Community College could cancel or pro-rate a course offered to the claimant adjunct instructor if the course turned out to be under-enrolled. Evidence also showed a continuous decline in student enrollment over the last 5 years. 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 considered the totality of circumstances and concluded that there was not a high likelihood that claimant would be re-employed under substantially similar economic terms as the prior semester. Claimant did not have reasonable assurance under G.L. c. 151A, § 28A.

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

Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member

Issue ID: 0025 6319 87

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 opened a claim for unemployment benefits with the DUA, seeking benefits for the period May 20 through June 9, 2018. In a determination, dated June 13, 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 9, 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 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 ability to pro-rate an adjunct instructor's salary if a course is under-enrolled and evidence showing a steady downward trend in student enrollment.

Findings of Fact

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

1. The claimant began working as an adjunct faculty member for the employer, a community college, on 9/1/87. During the period of September, 1987, and [sic] May, 2018, the claimant taught an Introductory to Sociology course in the evenings for the employer during the fall and spring semesters of each year.

2. The claimant has been offered and accepted the same intro to sociology course each semester with the instant employer from 1987 until the present time.

3. The claimant receives a stipend of $3,864 for each course he teaches as set forth by the Collective Bargaining Agreement. See Memorandum of Agreement (Remand Exhibit 8). See Contract (Remand Exhibit 9).

4. The claimant last worked for the employer on or about 5/13/18, when the spring 2018 semester ended. On 4/20/18, the claimant received an agreement from the employer to teach the same intro to sociology course in the fall of 2018. The agreement is the same agreement the claimant has received each semester to teach.

5. If the claimant does not hear from the employer before class begins, he shows up for the class and teaches until he receives a contract approximately a week or two into the semester. He is required to sign the contract and return it to the employer to continue teaching.

6. The employer's determination as to whether or not a course will run is based upon enrollment and/or other reasons decided by the employer. If a sufficient number of students enroll in a course, the instructor is usually issued a contract to teach that course.

7. The claimant has taught the same course for the last 31 years each semester. He has not heard from the employer since receiving the agreement on 4/20/18.

8. The claimant is a member of the Massachusetts Teachers Association. He is a part time employee who is not tenured. He receives a contract to teach semester by semester. During his employment with the instant employer, the claimant has never been offered nor has he taught a course during the summer sessions.

9. The instant employer is the claimant's primary employer and main source of income.

10. The claimant filed a claim for unemployment benefits on 5/23/18. The claimant was employed by two other employers for whom he performed services during his base period.

11. On 6/13/18, the DUA issued the claimant a Notice of Disqualification finding him ineligible for benefits under Section 28A.

12. On 6/22/18, the claimant appealed the Notice.

13. Overall student enrollment at [College A] has declined between 2017 and 2018. It is unknown by how many students the enrollment has declined.

14. Enrollments over the five-year period from 2012 to 2017 as reported by the Massachusetts Department of Higher Education has declined by over a 1,000 students. (Remand Exhibit 7)

15. The Memorandum of Agreement states under # 4 that the College has the authority to determine whether a course will be offered or run. (Remand Exhibit 8)

16. The Memorandum of Agreement does state that the employer can reduce or pro-rate the claimant's salary if there are fewer than a specific number of students enrolled. (Remand Exhibit 8)

17. The Collective Bargaining Agreement or letter from the employer does not specifically state that the employer can take an adjunct instructor's assignment away by combining one class with another, if there are fewer than a specific number of students enrolled. Article 4 of the CBA provides the Rights and Responsibilities of the Board of Higher Education. (Remand Exhibit 10, page 7)

18. The employer had not exercised either option with the claimant as mentioned in question 3 (a) or (b).

19. Three years ago, the claimant taught his Introduction to Sociology course for the employer even though the course was under enrolled. The claimant's salary was not reduced as a result of the under enrollment.

20. The claimant is not sure if Intro to Sociology is a required course since he is not sure if there is a major of sociology at the college.

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. Since Consolidated Finding of Fact # 7 is the same as Finding of Fact # 7 in the original decision, we assume that the statement, the claimant "has not heard from the employer since receiving the agreement on 4/20/18" means that he had not heard as of the date of the original hearing, July 23, 2018. We also assume that Consolidated Finding # 18's reference to "questions 3(a) or (b)" pertains to the Board's remand questions.[1] 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.

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; . . .

Two years ago, 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 refers to a letter from the employer, dated April 20, 2018, as an agreement to teach an Intro to Sociology course during the fall 2018 semester. Consolidated Finding # 4. We think this document is more accurately described as a written contingent offer to teach this

[1] Remand Exhibit 3, the Board of Review's remand order, asks the following under question # 3: (a) Does the CBA or a letter from the employer state that the employer can reduce or pro-rate the claimant's salary, if there are fewer than a specific number of students enrolled? If so, please enter the relevant sections of the CBA or the letter into evidence. (b) Does the CBA or a letter from the employer state that the employer can take an adjunct instructor's assignment away by combining one class with another, if there are fewer than a specific number of students enrolled? If so, please enter the relevant sections of the CBA or the letter into evidence.

course the following semester. *See* Exhibit 8.[2] It is the same type of document that the claimant regularly receives offering a course assignment for the subsequent semester. Consolidated Finding # 4. Since this was the 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 fall 2018 tentative offer. There is no question that the offer to teach Intro to Sociology was contingent upon sufficient student enrollment and that the employer reserved the right to cancel the course. *See* Consolidated Findings ## 15, 16, Exhibit 8, and Remand Exhibit 8.[3] Student enrollment is deemed to be a factor that is beyond the employer's control.[4] It is true that since 1987, the claimant has never had this offered course cancelled. *See* Consolidated Findings ## 2 and 7. This strongly suggests that he would teach the course offered to him for the fall 2018 term.

In her original decision, the review examiner summarily concludes that, because it was likely that the claimant would teach the offered course in the fall, and because the April 20, 2018, contingent offer contained the same terms and conditions as in prior semesters, the claimant had reasonable assurance within the meaning of G.L. c. 151A, § 28A. Her decision did not address the contingent nature of the offer and 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. As noted above, DOL requires this deeper analysis.

The record before us shows that, if an offered course 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 the under-enrolled course. *See* Consolidated Findings ## 6, 15, and 16. When the employer chooses to do so remains unclear. Three years ago, the claimant taught an under-enrolled course at full pay. Consolidated Finding # 19. However, since the employer failed to participate in the hearing to explain what makes it decide to cancel, pro-rate, or proceed with an under-enrolled course at full pay, its determination would seem to be arbitrary.

Furthermore, the evidence shows that there has been a steady decline in student enrollment over a five-year period and continuing into 2018. *See* Consolidated Findings ## 13 and 14. Although not explicitly stated in the findings, an exhibit containing figures from the Massachusetts Department of Higher Education reveals that student headcount at the employer college has dropped approximately 24% between 2013 and 2017. *See* Remand Exhibit 7. The record also

---

[2] Exhibit 8 is in the form of a memorandum from the employer's Dean of the Division of Liberal Arts to the claimant, dated April 20, 2018. Although not explicitly incorporated into the review examiner's findings, it is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

[3] Remand Exhibit 8 is referenced in Consolidated Findings ## 15 and 16. According to the claimant's testimony, this document, entitled "Memorandum of Agreement – Payment for Under-Enrolled Courses," is an agreement between the claimant's union and the employer. This testimony and Remand Exhibit 8 are also part of the unchallenged evidence in the record.

[4] *See* UIPL 5-17, p. 6.

includes a July 17, 2018, memorandum from the president of the employer college indicating that the student enrollment decline has continued into 2018. *See* Remand Exhibit 6. Lacking any employer input at the hearing, such as statistics showing how frequently or infrequently it cancelled or pro-rated adjunct courses, or other information showing why, notwithstanding the overall declining student enrollment, the claimant's particular assignment was likely to proceed at full pay, we decline to conclude that the claimant's offer came with a high probability that he would teach the offered fall 2018 course under substantially similar economic conditions as the prior semester.

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 May 20, 2018, through September 8, 2018, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 25, 2019

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