

**Adjunct professor's August contract offer to teach 2 courses in the fall semester did not amount to reasonable assurance under G.L. c. 151A, § 28A. Although the required nature of the offered courses reduced the chances of cancellation due to insufficient student enrollment, the same courses had been cancelled in each of the past 2 years, a decline in college enrollment suggested the trend might continue, and the employer could pro-rate the offered salary if the course was under-enrolled. Claimant was not reasonably assured of re-employment under economic terms that were substantially similar to the prior semester.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> Floor  
Boston, MA 02114  
Phone: 617-626-6400  
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.  
Chairman  
Judith M. Neumann, Esq.  
Member  
Charlene A. Stawicki, Esq.  
Member**

**Issue ID: 0019 0769 38**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by John P. Cronin, 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 separated from his position with the employer on June 19, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 15, 2016. 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 December 16, 2016. We accepted the claimant's application for review.<sup>1</sup>

Benefits were denied after the review examiner determined that the claimant had been given reasonable assurance of re-employment for the subsequent academic period 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 obtain additional evidence about the claimant's history of teaching the offered courses, the economic terms of his offer, college enrollment figures, and to clarify whether he had received an earlier verbal offer of employment. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

---

<sup>1</sup> Initially, the Board dismissed the claimant's application for review based upon lack of jurisdiction. However, in an order, dated February 14, 2017, the Board revoked its dismissal after the claimant presented sufficient evidence that his original appeal had been filed within the statutory deadline under G.L. c. 151A, § 40.

The issue before the Board is whether the review examiner's conclusion that the employer provided reasonable assurance to the claimant adjunct professor is supported by substantial and credible evidence and is free from error of law, where, after remand, the consolidated findings provide that student enrollment has been declining, the claimant's offered courses had been cancelled in recent years, and his offered salary could be reduced if fewer students took the courses.

### 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 instant employer, a local community college, in or about September of 2010. At that time, the claimant was hired as an adjunct professor, and was assigned to teach three courses during the fall semester.
2. Subsequently, the claimant was informed that he would be brought back to teach at the college during the spring semester of 2011, and that his number of assigned courses would be based upon student enrollment.
3. For each fall and spring semester through the fall semester of 2015, the claimant was employed by the employer as an adjunct professor. During 2014 and 2015, the claimant was assigned to teach 4 classes per semester.
4. For the spring semester of 2016, due to declining student enrollment, the claimant was assigned to teach only two classes, at the pay rate of \$3,540.00 per class.
5. Prior to the end of the spring, 2016, semester, the claimant had an informal conversation with the employer's department chair, in which it was indicated to him that he would be brought back to teach during the fall, 2016, semester.
6. At the time, the department chair did not specify the number of classes which the claimant would be assigned to teach, which number, the claimant knew, would be dependent upon student enrollment.
7. The spring, 2016, semester ended on June 19, 2016. As in prior years, the claimant was not offered any work during the summer.
8. The claimant filed a claim for unemployment insurance benefits on June 24, 2016. The effective date of the claim is June 19, 2016.
9. On July 15, 2016, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Disqualification, 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.”

10. Subsequently, via an email sent to the claimant on August 17, 2016, the employer provided the claimant with a contract for employment, indicating that he would be assigned to teach two classes during the fall, 2016, semester, at the same \$3,540.00-per-class pay rate that he had received in the preceding semester.
11. The two courses referenced in the contract — both of which addressed principles of sociology — are required courses for those majoring in sociology and certain other disciplines in the school, and are also available as — and occasionally taken as — elective courses by students in other disciplines.
12. Prior to receiving the August 17, 2016 email, the claimant was unaware as to whether he would, in fact, be teaching the courses or whether, if he did end up teaching them, [] he would be paid his usual, full pay rate or a prescribed pro-rated amount, which could result from a decline in student enrollment. The claimant’s status in teaching the courses and in receiving a particular pay rate were not, in fact, confirmed until weeks after he began teaching the courses during the semester.
13. During individual semesters in both 2014 and 2015, the claimant had his assignment to the same principles of sociology course cancelled due to low student enrollment after initially being assigned to teach the course.
14. The claimant accepted the contract and began teaching again at the commencement of the fall 2016 semester on September 3, 2016.
15. Between 2014 and 2016, the full-time equivalent enrollment at the employer’s school dropped from 5,967.1 to 5,581.2.

#### CREDIBILITY ASSESSMENT:

I find that the claimant provided direct and consistent testimony throughout both the initial and remand hearings on the matter. As such, I credit the claimant’s testimony, including the additional and clarifying statements he provided during the remand portion of the proceedings. In particular, I credit the claimant’s further description of his discussion with a department head prior to the end of the spring 2016 semester regarding his teaching assignments for the upcoming fall semester, and his denial that he had any separate conversation or communication with a “superintendent” regarding same. Similarly, I credit the direct, consistent, and detailed testimony of the

vice president of the claimant's union regarding the various issues upon which he testified during the remand hearing.

### 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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except as follows. The portion of Consolidated Finding # 12, which provides that the claimant would not know his status or amount of pay until weeks after the semester began, is misleading. The witnesses testified that this happens at the end of the add/drop period, two weeks into the semester.<sup>2</sup> In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the employer had provided the claimant with reasonable assurance of re-employment, within the meaning of G.L. c. 151A, § 28A.

As an academic employee of an educational institution, the claimant's eligibility for benefits during the relevant period is properly analyzed under G.L. c. 151A, § 28A, which 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; . . .

The record before us shows that any courses which the employer offered to the claimant were contingent upon sufficient student enrollment and that the employer could cancel a course if the number of students were insufficient. *See* Remand Exhibit # 10.<sup>3</sup> Alternatively, the employer could pro-rate the claimant's salary if it chose to proceed with an under-enrolled course. *See* Consolidated Findings # 12; *see also* Remand Exh. # 11, p. 3. The Board has previously held

---

<sup>2</sup> We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

<sup>3</sup> R. Exhibit # 10, a college email to the claimant cancelling a prior course due to insufficient student enrollment, supports the claimant's undisputed testimony that, as an adjunct professor, each course offered to him was subject to this contingency.

that an enrollment contingency does not by itself preclude the possibility of reasonable assurance, under G.L. c. 151A, § 28A. *See* Board of Review Decision 0002 1339 07 (May 12, 2014), where we explained that 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” (quoting from the U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) No. 4-87 (Dec. 24, 1986)).<sup>4</sup> 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.*

Recently, the U.S. Department of Labor (DOL) released additional guidance pertaining to the analysis of reasonable assurance for adjunct professors. In UIPL 5-17 (Dec. 22, 2016), the DOL sets 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 must be 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. Where an offer includes a contingency, 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 very likely that the offered job will be available in the next academic period. *Id.* at part 4(c), p. 6.

Consolidated Finding # 5 reflects an informal conversation during the spring between the claimant and his department chair about teaching again in the fall, 2016, semester. This conversation did not amount to an offer of employment, because there is no indication that the department chair had authority to formally offer employment, and, apparently, the conversation included no details about the economic terms of any such re-employment. Until the employer emailed the claimant on August 17, 2016, with a contract to teach two sociology courses in the fall, 2016, semester, the claimant had not received any offer of re-employment for the fall term.

The August 17, 2016, contract appears to be the college’s formal job offer for a teaching position in the same professional capacity and at the same pay rate as the claimant had been teaching in the prior semester. Consolidated Finding # 10. However, because the job offer included a contingency, we consider the nature of the contingency and the surrounding circumstances. Student enrollment is deemed to be a contingency that is outside the employer’s control. *See* UIPL 5-17, part 4(c), p. 6. The question before us is whether the totality of circumstances showed that, despite the enrollment contingency, it was highly likely that the claimant would actually teach his two offered sociology courses at \$3,540 per class in the fall, 2016, semester, as offered in the August 17, 2016, contract.

In this regard, Consolidated Findings ## 12 and 13 are significant. Although the two sociology classes were required courses, the employer had cancelled at least one of these assigned courses

---

<sup>4</sup> Board of Review Decision 0002 1339 07 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

in each of the most recent two years. Consolidated Finding # 13. The evidence also suggests that, as community college enrollment has been declining, the trend of course cancellations might continue. *See* Consolidated Finding # 15 and Remand Exhibits ## 12 and 13. Even if the course is not cancelled, a Memorandum of Agreement between the claimant's union and the employer permits the employer to pro-rate the claimant's salary if fewer students enroll. *See* Consolidated Finding # 12 and Remand Exhibit # 11. In light of the recent course cancellations, downward trend in student enrollment, and the fact that the employer could reduce the claimant's salary once the semester began, we do not believe the employer's August 17, 2016, offer came with a high likelihood of a job under substantially similar economic terms as the claimant's employment in the prior academic term.

We, therefore, conclude as a matter of law that the claimant did not have reasonable assurance of re-employment, within the meaning of G.L. c. 151A, § 28A.

The review examiner's decision reversed. The claimant is entitled to receive benefits for the period beginning June 19, 2016, through August 27, 2016, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - April 14, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, Esq. did not participate in this decision.

**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](http://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.

AB/rh