

The employer provided the claimant with an offer of reemployment in the same full-time position at a higher pay rate on July 5, 2024. Because this letter provided the claimant with reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, the claimant was not entitled to benefits beginning July 7, 2024.

**Board of Review
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Issue ID: 0083 2572 97

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 reverse.

The claimant separated from her position with the employer on June 20, 2024. She filed a claim for unemployment benefits with the DUA, effective June 16, 2024, which was denied for the period between July 7, 2024, and August 24, 2024, in a determination issued on August 1, 2024. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits during this period in a decision rendered on September 20, 2024. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not been given reasonable assurance of re-employment for the subsequent academic year, and, thus, she was not eligible for benefits under G.L. c. 151A, § 28A. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to issue subsidiary findings of fact pertaining to the employer's offer of re-employment for the subsequent academic year. 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 did not have reasonable assurance of re-employment for the subsequent academic year because she was not eligible to participate in the employer's "initial pooling and bid process" for selecting jobs in the subsequent academic year, 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 and credibility assessment are set forth below in their entirety:

1. Prior to filing for benefits, the claimant worked as a paraprofessional for the employer, a public school.
2. The claimant began working for the school district on 1/24/2011. In the fall of 2023, the claimant changed positions to that of a paraprofessional. Previously, the claimant worked for the same school district as a cafeteria attendant.
3. The claimant's supervisor was the employer's principal.
4. The claimant worked a full-time schedule, around 34.20 hours over five days per week, and earned \$25.46 per hour.
5. Since becoming a paraprofessional, the claimant has been a member of the employer's teacher's union, paraprofessional unit (Union).
6. The employer has a collective bargaining agreement with the Union that sets the terms of employment for employees in the paraprofessional unit of the employer.
7. While working for the employer, the claimant has not worked anywhere else.
8. In accordance with the employer's collective bargaining agreement with the Union, the employer has a bidding process in place for paraprofessionals wherein the employee enters a pool for available positions (initial pool).
9. Following the initial pool, the employer rehires further paraprofessionals based on seniority.
10. The claimant was not eligible to enter the employer's initial pool to bid for a position for the following school year because she had not worked the requisite 205 days required by the collective bargaining agreement between the employer and the Union.
11. On 3/25/2024, the employer notified the claimant that she would be laid off for the 2024–2025 school year.
12. The claimant last performed work for the employer on 6/20/2024, the end of the 2023–2024 school year.
13. On 06/21/2024, the claimant filed a claim for unemployment benefits with the Department of Unemployment Assistance (DUA), effective 6/16/2024.
14. In the beginning of July 2024, the employer contacted the claimant to inquire about her availability for the following school year and to enter her into the employer's recall process. She selected three positions from the remaining vacancies.

15. On 7/5/2024, the employer provided the claimant with a letter notifying her of a new assignment as a “Paraprofessional-Sped Sub/Sep. Aide-SPED inclusion Programs” for the 2024–2025 school year, reporting on 9/3/2024.
16. The paraprofessional position the employer offered to the claimant for the 2024–2025 school year was full-time, approximately 34.20 hours per week, at a rate of pay of \$27.13 per hour. The position is covered by the collective bargaining agreement between the employer and the Union.
17. During the summer of 2024, the claimant did not work.
18. On 8/1/2024, the DUA issued the claimant a Notice of Disqualification within Section 28A of the Law stating, “It has been established that you have performed services for an educational institution during the most recent academic year or term and there is a contract or a reasonable assurance that you will perform services for an educational institution during the next school year or term. Therefore you 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”.
19. The Notice of Disqualification further stated, “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 7/7/2024 and through 8/24/2024”. The claimant’s appeal is from this determination.

Credibility Assessment:

The claimant and the employer both participated in the initial hearing by telephone. The credible testimony of both the claimant and the employer’s witness during the hearing was free of disagreement or conflict with regard to the facts of the claimant’s employment, separation, and re-employment. Both parties agreed that the claimant was not eligible to participate in the employer’s initial paraprofessional bidding process before the end of the 2023-2024 school year. The employer’s witness directly and candidly stated that the claimant was not eligible to participate in the employer’s initial paraprofessional bidding process because she had not worked the requisite 205 days as a paraprofessional in accordance with the employer’s collective bargaining agreement. The record shows that on 3/25/2024, the employer provided the claimant with a lay-off letter for the 2024–2025 school year. The claimant testified that the employer contacted her in the summer of 2024 to participate in a “pool and bid” process. The employer’s witness elaborated that once the initial paraprofessional bidding process concludes, the employer makes the remaining positions available based on seniority. Both parties affirmed that in July 2024, the employer contacted the claimant to involve her in this secondary recall process, resulting in the claimant being offered a full-time assignment as a paraprofessional at a different school for the 2024–2025 school year via a letter dated 7/5/2024. Based on the totality of the evidence, the claimant’s assertion that

the employer failed to give her reasonable assurance of re-employment by the end of the 2023–2024 academic year is deemed reasonable. However, it is further determined that the claimant did have reasonable assurance of reemployment on the date the employer issued the claimant a recall letter, 7/05/2024. Given this, the employer’s testimony in this area is accepted as credible.

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, we reject the portion of the review examiner’s credibility assessment that accepts the parties’ testimony about when the claimant was provided with reasonable assurance of reemployment for the subsequent academic year. The question of when and if the claimant had reasonable assurance of re-employment is a legal conclusion that, at this stage of the proceedings, is reserved for the Board. 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.”). As discussed more fully below, we reject the review examiner’s legal conclusion that the claimant was entitled to benefits during the period between July 7, 2024, and August 24, 2024.

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.

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 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. “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 July 5, 2024, the employer provided the claimant with a letter offering her reemployment for the 2024–2025 academic year. Consolidated Finding # 14. In this letter, the employer offered a full-time paraprofessional position at a rate of pay higher than her full-time paraprofessional position during the 2023–2024 academic year. Consolidated Findings ## 2, 4, 15, and 16. As such, the employer has shown that, as of July 5, 2024, it provided the claimant with a written offer of reemployment in the same capacity and under more favorable economic terms than the previous academic year.

We, therefore, conclude as a matter of law that the claimant received reasonable assurance of reemployment for the subsequent academic period within the meaning of G.L. c. 151A, § 28A(b), in her full-time paraprofessional job, and she is disqualified from receiving benefits during the relevant period based upon wages earned in that position.

The review examiner's decision is reversed. The claimant is denied benefits for the weeks between July 7, 2024, and August 24, 2024, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 27, 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