0002 1339 03 (May 12, 2014) – An adjunct professor offered only two courses in the fall semester, after teaching five courses during the prior academic period, had reasonable assurance of teaching based upon a pattern of courses not being cancelled due to inadequate enrollment, but the offer was not under substantially similar economic terms and conditions. Board distinguishes adjunct professors from substitute teachers.

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Issue ID: 0002 1339 03

BOARD OF REVIEW DECISION

*** Corrected[1] ***

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 affirm.

The claimant stopped working for the employer at approximately the end of June, 2012. He filed a claim for unemployment benefits with the DUA, effective July 1, 2012, which was initially denied. The claimant filed a timely appeal from the denial of benefits. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's determination and awarded benefits in a decision rendered on October 1, 2012. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not been provided with reasonable assurance of re-employment for the following academic term and, thus, was not disqualified, 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 provided the parties, as well as the DUA, an opportunity to submit to the Board in writing reasons for agreeing or disagreeing with the hearing decision. The claimant and the DUA responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the employer did not provide reasonable assurance of re-employment in successive academic terms is supported by substantial and credible evidence and is free from error of law, where the employer reserved the right to cancel courses due to low enrollment but such cancellation in practice was unlikely, and where the claimant had a contract entitling him to a minimum of one course per academic term, but where the claimant, who had taught five courses during the spring semester of 2012,

[1] This decision is reissued to correct editorial errors.

was not offered any courses for the fall semester until August 8, 2012, and was then offered only two.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant initiated a new claim for unemployment insurance benefits on July 2, 2012, effective July 1, 2012.

2. The base period of this claim is from July 1, 2011 through June 30, 2012.

3. During the base period of the claim, the claimant worked for two (2) employers, both of which are educational facilities.

4. The claimant's benefit rate is based solely on wages earned while working for these educational facilities.

5. The claimant has worked for the employer since May, 2010 [sic].

6. During the spring semester, the claimant worked as a part time senior lecturer for the employer, a college, teaching five (5) courses and earning $5,200.00 per course.

7. Through the collective bargaining agreement of the claimant's union, the claimant is guaranteed to be paid for one (1) course each semester whether it runs or not.

8. The claimant was notified by the Chief Academic Officer by letter, dated August 8, 2012, that he was offered two (2) courses for the fall semester for the employer.

9. The claimant signed the offer letter and returned it to the employer on an unknown date in August, 2012.

10. As a part time senior lecturer, the claimant receives the benefits of full time faculty, including sick leave.

11. The claimant had obligations to the employer during each semester to have office hours and attend department meetings whether or not he was scheduled to teach any classes.

12. The claimant returned to work for the employer as of August 27, 2012. At that time he was given a third class which consequently [sic] was reassigned to another instructor.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the findings of fact are supported by substantial and credible evidence; and (2) whether the ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact and credibility assessment except as follows. Finding of fact # 5 incorrectly states that the claimant has worked for the employer since 2010. As set forth in Exhibits 2, 5, 6, and 12, the parties reported that the claimant has worked for the employer since 2007. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant was not provided with reasonable assurance of reappointment for the fall 2012 academic term.

G.L. c. 151A, § 28A, 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:
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> (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; . . .

The claimant argues that, because the employer's courses are offered contingent upon enrollment and seniority, there is no guarantee of employment from semester to semester. In prior decisions, the Board has interpreted the above quoted statutory provision to allow benefits categorically, where an offer of employment in a successive year or term is contingent upon enrollment. *See, e.g.*, BR-95647 (April 8, 2005); BR-95829 (February 24, 2005)[2]. We take the opportunity provided by the instant case and its companion (Issue No. 0002 1339 07) to consider whether, under some circumstances, an offer of employment that is subject to an enrollment contingency may be sufficiently definite to constitute "reasonable assurance." Based largely

[2] BR-95647 and BR-95829 are unpublished Board of Review decisions, available upon request. For privacy reasons, identifying information is redacted.

upon the federal guidelines discussed below, we conclude an enrollment contingency does not, in and of itself, preclude the possibility of reasonable assurance.

Under the federal guidelines, an offer of reemployment constitutes a bona fide offer of reasonable assurance even if there is no contractual guarantee, provided that the economic terms and conditions of the position in the second academic period are not substantially less. *See* U.S. Dept. of Labor Unemployment Insurance Program Letter (UIPL) No. 4-87 (Dec. 24, 1986). To be a "bona fide offer" providing "reasonable assurance" within the meaning of the UIPL, the offer must be more than a "mere possibility." However, some uncertainty is permissible as long as the employer can establish that, "… (1) the circumstances under which the claimant would be employed are not within the educational institution's control, and (2) … such claimants normally perform services the following academic year." Id. Furthermore, "[reasonable] assurance exists only if the economic terms and conditions of the job offered in the second period are not substantially less (as determined under State law) than the terms and conditions for the job in the first period." Id.

While there is no Massachusetts appellate decision on point, courts in other jurisdictions have held that, where an adjunct professor at a college or university is offered courses for the following academic term contingent on enrollment and can show a pattern of re-employment under similar conditions, the claimant will be deemed to have reasonable assurance within the meaning of the law. *See, e.g.,* Archie v. Unemployment Compensation Board of Review, 897 A.2d 1 (Pa. Commw. Ct. 2006) (a part-time adjunct professor with a pattern of offers to teach courses contingent upon enrollment had reasonable assurance of re-employment in light of more than three prior years of consecutive appointments with the employer for similar courses despite the enrollment contingencies).

Here, the review examiner found that, in the spring 2012 academic term, the claimant taught five courses for the employer. The claimant filed a claim effective July 1, 2012. By letter dated August 8, 2012, the employer offered the claimant two courses for the fall semester, contingent upon enrollment. The review examiner further found that claimant's collective bargaining agreement guaranteed him the right to be paid for one course each semester, whether or not it runs. Documentary evidence in the record indicates that the claimant has taught at least three courses for the employer (and often more) in every fall and spring academic term for the employer since 2008 (Exhibit 12). While occasionally an offered course has been cancelled for lack of enrollment, the clear pattern has been for the claimant actually to teach four to five courses per term.[3] This pattern establishes that, as to these parties, the two courses offered in August, 2012, were sufficiently likely to occur so as to meet the requirement that the offered employment was reasonably assured. As of August 8, 2012, therefore, the claimant had a reasonable assurance of employment for two courses in the fall semester.[4]

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[3] The claimant's course appointment history, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record in Exhibit 12, 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 Director of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

[4] Reasonable assurance for purposes of G.L. c. 151A, § 28A(a) exists as of the time the employer notifies the claimant of a specific assignment for an upcoming term. Since we have concluded in this decision that claimant was not offered a substantially similar position for the fall term, as compared with the preceding term, the date on which such notice was provided (here, August 8) would not affect the outcome of this case or the period of claimant's eligibility for benefits during the summer of 2012.

However, the federal guidelines set forth in UIPL No. 4-87, as noted above, also require that the claimant be offered economic terms that are not "substantially less" than what the claimant had obtained during the prior academic period. The UIPL itself makes clear that a substantial reduction in the amount of work offered will defeat a finding of reasonable assurance. *See* UIPL No. 4-87 at page 3. Therefore, the number of courses offered (and likely to take place) in the succeeding academic period must not be substantially fewer than in the preceding period in order for the claimant to have a reasonable assurance that will defeat benefits during the break period. In the instant case, the claimant was offered two courses for the upcoming academic term, fewer than the five that he had taught during the preceding spring semester and fewer than the four he had taught the preceding fall (of 2011).

The UIPL presupposes that a reduction in the amount of work (courses) offered will translate into a reduction in earnings, as that is borne out here. The fewer assigned courses during the fall 2012 semester also reflect substantially less income than during the previous academic term. Assuming the claimant was to be paid $5,200.00 per course, as he was paid during the spring 2012 term, the claimant's fall term offer constituted a 60% reduction in semester earnings from $26,000 in the spring to $10,400 offered for the fall. This is by any measure a substantial and significant reduction in anticipated income. Even if the fall semester of 2012 were compared with the preceding fall semester of 2011, the reduction would be approximately 50%. In our view, therefore, the economic terms and conditions of the claimant's offer of re-employment for the fall 2012 semester were substantially less than during the preceding academic term.[5]

On appeal, the employer urges the Board to treat the claimant as a part-time employee with variable hours, much like a substitute teacher. Indeed, in two published decisions, the Board has held that on-call substitute teachers had reasonable assurance of re-appointment under the same economic terms and conditions when they were offered on-call substitute teaching positions in the subsequent academic term, despite the variable number of days called. *See* BR-121907-A (July 31, 2012) and BR-117509-A (March 27, 2012). However, adjunct professors are not like on-call substitute teachers. Substitute teachers can put themselves on call lists for multiple school employers each semester. Moreover, the nature of their position requires little to no preparation prior to reporting for work. In contrast, adjunct professors cannot simply apply to teach a course elsewhere if the course is suddenly cancelled, as they must devote considerable time to preparing for each course before the semester begins. More importantly, in contrast with adjunct professors such as the claimant, there is no way to measure or anticipate the amount of work an on-call substitute teacher will have in any given academic term, nor compare it in quantity with a preceding term. For purposes of determining whether the economic conditions of an on-call substitute are "substantially reduced" from the previous term, the only available criteria are those relating to hourly pay and benefits.

As noted earlier, although the record reflected that, as of August 8, 2012, a high likelihood existed that claimant would teach courses for the employer during the fall of 2012, the drop in

[5] For similar reasons, the employer's argument that the claimant is contractually guaranteed that he will be paid for one course each semester, regardless of enrollment, does not fully satisfy the "bona fide offer" and "reasonable assurance" standards set forth in the federal guidelines. This is because the claimant's pattern of employment reflected in this record shows consistent employment at higher than one course per semester.

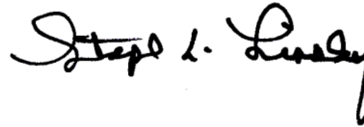
the number of courses offered from the previous academic term from five to two was an offer of employment under substantially reduced economic terms and conditions.

We, therefore, conclude as a matter of law that the employer did not provide the claimant with reasonable assurance of re-employment for the following academic term, within the meaning of G.L. c. 151A, § 28A.

The review examiner's decision is affirmed. The claimant is entitled to benefits during the period between academic terms, beginning the week ending July 7, 2012, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 12, 2014

Paul T. Fitzgerald, Esq.
Chairman



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ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

AB/JN/rh