0017 6916 85 (Oct. 19, 2016) – In order to determine whether adjunct professors, who are paid by the course and hired one semester at a time, received reasonable assurance to teach under economic terms that were not substantially less, the appropriate comparison is to compare the offer with the economic terms of the most recent academic semester.

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Issue ID: 0017 6916 85

BOARD OF REVIEW DECISION

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. Benefits were denied on the ground that the claimant had received reasonable assurance of re-employment for the next academic period, pursuant to G.L. c. 151A, § 28A, and, thus, is not entitled to benefits during the period December 20, 2015, through January 16, 2016.

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on March 2, 2016. The claimant appealed 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 in a decision rendered on May 24, 2016. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court, pursuant to G.L. c. 151A, § 42.

Following a request from the Director of the DUA to revoke and reconsider our decision, as permitted under G.L. c. 151A, § 71, the Board issued an Order to Revoke its Denial of the claimant's appeal on September 26, 2016.

The issue before us is whether the review examiner's conclusion that the claimant adjunct professor had reasonable assurance of reemployment for the spring, 2016, semester is supported by substantial and credible evidence and is free from error of law, where the number of courses offered was consistent with spring terms in previous years but substantially less than in the most recent fall semester.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we reverse the review examiner's decision.

Findings of Fact

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

1. The claimant was employed as a part-time Lecturer for the Employer, a university.

2. During her employment, the claimant had been assigned to teach two or three classes in both the fall and spring academic semesters. The claimant has always been assigned to teach at least one class during a semester. In 2011-2012, the claimant was assigned to teach only one class each semester.

3. In spring 2014, the claimant taught two classes. In fall 2014, the claimant taught two classes. In spring 2015, the claimant taught two classes.

4. In fall 2015, the claimant was assigned to teach three classes. The claimant was paid approximately $15,000.

5. In January 2016, the employer supplied a letter to the claimant with a contract to teach in the 2016 spring semester. The contract stated the contract was for "English – 6 cr." The contract was for $10,008 for January 24, 2016 through May 31, 2016.

6. The claimant is teaching two classes in spring 2016.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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. However, as discussed more fully below, we conclude that the claimant did not have reasonable assurance of re-employment, within the meaning of G.L. c. 151A, § 28A.

As an adjunct instructor performing services for an educational institution, the claimant's eligibility for benefits during the winter break between semesters is governed by G.L. c. 151A, § 28A, which provides, 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 . . . .

The employer bears the burden to establish that it has provided reasonable assurance of re-employment. *See* Board of Review Decision 0016 2670 84 (January 29, 2016).

We have previously held that an employer's offer to teach in the next academic period may constitute reasonable assurance even if the offer was contingent upon sufficient student enrollment. A pattern of teaching each semester year after year may establish a reasonable likelihood that, notwithstanding the contingent nature of the offer, the adjunct instructor will teach again the next semester. However, such a pattern is not, by itself, sufficient to demonstrate reasonable assurance, as meant under the statute. The claimant also must be offered employment under economic conditions that are not substantially less. *See* U.S. Dept. of Labor Unemployment Insurance Program Letter (UIPL) No. 4-87 (Dec. 24, 1986).

The employer pays the claimant based upon the number of classes she teaches. For the spring, 2016 semester, it has offered the claimant two classes. There are two ways to look at this offer. On the one hand, this is the same number of courses that she taught the previous spring, in 2015.[1] *See* Finding of Fact # 3. The review examiner concluded that because the claimant's two classes for the spring, 2016, semester are the same number as she is usually assigned to teach in the spring, it was an offer under economic conditions that are substantially the same. On the other hand, the claimant has an offer for the spring, 2016, semester that is only two-thirds of what she taught in the immediately preceding (fall) semester. The employer paid the claimant $15,000 to teach three classes in the fall, 2016, semester and is offering her $10,008 to teach two classes in the next semester. Findings of Fact ## 4 and 5. The question is whether we are to compare the spring, 2016, offer with the previous spring's offer or, instead, with the immediately preceding fall, 2015, offer.

The statutory language in G.L. c. 151A, § 28A(a) states that, in examining eligibility for benefits "during the period between two successive academic years or terms," we are to compare "the first academic year or term" with "the second of such academic years or terms." In its UIPL, the Department of Labor (DOL) instructs us to compare the economic terms and conditions in the "first period" with the "second period."[2] We think it is reasonably apparent that we are to compare consecutive academic years, terms, or periods. We also consider that both the statutory provision and the DOL guidance are meant to apply to instructional employees in academic institutions from grade school through college, and that most teachers, other than adjuncts, work under contracts that cover an entire academic year. With such teachers, it makes sense to view the prior academic period as the prior academic year. But, where an adjunct professor is hired one semester at a time, it is more consistent with the statutory language to compare her prior academic "period" as the prior semester.

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[1] Although the findings actually go back to the spring of 2014, showing a pattern of teaching two courses in each semester except during the fall, 2015, semester, this additional history is not material to our decision.

[2] UIPL No. 4-87, paragraph 4(c).

In the present case, the employer's fall, 2015, and spring, 2016, semesters were consecutive academic periods for the claimant. She earned 33% more in the fall than she was being offered to teach in the spring. By any measure, this constitutes a substantial drop in the economic terms and conditions of her employment in consecutive academic terms.

We believe that confining our comparison of economic terms and conditions offered to an adjunct instructor to the most recent academic semester both fulfills the statutory objective and infuses a certain degree of consistency into the reasonable assurance analysis.[3] In the long run, it will also have a neutral effect on the award of benefits.[4]

We, therefore, conclude as a matter of law that the employer has failed to prove that the claimant received reasonable assurance of reemployment under substantially similar economic conditions for the spring, 2016, academic term, pursuant to G.L. c. 151A, § 28A.

[3] Employers must still present a claimant's hiring history reaching back several years in order to establish the likelihood that the courses or salary, which are being offered contingent upon enrollment, will actually be taught or paid.

[4] For example, if an adjunct professor has an unusually high course load in one semester, but consistently teaches the same number of courses in each semester thereafter, there will be no substantial change in economic terms and conditions between subsequent academic terms. As another example, an adjunct, who usually teaches three courses in the fall and two courses in the spring but in a particular year is offered only two courses for the fall, may not be eligible during the summer break that year, although she would have been eligible if the comparison were "fall to fall."

The review examiner's decision is reversed. The claimant is entitled to receive benefits during the period December 20, 2015, through January 16, 2016, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 19, 2016

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Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE BOSTON MUNICIPAL 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.

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