

**Because the community college could pro-rate the adjunct professor's salary or cancel his assignment by moving the enrolled students into another instructor's section, its offered teaching assignment did not constitute reasonable assurance of re-employment under substantially similar economic conditions within the meaning of G.L. c. 151A, § 28A.**

**Board of Review  
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**Issue ID: 0019 3849 62**

## **BOARD OF REVIEW DECISION**

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

The claimant appeals a decision by Marielle Abou-Mitri, 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 July 29, 2016. He reopened a claim for unemployment benefits with the DUA but was denied benefits during the period from July 31, 2016, through September 3, 2016, in a determination issued on January 13, 2017. 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 for the same period in a decision rendered on July 22, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party 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 provided reasonable assurance of re-employment to this adjunct professor for the fall 2017 semester is supported by substantial and credible evidence and is free from error of law.

### **Findings of Fact**

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

1. On January 25, 2016, the claimant filed a claim for unemployment benefits effective December 20, 2015. The claimant's only base period employer is the instant employer.
2. The claimant worked as a full-time instructor for the instant employer, a community college, from September of 1982, until he retired in 2003. As a full-time instructor, the claimant was required to teach 15 credit hours.
3. After his retirement, the claimant was rehired with the instant employer in 2003 to work as an adjunct mathematics professor. The claimant was able to maintain his seniority but the number of classes he taught varied each semester depending on student enrollment and class availability.
4. The claimant was required to fill out a teaching availability form before the start of every semester to provide his availability to the employer for the following semester. The claimant would rely on previous semester schedules and provide specific days, times and classes he was available to teach.
5. The claimant would receive a contract from the employer before the start of the semester which provided his course assignment, course schedule and the salary. The conditions provided in the contract were contingent on student enrollment in the class.
6. The employer paid the claimant \$1,239 per credit if a class had sufficient enrollment of at least 12 students. If a class did not have sufficient enrollment, by the first day of classes, the employer could cancel the course or combine a low enrollment course with another class. In some cases, the employer allowed the class to proceed without sufficient enrollment but the claimant's salary would be prorated. The claimant's salary was prorated on two occasions due to low enrollment since he became an adjunct professor.
7. In the fall 2013 semester, the claimant taught two classes, totaling 7 credits. The claimant taught calculus III and finite math.
8. In the fall of 2014, the claimant taught two classes, totaling 7 credits. The claimant taught calculus III and finite math.
9. In the fall 2015 semester, the claimant taught three classes, totaling 11 credits. The claimant taught calculus III, college algebra, and finite math.
10. In the spring 2016 semester, the claimant taught 2 classes, totaling 7 credits.
11. In the 2016 summer session I, from June 3, 2016, through July 29, 2016, the claimant taught calculus I and calculus [II].

12. In the 2016 summer session 2, from July 31, 2016, through September 3, 2016, the claimant was not offered any classes. The employer had not [scheduled] math classes during this semester since 2006.
13. On January 25, 2016, the claimant filled out his teaching availability form for the fall 2016 semester. The claimant provided that he was available on Tuesday and Thursday from 2:30 p.m. to 4:20 p.m. for [c]alculus III and on Tuesday and Thursday from 5:00 p.m. to 6:15 p.m. for [f]inite [m]athematics.
14. On June 14, 2016, the claimant received his contracts for the fall 2016 semester. The claimant received a contract to teach [f]inite [m]athematics on Tuesday and Thursday from 5:00 p.m. to 6:15 p.m. The claimant received a second contract to teach [c]ontemporary [m]ath I on Thursday from 6:30 p.m. to 9:15 p.m. The claimant received a third contract to teach [c]alculus III on Tuesday and Thursday from 2:30 p.m. to 4:20 p.m.
15. The claimant was concerned about student enrollment for his classes in the fall 2016 semester because the employer did not list the claimant's name next to the course name in the course catalog for students to view.
16. The claimant was concerned about student enrollment for the contemporary math class because he never taught this class before and it satisfied the same requirement that college algebra satisfied, which the claimant believed was a preferred course by students.
17. In the fall 2016 semester, the claimant taught a total of 10 credits. The claimant taught one 4 credit class and two 3 credit classes. The claimant taught calculus III, college algebra and finite math.
18. On January 13, 2017, the claimant was issued a Notice of Disqualification disqualifying him from receiving benefits from the week beginning July 31, 2016, through the week ending September 3, 2016, under Section 28A of the Law.

### 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 disagree with the review examiner's legal conclusion that the employer provided reasonable assurance of re-employment for the fall 2016 semester.

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 U.S. Department of Labor (DOL) has recently issued guidance for determining whether an adjunct professor is entitled to benefits between academic periods.<sup>1</sup> In UIPL 5-17, the DOL sets forth an initial set of criteria for determining whether a claimant has been provided with reasonable assurance of re-employment. 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.

Prior to the weeks of unemployment at issue in the present case, the employer offered the claimant a job in the same professional capacity. *See* Finding of Fact # 14. The question is whether this was an offer under economic conditions that were not considerably less than the prior academic period. Regardless of whether we compare the fall 2016 offer with the claimant’s teaching assignment during the summer 2016 session or during the spring 2016 term, the employer has not sustained its burden to show that the teaching assignment offered to the claimant for the fall provided reasonable assurance of re-employment under substantially similar economic conditions.

The employer’s fall 2016 offer to teach the three mathematics courses, 10 credits at a rate of \$1,239 per credit hour, was contingent upon sufficient student enrollment. *See* Findings of Fact ## 6, 14, and 17. The DOL states that, where an offer includes a contingency, 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. UIPL 5-17 at part 4(c), p. 6. Generally, a contingency based upon student enrollment is not within the employer’s control. *Id.*

We next consider whether, notwithstanding the enrollment contingency, it was very likely that the claimant would teach the offered 10 credits at \$1,239 per credit hour during the fall 2016 semester. In her decision, the review examiner erred by using the fact that the claimant did end up teaching the 10 credits as support for her conclusion that the claimant had reasonable

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<sup>1</sup> Unemployment Insurance Program Letter (UIPL) No. 5-17 (Dec. 22, 2016) sets forth the DOL’s interpretation of “contract” and “reasonable assurance” as used in section 3304(a)(6)(A) of the Federal Unemployment Tax Act (FUTA). *See* 19 U.S.C. § 3304(a)(6)(A). The provisions under the Massachusetts unemployment statute at issue in this case are modeled after this federal provision. *See* G.L. c. 151A, § 28A.

assurance. The issue is whether the claimant had reasonable assurance during the unemployment weeks at issue, July 31, 2016, through September 3, 2016, not based upon hindsight.

The findings provide that the employer could prorate the claimant's salary if fewer than 12 students enrolled in a course, and, in fact, this has happened to the claimant in the past. Finding of Fact # 6. Or, the employer could take the assignment away by combining the low enrollment course with another. Finding of Fact # 6. The claimant has also seen the employer take two minimally enrolled 12-student classes and combine them into one course, thereby cancelling one adjunct professor's teaching assignment. Finding of Fact # 6.<sup>2</sup> Under these circumstances, there is no way the claimant could know whether he would end up teaching an offered course, or if he would teach it at full pay. The employer's ability and past practice to cancel a course or prorate the offered salary rendered its fall 2016 teaching assignment offer uncertain. Lacking any employer input at the hearing, such as statistics showing how frequently or infrequently it cancelled or prorated these particular courses, there is nothing in the record to indicate that the claimant's offer came with a high likelihood that he would teach the three courses under substantially similar economic conditions as the prior term.

We, therefore, conclude as a matter of law that the claimant did not receive reasonable assurance of re-employment 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 beginning July 31, 2016, through September 3, 2016, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - October 11, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
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.

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<sup>2</sup> We have supplemented the findings of fact, as necessary, with the unchallenged testimony 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).

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.

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