

**Board of Review
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**Issue ID: 0010 7230 82
Claimant ID: 335059**

BOARD OF REVIEW DECISION

0010 7230 82 (Sept. 16, 2014) – The claimant's re-appointment letter was not reasonable assurance of reemployment as a long-term substitute teacher for the following academic term, because the letter did not offer a specific position and the claimant had to affirmatively apply for posted positions. The offer was a mere possibility of reemployment and nothing more.

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 reverse.

The claimant stopped working for the employer on or about June 21, 2013. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 12, 2013. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 24, 2014. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had been provided with reasonable assurance of reemployment for the following academic term and, thus, was disqualified, under G.L. c. 151A, § 28A. 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 make subsidiary findings of fact on the employer's assurance of employment for the following academic term. 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 conclusion that the claimant had reasonable assurance of reemployment as a long-term substitute teacher for the following academic term 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 assessments are set forth below in their entirety:

1. The employer is a school municipality.

2. On or about September 12, 2012, the claimant started to work as a full time long term substitute teacher for the employer. The claimant was a special education teacher.
3. The claimant was scheduled to work Monday through Friday from 8:45AM until approximately 2:30PM. The claimant was paid an annual salary of approximately \$56,000.
4. On May 16, 2013, the employer wrote a letter to the claimant (Exhibit 13).
5. In this letter, the employer wrote:

“This letter is to notify you that it is our present intention to employ you for the next academic school year (2013-2014) as a long term substitute. If for any reason our future employment situation changes, you will be notified thereafter.

In the interim, this notice is intended as reasonable assurance for employment in the academic school year as stated above (Exhibit 13).”

6. In the letter dated May 16, 2013, the employer did not offer the claimant a specific long-term substitute position, in a specific school and/or specific classroom, for the 2013-2014 school years.
7. The claimant did have to affirmatively apply for teaching positions with the employer’s establishment.
8. The employer maintains an electronic database to post its available positions. The claimant did apply for permanent and temporary teaching positions on the employer’s electronic database. The claimant was most interested in long term substitute teaching positions as the claimant had held such positions in the past.
9. In May 2013, the claimant did interview in person for a teaching position with the employer. The claimant was not offered this position.
10. The claimant also had a few telephone interviews with the employer for teaching positions. The employer did not offer these positions to the claimant.
11. The claimant’s last day of work was on or about June 21, 2013.
12. The employer subsequently started its summer recess.
13. The employer has not offered the claimant any teaching positions since her last day of work on June 21, 2013.

14. The employer has not offered the claimant any specific long-term substitute or permanent teaching positions after the May 16, 2013 [letter] was issued.
15. On June 24, 2013, the claimant filed a claim for unemployment insurance benefits (Exhibit 1). The effective date of this claim is June 23, 2013.
16. The claimant only has base period wages from the employer (Exhibit 2).
17. The 2013-2014 academic school years started on or about August 23, 2013 for the employer's staff members. This was an orientation period. The students started school on or about August 30, 2013.
18. On September 12, 2013, the Department issued a Notice of Disqualification under Section 28(a) (b) & (c) of the Law for the period of June 23, 2013 through September 7, 2013 (Exhibit 8).
19. The claimant appealed the Notice of Disqualification (Exhibit 8).
20. As of February 18, 2014, the employer still had not offered the claimant any teaching positions.

Ruling of the Board

In accordance with our statutory obligation, we review 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. 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 reject the review examiner's legal conclusion that the claimant had reasonable assurance of reemployment for the following academic term.

As noted above, in denying the claimant benefits, the review examiner applied G.L. c. 151A, § 28A, which governs the payment of benefits based on services performed in an educational institution. This statutory provision 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; . . .

Under 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” of continued employment. *Id.*

Based on the record before us, we cannot accept the review examiner’s conclusion that the employer’s letter to the claimant dated May 16, 2013 (included in the record as Exhibit 13) represented reasonable assurance of reemployment as a long-term substitute teacher for the following academic term. The consolidated findings of fact reflect that even though the employer notified the claimant of its intent to reemploy her, the employer did not offer her a specific long-term substitute teaching position in a specific classroom. Furthermore, the review examiner found that in order for the claimant to be reemployed, she had to apply affirmatively for teaching positions posted on an electronic database, and the employer determined thereafter whether or not to grant the claimant an interview. The employer failed to actually hire the claimant for any of the teaching positions for which she applied and interviewed; and, five months into the school year, the employer had still not reemployed the claimant in any teaching position. Under these circumstances, we view the employer’s letter to the claimant as offering a mere possibility of reemployment as a long-term substitute teacher, and nothing more.

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

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week ending June 23, 2013, and for subsequent weeks, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 16, 2014



Judith M. Neumann, Esq.
Member

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/rh