The employer provided the claimant with a written offer for re-employment in a professional capacity. However, the position offered was for a considerably lower salary because the claimant failed her licensure exam. Inasmuch as the economic terms of the position offered were considerably less than the previous year, the employer's offer was not reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A. However, the employer provided the claimant with reasonable assurance late in the summer, when she obtained emergency renewal of her teaching license.

Board of Review
100 Cambridge Street, Suite 400
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0082 9876 61

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 separated from her position with the employer on June 17, 2024. She filed a claim for unemployment benefits with the DUA, effective June 16, 2024, which was approved in a determination issued on July 26, 2024. The employer 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 awarded benefits in a decision rendered on August 30, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the employer had not provided the claimant with reasonable assurance of re-employment in the subsequent academic year and, thus, she was not disqualified under G.L. c. 151A, § 28A. 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 employer had not provided the claimant with reasonable assurance of re-employment because the employer offered the claimant a position with a substantially reduced salary for the 2024–25 academic year, 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 working full-time as a special education teacher for the employer, a public school district, on August 26, 2019.

2. During the 2023-2024 school year, the claimant earned $63,695.00 annual salary.

3. In approximately May 2024, the claimant took the Massachusetts Test for Education Licensure. The claimant did not pass the test. As a result, the claimant's license was set to expire on June 30, 2024.

4. On May 24, 2024, the employer issued the claimant a letter stating that her position would be discontinued due to her license expiring.

5. On June 17, 2024, the claimant worked her last physical day for the employer for the 2023-2024 school year.

6. On June 25, 2024, the employer issued the claimant a reasonable assurance letter that her position would be available to her in the 2024–2025 school year. The claimant's salary was offered at $49,605. The claimant's salary was lowered because the claimant did not have an active license. The offer was not contingent. The claimant was not required to notify the employer of acceptance of the offer.

7. On June 25, 2024, the claimant emailed the employer about the offer and objected to the lower salary. The claimant was told that the salary was all that could be offered since she did not have a license. The claimant was told that a scaled salary would be offered if her license was renewed.

8. The claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA) effective June 16, 2024.

9. On June 16, 2024, the claimant applied for an emergency license extension.

10. On August 16, 2024, the claimant was issued the emergency license extension.

11. On August 16, 2024, the employer offered the claimant a salary of $68,819 for the 2024- 2025 school year.

12. The claimant was due to return to work on August 26, 2024.

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 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. While we agree with the review examiner's legal conclusion that the employer did not provide the claimant with reasonable assurance of re-employment at the end of the 2023–2024 academic year, we believe that he erred in awarding the claimant benefits indefinitely beginning June 16, 2024, as outlined below.

As a professional employee of an educational institution, the claimant's eligibility for benefits during the relevant period is properly analyzed under G.L. c. 151A, § 28A, which states, in relevant part, as follows:

> 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:
>
> > (a) with respect to service performed in an instructional . . . capacity for an educational institution, benefits shall not be paid on the basis of such services for any week commencing during the period between two successive academic years or terms . . . to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms . . . .

Before a claimant may be disqualified from receiving benefits pursuant to G.L. c. 151A, § 28A, there must be substantial evidence to show that the employer provided reasonable assurance of re-employment. The burden to produce that evidence lies with the employer. *See* Board of Review Decision 0016 2670 84 (Jan. 29, 2016). If it is determined that a claimant had reasonable assurance, her 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. "Considerably less" means that the claimant must earn at least 90% of the amount she earned in the prior academic period. Id. at part 4(a)(3), p. 5. If the employer's offer meets these criteria, we consider whether the offer includes a contingency. If it does, 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 in the next academic period. *See* Id. at part 4(c), p. 6.

On June 25, 2024, the employer sent the claimant a letter offering her re-employment for the 2024–2025 academic year. Finding of Fact # 6. The employer offered the claimant a position as an interim special education teacher.[1] Because the claimant worked as a special education teacher in

[1] The parties' uncontested testimony in this regard, while not explicitly incorporated into the review examiner's findings of fact, is part of the unchallenged evidence introduced at the hearing and placed in to the record, and it is thus properly referred to in our decision today. *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).

the 2023–2024 academic year, the employer's June 25th written offer met the first and second prerequisites for reasonable assurance articulated in UIPL 5-17. *See* Finding of Fact # 1.

However, the employer was only able to offer the claimant an annual salary of $49,605 for the interim teaching position because the claimant's teaching license had expired at the time the June 25th letter was issued. Finding of Fact # 6. This offer represented an approximately 33% reduction in salary from the claimant's salary during the 2023–2024 academic year. Therefore, the economic conditions of the offer were considerably less than the prior academic period.

We acknowledge that the employer was precluded from offering the claimant a comparable salary for the 2024–2025 academic year because the claimant failed her licensure test. *See* Finding of Fact # 6. However, the reasonable assurance test set forth by the DOL does not include consideration of such factors as whether the claimant was responsible for not meeting the salary requirements. The test is straightforward. It does not allow for an assessment of fault. Therefore, we agree with the review examiner's legal conclusion that the employer did not offer the claimant reasonable assurance of re-employment, because the offer of re-employment included economic terms that were considerably less than the prior academic period.

However, once the claimant obtained her emergency teaching license on August 16, 2024, the employer offered the claimant a teaching position with a salary of $68,819.00 for the 2024–2025 academic year. Findings of Fact ## 10 and 11. The economic terms of this offer were greater than the economic terms of her position in the 2023–2024 academic year. Absent any evidence that this offer contained any contingencies, and we see none, the employer has met its burden to show it provided the claimant with reasonable assurance of re-employment beginning August 16, 2024.

We, therefore, conclude as a matter of law that the claimant did not have reasonable assurance of re-employment under G.L. c 151A, § 28A, during the period between June 16, 2024, and August 17, 2024. We further conclude the employer has met its burden to show it provided the claimant with reasonable assurance of re-employment for the subsequent academic year beginning the week of August 18, 2024.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the weeks between June 16, 2024, and August 17, 2024, if she is otherwise eligible. The claimant is denied benefits for the week of August 18, 2024.



BOSTON, MASSACHUSETTS
DATE OF DECISION - October 30, 2024

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

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