:	\$4,055.00
Substitute Teacher:	\$781.82
Summer Aide:	\$714.00
Bus Monitor:	\$210.00

Grand Total Gross Wages: \$23,166.40.

34. On a Monetary Determination dated April 18, 2020, the Department of Unemployment Assistance (DUA) list[s] the following gross wages for the claimant with the instant employer's establishment from April 1, 2019 and March 31, 2020 as follows:

<u>April-June 2019</u>	<u>July-Sept 2019</u>	<u>Oct-Dec 2019</u>	<u>Jan-Mar 2020</u>
\$3,643.98	\$3,717.18	\$3,931.47	\$6,345.66

Total Gross Wags Paid (instant employer):
\$17,638.29

35. The claimant also worked for the 2nd employer from September 1, 2014 until August 1, 2019. The 2nd employer is not a school. The 2nd employer provides services for individuals with disabilities. Th[e] claimant worked as a[n] Applied Behavioral Analysis (ABA) for the 2nd employer. The claimant does not work for the 2nd employer any longer.
36. On a Monetary Determination issued April 18, 2020, the DUA correctly list[s] the claimant’s gross wages with the 2nd employer from April 1, 2019 until March 31, 2020 as follows:

<u>April-June 2019</u>	<u>July-Sept 2019</u>	<u>Oct-Dec 2019</u>	<u>Jan-Mar 2020</u>
\$1,750.00	\$750.00	\$0.00	\$0.00

Total Gross Wages Paid (2nd employer):
\$2,500

37. On a Monetary Determination dated April 18, 2020, the DUA records list the claimant’s combined gross wages with the instant employer and the 2nd employer from April 1, 2019 until March 31, 2020 as follows:

Total Gross Wages Paid:
\$20,138.29

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 ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner’s consolidated findings of fact except as follows. Consolidated Finding # 12, which states the claimant had reasonable assurance of re-employment for the subsequent academic year, is not a factual finding. It is a legal conclusion, which, at this stage of the proceedings is left to the Board of Review. 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 was not in unemployment during the entire period on appeal.

The Notice of Hearing issued to the parties on October 21, 2021, indicated that the sole legal issue to be considered at the hearing was whether the claimant was in total or partial unemployment during the period on appeal. G.L. c. 151A, § 29, authorizes benefits to be paid to those in total or partial unemployment. Those terms are defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

(1) “Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .

(2) “Total unemployment”, an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

“Remuneration” is defined at G.L. c. 151A, § 1(r)(3), which states as follows:

For the purpose of this subsection, "Remuneration", any consideration, whether paid directly or indirectly, including salaries, commissions and bonuses, and reasonable cash value of board, rent, housing, lodging, payment in kind and all payments in any medium other than cash, received by an individual (1) from his employing unit for services rendered to such employing unit, (2) as net earnings from self-employment, and (3) as termination, severance or dismissal pay, or as payment in lieu of dismissal notice, whether or not notice is required, or as payment for vacation allowance during a period of regular employment; . . .

Remuneration shall be deemed to have been received in such week or weeks in which it was earned or for such week or weeks, including any fractions thereof, to which it can reasonably be considered to apply. If the length of the period to which the remuneration applies is not clearly identified, such period shall be determined by dividing such remuneration by the amount of the individual’s average weekly wage.

The review examiner concluded that claimant was not in unemployment from April 12, 2020, through December 26, 2020, because she chose to have the earnings from her 10-month academic-year position disbursed over a 12-month period and she, therefore, earned more than her weekly benefit amount plus earnings disregard during each of those weeks. *See Consolidated Finding # 15.* We believe that this is a misapplication of the law.

Pursuant to the definition of remuneration articulated in G.L. c. 151A, § 1(r)(3), the DUA must apply any wages received by the claimant to the week or weeks in which it was earned, even if the employer disburses those wages to the claimant at a later date. For example, the DUA will attribute an award of back pay to the weeks in which the claimant actually performed the wage-earning services for which she received that award, even if the money was disbursed at a much later date.

See Meyers v. Dir. Of Division of Employment Security, 341 Mass. 79, 82 (1960). The same principle applies to the claimant's wages from her full-time position as a classroom aide.

The last date the claimant performed wage-earning services under her contract for the 2019–20 academic year was June 16, 2020. Consolidated Finding # 9. Because she was working full-time as a classroom aide from the effective date of her claim, April 12, 2020, through the week ending June 20, 2020, and was receiving remuneration for this work, she cannot have been in total unemployment within the meaning of G.L. c. 151A, § 1(r)(2). Because her weekly gross pay for this position exceeded her weekly benefit amount plus earnings disregard, she was also not in partial unemployment within the meaning of G.L. c. 151A, § 1(r)(1), even though she lost hours and wages from her other part-time positions.

While the employer did continue to pay the claimant for her work as a classroom aide during the weeks of June 21, 2020, through August 22, 2020, she was not *earning* these wages during this period because she was not performing services as a classroom aide. Because G.L. c. 151A, § 1(r)(3) specifies that the DUA must attribute wages only to the weeks in which they were *earned*, the review examiner erred in denying the claimant benefits between June 21, 2020, and August 22, 2020, on the ground that she continued to receive pay for her academic-year work. The only wages that may be attributed to the period between June 21, 2020, and August 22, 2020, are those wages earned for services performed during those weeks.

The claimant returned to work in her full-time position as a classroom aide for the 2020–21 academic year during the week of August 23, 2020. Consolidated Finding # 13. As the claimant resumed full-time employment, she cannot have been in unemployment beginning that week.

We, therefore, conclude as a matter of law, that the claimant was in unemployment during the period between June 21, 2020, and August 22, 2020, in any week where she earned less than her weekly benefit amount plus earnings disregard. However, given the nature of the claimant's employment, our inquiry cannot end there.

Because the claimant works for a municipal school system, her eligibility for benefits is also governed by the provisions of G.L. c. 151A, § 28A. Accordingly, we remanded the case to obtain additional information pertaining to whether the claimant, a non-professional employee of an educational institution, was eligible for benefits pursuant to § 28A, which states, 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 for an academic-year position 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.

Upon review of the record, we conclude that letter issued to the claimant on May 27, 2020 was sufficient to provide the claimant with reasonable assurance of re-employment for her classroom aide position in the 2020-21 academic year. *See Consolidated Findings ## 19–22.* Therefore, pursuant to G.L. c. 151A, § 28A, the claimant is not entitled to any unemployment benefits based upon the wages she earned from her full-time work as a classroom aide during the 2019–20 academic year.

However, the claimant's classroom aide position was a 10-month, academic-year position, meaning she was free to take the summer off or pursue other full- or part-time work during the summer break. *See Consolidated Findings ## 2 and 9.* In addition to her classroom aide position, the claimant worked as a summer aide for the instant employer during her base period. Consolidated Finding # 29. As there is no indication that the claimant had reasonable assurance for this summer position, her base period earnings from that work may not be excluded under G.L. c. 151A, § 28A.

The claimant also worked as a home services provider, bus monitor, and substitute teacher for the instant employer throughout her base period. Consolidated Findings ## 29 and 30. In the absence of any indication that the employer provided the claimant with reasonable assurance for these three part-time positions, her base period wages from all three jobs may not be excluded under G.L. c. 151A, § 28A.

Finally, the claimant worked as an Applied Behavioral Analyst for a second employer during her base period. Consolidated Finding # 35. Because her work for this second employer was distinct from the classroom aide position for which the claimant received reasonable assurance, her based period wages from this work also may not be excluded under G.L. c. 151A, § 28A.

Consolidated Findings of Fact ## 33 and 37 provide that the claimant earned a total of \$8,260.82 during her base period from services performed in the five positions distinct from her full-time

classroom aide position. The claimant is entitled to a weekly benefit amount during the period between academic terms based upon these earnings.

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 classroom aide 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. The claimant is not entitled to benefits during the period between April 12, 2020, and June 20, 2020. She is entitled to a weekly benefit amount based only upon \$8,260.82 in base period earnings during the period between June 21, 2020, and August 22, 2020, if she is otherwise eligible. The claimant is not entitled to benefits during the period between August 23, 2020, and December 26, 2020.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 27, 2022



Michael J. Albano
Member

Member Charlene A. Stawicki, 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