0002 1339 07 (May 12, 2014) – Where adjunct professor was offered a greater number of courses for the upcoming academic term than he had taught during the preceding term, and there was a clear pattern of offered courses not being cancelled due to low enrollment, he was disqualified from receiving benefits between semesters. He had reasonable assurance of re-employment under substantially similar economic terms and conditions within the meaning of G.L. c. 151A, § 28A.

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Issue ID: 0002 1339 07

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 reverse.

The claimant stopped working for the employer on or about December 22, 2011. He filed a claim for unemployment benefits with the DUA, which was initially approved, but subsequently denied in a re-determination issued on July 13, 2012. The DUA determined that the claimant had been overpaid benefits in the amount of $2,500.00. The claimant appealed the re-determination and overpayment to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's re-determination and overpayment and awarded benefits in a decision rendered on September 4, 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 remanded the case to the review examiner to take additional evidence on the claimant's compensation, his prior teaching history with the employer, and the employer's guarantees of minimum teaching assignments. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Subsequently, 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 employer responded. Our decision is based upon our review of the entire record.

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

The issue before the Board is whether the review examiner's conclusion that the claimant did not have reasonable assurance of re-employment is supported by substantial and credible evidence and is free from error of law, where the claimant had taught four courses during the fall semester and had been offered five courses during the upcoming spring semester, where the employer reserved the right to cancel courses due to low enrollment, but where the evidence did not reflect a significant likelihood that one or more of the offered courses would, in fact, be cancelled.

Findings of Fact

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

1. The claimant began working for the employer in about 2007.

2. The employer is a college.

3. In January 2010, the claimant was promoted to the position of Senior Lecturer at the employer's college.

4. Before his unemployment claim was reopened for the week ending December 24, 2011 (see below), the claimant was employed part-time as a senior lecturer, ending on or about December 22, 2011.

5. The claimant stopped working on or about December 22 because the college had a Christmas break.

6. As of December 2011, the claimant had the least amount of seniority among the lecturers.

7. There is in effect a collective bargaining agreement between the college and its lecturers. The agreement guarantees that lecturers will teach three courses a year and if the employer fails to provide lecturers with three courses in a year, the lecturers will be paid for three courses.

8. If none of the three "guaranteed" courses offered to the claimant met minimum enrollment requirements or were otherwise cancelled, a dialogue would take place between the claimant and the Chair of the Department where he worked to determine if there were substitute course offerings the claimant could teach, if there was project work the claimant could do, or if an agreement could be reached whereby the claimant could teach at a tutorial rate to students who did enroll in the cancelled course. The claimant could potentially work performing a combination of these options. The claimant's pay and hours would be determined based on what work the claimant ended up performing.

9. It is the employer's practice to send appointment letters to its lecturers before the start of a semester.

10. The appointment letters include the following language: "I am pleased to offer you a part-time teaching position at [Employer]. This appointment is subject to the terms and conditions of the Agreement between the College and the AAUP…The College reserves the right to cancel courses prior to the start of the course and in doing so assumes no financial obligation to the faculty member. If the enrollment fails to make the necessary minimum (# of students) for the salary specified below, the College may choose to offer the tutorial rate noted in the Agreement with the AAUP. You may accept or decline this offer to teach a tutorial (see below). If you decide to accept this offer and wish to receive your compensation by the schedule below, you must return this signed appointment letter by (date)."

11. In its appointment letters, the employer offers lecturers the opportunity to teach as a tutor if enrollment fails to make the necessary minimum of students for the course to be held.

12. The appointment letters include a statement at the bottom for the lecturer's signature. Above the signature line, it reads, "I plan to return to [Employer] and I accept the terms of the appointment". Below the signature line, the letters include a line for the lecturer to indicate if he/she will or will not teach at the tutorial rate.

13. At times during the claimant's employment, courses for which he received an assignment letter and indicated he accepted the assignment, the course did not go forward.

14. Each semester, the employer has two eight week sessions. In 2012, the first eight week session began on January 23, 2012 and the second eight week session began on March 19, 2012.

15. On or about December 20, 2011, the employer sent the claimant an appointment letter listing a teaching assignment from January 23, 2012-March 18, 2012 for a Writing Workshop I Course. The claimant responded to this letter indicating he accepted the appointment.

16. On or about December 12, 2011, the employer sent the claimant an appointment letter listing a teaching assignment of two English courses, both beginning on January 23, 2012 and ending on March 18, 2012. The claimant responded to this letter indicating he accepted the appointment.

17. On January 23, 2012, the claimant began teaching the three above-listed assignments.

18. On or about December 20, 2011, the employer sent the claimant an appointment letter listing a teaching assignment from March 19, 2012 – May

13, 2012 for a Rock Lyrics as Poetry course. The claimant responded to this letter indicating he accepted the appointment.

19. On or about December 20, 2011, the employer sent the claimant an appointment letter listing a teaching assignment from March 19, 2012 – May 13, 2012 for a Writing Workshop II Course. The claimant responded to this letter indicating he accepted the appointment.

20. The claimant is compensated four times a semester on a monthly basis.

21. The claimant is paid by a method other than per hour or per course. He is paid by a method which includes as part of the calculation the number of courses the claimant teaches during the semester.

22. In the fall 2011 semester, the claimant was offered four courses. In the fall of 2011 semester, the claimant taught four courses.

23. In the spring of 2012 semester, the claimant was offered five courses. In the spring of 2012, the claimant taught five courses.

24. For each of the weeks ending December 24, 2011, December 31, 2011, January 7, 2012, and January 14, 2012, the claimant was paid unemployment benefits in the amount of $625.00 (a total of $2,500.00).

25. On December 29, 2011, the claimant's unemployment claim was reopened effective December 24, 2011.

26. On July 13, 2012, the Department issued a Notice of Redetermination and Overpayment to the claimant. The Notice stated that the claimant was not entitled to waiting period credit and/or benefits for the weeks ending 12/24/11-1/14/12".

27. The Notice stated that in accordance with the provisions of Section 28A of the Law, the claimant received benefits to which he was not entitled and that the claimant was responsible for returning to the unemployment fund, benefit payments in the amount of $2,500.00 which were collected by him.

28. The Notice indicated that the overpayment was not due to misrepresentation of facts and not subject to a 12% annual percentage rate interest charged on the unpaid balance.

<u>Ruling of the Board</u>

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the ultimate 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 conclude, contrary to the examiner, that the claimant did have reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A.

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:
>
> (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; . . .

In prior decisions, the Board has interpreted the above 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 03) 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 upon the federal guidelines discussed below, we conclude that the circumstances present in this case meet that standard, despite the ostensible enrollment contingency.

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

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

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).

In this case, the facts reflect that, for the upcoming spring 2012 academic term, the claimant was offered five courses and he wound up teaching five courses. Further, for the previous fall 2011 academic term, the claimant had been offered four courses and had taught four courses. 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 at least 2008 (Remand Exhibit 10). 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] Under these circumstances, the employer has met its burden of establishing sufficient likelihood that the claimant will actually teach and be compensated for the courses that he was offered for the spring of 2012 as to have given him reasonable assurance.

The employer also contends that the claimant's status as a Senior Lecturer binds the employer to a contractual requirement that the claimant be paid for at least one course per term. In the employer's view, this contractual commitment in itself supplies reasonable assurance for the intervals between terms and/or between academic years. This argument, however, fails to satisfy another aspect of the federal guidelines, that the claimant be offered economic terms that are not "substantially less" than what had been received during the prior academic period. *See* UIPL No. 4-87. 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. By the same token, this Board has held that a claimant whose primary employment was as a full time teacher during the preceding academic year and who receives an offer of on-call substitute teaching for the following year has not received an offer of substantially similar economic terms and therefore lacks a reasonable assurance. BR-109037-OP.[4] Therefore, in order for the claimant to have a reasonable assurance, the compensation and other economic terms (here, corresponding to the number of courses) offered in the succeeding academic period must not be substantially reduced from the preceding period.

In the instant case, the claimant was actually offered a greater number of courses for the upcoming academic term (five) than he had taught during the preceding term (four). As noted earlier, the record reflected a high likelihood that plaintiff would teach at least four of the five courses offered. Thus, there was both a pattern of re-employment by the employer and substantially similar terms and conditions offered for the subsequent term.

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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 into the record as Remand Exhibit 10, 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).

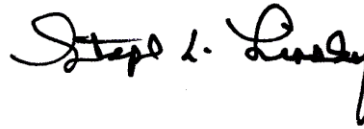
[4] In that case, the claimant had also worked a secondary job as a substitute teacher during the preceding academic period, and the wages from that secondary job were excluded when establishing the amount of her benefit rate and credit.

We, therefore, conclude as a matter of law that the employer provided 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 reversed. The claimant is denied benefits for the weeks ending December 24, 2011, through January 14, 2012. The claimant is responsible for returning to the unemployment fund the overpaid benefits in the amount of $2,500.00. The overpayment is not subject to an interest charge.

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.

AM/AB/JN/rh