Until July 12th, when the employer sent the claimant adjunct instructor its contract offer to teach in the fall semester, she did not have reasonable assurance of re-employment under G.L. c. 151A, § 28A. Although contingent upon sufficient enrollment, the employer established that it was highly probable that she would actually teach the courses at the salary stated in its July 12 contract offer. The employer's abbreviated summer sessions were not regular academic terms for purposes of § 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: 0031 1646 18

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 we affirm in part and reverse in part.

The claimant separated from her position with the employer in May, 2019. She filed a claim for unemployment benefits with the DUA, effective May 12, 2019, which was denied in a determination issued on June 8, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner modified the agency's initial determination and denied benefits for the period beginning June 30 through August 31, 2019, in a decision rendered on August 7, 2019. We accepted the claimant's application for 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, she was not eligible for benefits under G.L. c. 151A, § 28A. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to obtain further evidence about enrollment, pay scale, the claimant's courses, the employer's summer program, and the likelihood of the claimant teaching at the offered salary. Both parties 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.

The issue before the Board is whether the review examiner's decision, which concluded that, beginning June 30, 2019, the claimant adjunct instructor had reasonable assurance of re-employment for the subsequent academic term, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for the employer, a state university, starting in the Fall of 2013 as an Adjunct Instructor.

2. The effective date of the claim is May 12, 2019.

3. All spring semester contracts with the instant employer terminated effective May 31st of each year. The claimant, and all other Adjunct Instructors, are paid eight times during a semester, the last pay period ending May 11, 2019. Regular classes ended on May 7, 2019, examination period ended on May 13, 2019, and grades were due by noon on May 21, 2019 (per Remand Ex 4).

4. The claimant also performs work as an Adjunct Instructor for another educational institution, with which the claimant has been for eleven years.

5. For the fall semester of 2014, the claimant was offered and taught courses for a total of eleven credits.

6. For the spring semester of 2015, the claimant was offered and taught courses for a total of six credits, which was then modified in February of 2015 for an additional four credits for a total of ten credits.

7. For the fall semester of 2015, the claimant was offered and taught courses for a total of nine credits.

8. For the spring semester of 2016, the claimant was offered courses for a total of nine credits, of which only six credits materialized, but was then modified twice in February of 2016 for an additional six credits for a total of twelve credits.

9. For the fall semester of 2016, the claimant was offered and taught courses for a total of eleven credits.

10. For the spring semester of 2017, the claimant was offered and taught courses for a total of nine credits.

11. For the fall semester of 2017, the claimant was offered and taught courses for a total of eleven credits.

12. For the spring semester of 2018, the claimant was offered and taught courses for a total of six credits.

13. For the fall semester of 2018, the claimant was offered and taught courses for a total of three credits, which was then increased by an additional three credits for a total of six credits.

14. For the spring semester of 2019, the claimant was verbally offered six credits, but was offered nine credits by contract and she taught nine credits worth of courses.

15. During the spring semester of 2019, the Department Chair asked the claimant for her availability. The claimant informed the Department Chair that she has open availability.

16. Around July 1, 2019, the Department Chair informed the claimant that she believed that she could offer two courses (six credits) in the fall semester of 2019.

17. Around July 12, 2019, the employer sent a Temporary Employment Guidelines and Agreement with a Commonwealth of Massachusetts-Standard Contract Form to the claimant, which offered eleven credits for the fall semester of 2019 (September 1, 2019 to December 31, 2019).

18. The claimant sometimes has problems with mail delivery as her mail ends up in a neighbor's mailbox. The claimant found the Temporary Employment Guidelines and Agreement with a Commonwealth of Massachusetts-Standard Contract Form around July 21, 2019 alone in her mailbox.

19. The employer retained the right to cancel the course(s) if there was insufficient enrollment.

20. The employer can choose to allow a course to go forward with insufficient enrollment and upon agreement of the adjunct to teach the course on a prorated basis, which the claimant has not experienced personally.

21. On July 24, 2019, the claimant signed the contract and returned it to the employer.

22. The claimant's rate of pay is set pursuant to a collective bargaining agreement. The claimant knew that her pay was set by a collective bargaining agreement. $1,727.00 per credit was paid the claimant in the spring semester of 2019.

23. The claimant believed that the employer was hiring three "one-year" positions. "One-year" positions were full-time faculty who generally taught first-year courses for a term of one year. The claimant was concerned because she believed that three new full-time faculty would mean fewer first-year courses for Adjunct Instructors. The employer retained the right to cancel the offered courses of an Adjunct Instructor if enrollment in a course was low in a

course for a full-time faculty member in order to offer the full-time faculty member that, which was previously offered to an Adjunct Instructor. The claimant never experienced her offered course being reassigned to a full-time faculty member.

24. By July 12, 2019, enrollment for the day school (traditional undergraduate program) is generally finalized because traditional undergraduate students enroll in the next semester's courses before the end of the semester, the deadline of which is unknown. The claimant taught first-year courses exclusively in the traditional undergraduate program, the acceptance and admission take place earlier in the previous semester. Traditional undergraduate students typically reside on campus and freshmen courses are assigned by the school. The claimant was unaware of that the traditional undergraduate enrollment numbers were generally set by then as the claimant believed that it actually hinged on any student deposits. The claimant exclusively taught English 101 and English 102.

25. Two or three years ago, the claimant was offered to teach a particular course in a 2:00 p.m. time slot, which the employer moved to 3:00 p.m. because of a scheduling conflict with another required course.

26. Summer sessions are six weeks in length compared to sixteen weeks for a traditional semester (fall and spring). Summer sessions are generally offered by the Division of Graduate and Continuing Education and students are generally comprised of graduate, continuing education, online and local students. Traditional undergraduate (day) students generally do not take summer courses, but can. 70-75% of instructors for summer courses are tenured faculty, who are paid under a contract for the course(s) being taught beyond their traditional course load during the academic year. Tenured faculty are paid an annual salary for the traditional academic year, which is paid out over the course of a calendar year. The claimant has been asked if she was interested in teaching sub-100 level courses (prep/refresher courses) in the past, but has never been offered a course in the summer though she expressed interest.

27. The university's enrollment figures are unknown by the parties, but both indicate that enrollment is down.

28. The courses offered to the claimant in fall 2019 semester (and in every semester) are required general education courses (English 101 and English 102).

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we agree with the review examiner's legal conclusion that the claimant is ineligible for benefits, but disagree as to the effective date of that disqualification.

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 released guidance pertaining to the analysis of reasonable assurance for adjunct professors. In Unemployment Insurance Program Letter (UIPL) No. 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 in the next academic period. Id. at part 4(c), p. 6.

In his original decision, the review examiner concluded that because the claimant had not received any word about how many classes she would be teaching in the fall 2019 semester until around July 1, 2019, she did not have reasonable assurance of re-employment until that point in time. The consolidated findings provide that on or about July 1, 2019, the claimant's Department Chair informed her that she believed she could offer the claimant six credits for the fall 2019 semester. Consolidated Finding # 16. Considering that in the most recent academic term, the spring 2019 semester, the claimant taught nine credits for the employer, the Department Chair's communication indicates that the employer would re-employ the claimant to teach one-third fewer credits in the fall 2019 semester. If, in fact, this could be considered an offer, it does not constitute reasonable assurance as it would constitute an offer to return under economic terms that are considerably less than in the prior academic period. Therefore, we disagree that the Department Chair's communication provided the claimant with reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A.

However, on July 12, 2019, the employer sent the claimant a written contract offer to teach 11 credits in the fall, 2019 semester. Consolidated Finding # 17. The economic terms of the offer, set under a collective bargaining agreement, were substantially higher than in the prior academic term, when she taught only nine credits. *See* Consolidated Finding # 22 and Exhibit 20. It was also an offer in the same professional capacity, Adjunct Instructor, as in the prior academic period.[1] Since the written offer was in the same form that the employer used to offer work to the claimant in prior terms, we have no reason to question that it was issued by a person with the authority to offer these course assignments. *See* Consolidated Finding # 17 and Exhibits 7–20.

Of course, the employer also retained the right to cancel the offered courses if there was insufficient student enrollment. Consolidated Finding # 19. Where an offer of re-employment includes a contingency, we must first consider whether that contingency is outside of the employer's control. Student enrollment is deemed to be a factor that is beyond the employer's control.[2]

Next, we must decide whether, notwithstanding that contingency, the totality of the circumstances showed that it was highly probable that the claimant would be re-employed in the offered job. In this case, we think the employer has shown that it was.

First, there is no indication that the employer has ever cancelled one of the claimant's offered courses. *See* Consolidated Findings ## 5–14. Second, although the employer retains the right to pro-rate the offered salary if a course is under-enrolled, the employer established that it was unlikely to pro-rate the claimant's fall 2019 semester courses, as it has never asked her to accept a pro-rated salary in the past. Consolidated Finding # 20. Also, the claimant teaches required English courses, making it less likely that a student would drop the course. Consolidated Finding # 28. Third, although a full-time faculty member can take an adjunct instructor's assignment if the former's course is cancelled due to under-enrollment, this has never happened to the claimant. *See* Consolidated Finding # 23. Additionally, the claimant teaches in the employer's Day School and by the time the employer issues its contract offer in July, its Day School enrollment figures are generally finalized because students must pre-register before that. *See* Consolidated Finding # 24. In light of this evidence, the employer has demonstrated that when it transmitted its July 12, 2019, offer to the claimant, there was a high probability that the job as offered in the contract would be available in the next academic period.[3]

In her appeal, the claimant maintains that she is entitled to benefits because the employer failed to make an offer for the next academic term, arguing that it offered the claimant no work during the employer's summer sessions. We do not view either of the employer's summer sessions as a regular academic term for purposes of our reasonable assurance analysis. The claimant has never taught during the summer sessions, and each session is on an abbreviated schedule

[1] *Compare* Exhibits 19 and 20, which are the contract offers for the spring 2019 and fall 2019 semesters, respectively. 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).

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

[3] Consolidated Finding # 27 vaguely refers to enrollment at the college being down, but there is no evidence about how this could impact the claimant's department or her required course assignment.

compared to the employer's regular spring and fall academic semesters.[4] We also consider that the summer courses are offered through the employer's Division of Graduate and Continuing Education, not the regular undergraduate Day School where the claimant teaches, and it is geared toward a separate student population, primarily graduate, continuing education, and online students. *See* Consolidated Finding # 26.

We, therefore, conclude as a matter of law that the employer has met its burden to show that upon issuing its July 12, 2019, contract offer, it provided the claimant with reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, for the fall 2019 academic term.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the weeks beginning May 12 through July 13, 2019, if otherwise eligible. She is ineligible to receive benefits during the period beginning July 14 through August 31, 2019.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 12, 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

[4] *Compare* UIPL 5-17, Attachment II, Sec. V, example 5, where the DOL states that, because the employer operates on an academic year consisting of four quarters, each consisting of 11 weeks of classes with a two-week break in between, and the adjunct instructor had been teaching political science courses during all fall quarters, the summer quarter was not a period between academic years.