Evidence showed a continuous decline in overall student enrollment at the school over the last 5 years. Even though the claimant had not personally had an under-enrolled course cancelled or pro-rated, others had. Because the employer failed to participate in the hearing to explain when it cancelled, pro-rated, or granted full pay to adjunct instructors teaching under-enrolled courses, Board declined to conclude that there was a high likelihood that claimant would be re-employed under substantially similar economic terms as the prior semester. Held claimant did not have reasonable assurance under G.L. c. 151A, § 28A.

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Issue ID: 0024 2671 24

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. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from his position with the employer and reopened a claim for unemployment benefits with the DUA, seeking benefits for the period December 17, 2017, through January 6, 2018. In a determination, dated July 7, 2018, the DUA denied the payment of benefits for those weeks. The claimant appealed the determination to the DUA hearings department. Following a hearing attended only by the claimant, the review examiner affirmed the determination to deny benefits in a decision rendered on August 11, 2018. We accepted the claimant's application to review.

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, he 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 further evidence pertaining to the period at issue and to circumstances concerning the likelihood of the claimant's re-employment under substantially similar economic terms. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's decision, which concluded that the employer provided the claimant with reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, is supported by substantial and credible evidence and is free from error of law, in light of the employer's practice to pro-rate an adjunct instructor's salary if a course is under-enrolled and evidence showing a downward trend in student enrollment.

Findings of Fact

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

1. The claimant has worked for the employer, a community college, from 2002 through the present. He has not separated from this employment.

2. The relative period at issue, December 17, 2017 to January 6, 2018 is part of the claimant's 2017-01 claim which he filed on January 1, 2017.

3. The claimant works as an Adjunct Instructor.

4. The claimant never had a course he was offered to teach cancelled by the school.

5. During the fall of 2017 semester, the claimant taught one 8 credit course in Writing and Grammar during the evening. The fall semester ran from September of 2017 to December 20, 2017. The claimant received $10,922 for the 8 credit Writing and Grammar course he taught during the fall of 2017. The claimant had been asked by the Assistant Dean at the end of November 2017 in an email if he was available to teach the writing course during the spring of 2018. The claimant told her he was available to teach it. (Remand Exhibit 9) This communication did take place prior to the end of the fall 2017 semester.

6. The claimant's pay rate is set under a collective bargaining agreement. The claimant does not have a copy of the relevant pages of the collective bargaining agreement to establish the pay rate. Without the relevant pages, it cannot be determined that the Collective Bargaining Agreement dictates at least the same pay rate for the spring 2018 semester.

7. During the initial hearing, the claimant testified that if student enrollment in a course falls below 15 students, the employer will cancel the course. This testimony is not deemed credible since he provided conflicting testimony at the remand hearing that he has taught a course where enrollment was below 15 students.

8. There is a Memorandum of Agreement Payment for Under-Enrolled Courses. (Remand Exhibit 7) The agreement states the employer can pay reduced compensation on a per capita basis for courses they chose to run that are under enrolled.

9. There is nothing specific in the Collective Bargaining Agreement or a letter from the employer stating that the employer can take an adjunct instructor's

assignment away by combining one class with another, if there are fewer than a minimum number of students enrolled.

10. The claimant is aware of two Instructors being offered a lower rate of pay for a course that was under enrolled. In spring semester of 2018, an Instructor named [A] was offered to teach a reading course with low enrollment at a lesser pay rate and when she declined, the same offer was made to an Instructor by the name of [B], who accepted the offer.

11. The claimant has taught a course that was under enrolled in the fall of 2017. His salary was not reduced for this course.

12. The winter break began on December 20, 2017 and ended on January 20, 2018 when the spring semester began.

13. Three weeks after [sic] semester began, the claimant signed a contract to teach.

14. The claimant had received a tentative assignment memo [sic] late December of 2017 regarding his spring 2018 course. The claimant did not have a copy of the memo for his spring 2018 course to offer.

15. The claimant did offer legible copies of the [Employer A] Spring 2017 Enrollment Update that was entered as Remand Exhibit 10.

16. The overall student enrollment at [Employer A] declined between 2016 and 2017 by 343 students. In 2016, enrollment was at 3,871 and in 2017, enrollment was 3,528.

17. The claimant was told in a staff meeting at the beginning of spring 2018 semester that the trend of declined enrollment continued in 2018.

18. Overall student enrollment at [Employer A] declined in the 5 year period leading up to 2017 by 1,006 students. In 2012 enrollment was 4,534 and in 2017, enrollment was 3,528.

19. The claimant was told in a staff meeting in the beginning of the spring 2018 semester that the 5 year trend has continued to 2018.

20. The claimant did return to work as an Adjunct Instructor after the 2017-2018 winter break and taught the same course under the same terms and conditions.

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 except as follows. To the extent Consolidated Findings ## 5 and 20 provide that the claimant taught only one course in both the fall 2017 and spring 2018 semesters, this fact is unsupported, as the evidence indicates that the claimant taught two courses in each semester.[1] We also note that Consolidated Finding # 7 is a credibility assessment of a portion of the claimant's testimony rather than a factual finding. 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 claimant is ineligible for benefits under 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; . . .

Recently, the U.S. Department of Labor (DOL) released guidance pertaining to the analysis of reasonable assurance for adjunct professors. In UIPL 5-17 (Dec. 22, 2016), 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 is 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 highly probable that the offered job will be available under substantially similar economic terms in the next academic period. *See* Id. at part 4(c), p. 6.

The review examiner found that the employer sent a tentative assignment to the claimant for his spring 2018 assignment in late December, 2017. *See* Consolidated Finding # 14. Although not

[1] The claimant testified that he taught an 8-credit writing course and a 4-credit reading course. This is corroborated by Remand Exhibit 6. While not explicitly incorporated into the review examiner's findings, the claimant's testimony and this remand exhibit are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. *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).

in evidence, the claimant confirmed that it was a writing similar to Remand Exhibit 8, which was the tentative assignment offered to him for the fall 2018 semester.[2] On appeal, the claimant argued that there is no proof that the offer was made by a person with authority to offer employment. However, since it appears that this was the same manner with which the college offered its tentative assignment in each semester, there is no reason to believe that it was tendered by someone other than a person who has been delegated the authority to make the offer. We are also satisfied that the employer had offered the claimant work in the same professional capacity of adjunct instruction, as in the prior academic period.

We next consider the contingent nature of the spring 2018 tentative offer. There is no question that offer was contingent upon sufficient student enrollment, and that the employer reserved the right to cancel the course. *See* Remand Exhibits 5, 7, and 8. Student enrollment is deemed to be a factor that is beyond the employer's control.[3] It is true that, since 2002, the claimant has never had one of his offered courses cancelled. *See* Consolidated Finding # 4. This strongly suggests that he would teach the courses offered to him for the spring 2018 term. However, we must also decide whether, in light of the totality of the circumstances, there was a high likelihood that the claimant would be employed under *economic conditions* that were not considerably less than the prior academic term.

In her original decision, the review examiner summarily concludes that, in December, 2017, the claimant knew that he was going to return to work in the same capacity and under the same economic terms in the following semester. She failed to address the contingent nature of the offer or to inquire into the totality of the circumstances. As noted above, DOL requires this deeper analysis.

The record before us shows that, if any of the offered courses had insufficient enrollment, the employer retained the right to either cancel the course or pro-rate the adjunct instructor's salary, if it chose to proceed with an under-enrolled course. *See* Consolidated Finding # 8. When the employer chooses to do so remains unclear. The claimant recently taught an under-enrolled course at full pay, but others were only given the option to teach their under-enrolled course at lesser pay. *See* Consolidated Findings ## 10 and 11. Since the employer failed to participate in the hearing to explain how it distinguished between under-enrolled courses that were offered at full pay and those that were not, its determination would seem to be arbitrary.

In this case, there is also evidence showing a steady decline in student enrollment over a five-year period and continuing into 2018. *See* Consolidated Findings ## 16–19. Lacking any employer input at the hearing, such as statistics showing how frequently or infrequently it cancelled or pro-rated adjunct courses in light of the overall declining student enrollment, or an explanation distinguishing the claimant's particular teaching assignment from others who have had their compensation pro-rated, we decline to conclude that the claimant's offer came with a high probability that he would teach the offered spring 2018 courses under substantially similar economic conditions as the prior term.

[2] This testimony is also part of the unchallenged record.
[3] *See* UIPL 5-17, p. 6.

We, therefore, conclude as a matter of law that because the evidence does not show that the claimant had reasonable assurance of performing services under substantially similar economic conditions as the prior term, he is not disqualified by G.L. c. 151A, § 28A.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period December 17, 2017, through January 6, 2018, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 20, 2018

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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

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