

Claimant adjunct instructor did not have reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A, where the employer had cancelled some of her courses due to low enrollment in the previous two semesters and overall college enrollment continued its downward trend.

**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 5700 75

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 her position with the employer and filed a claim for unemployment benefits with the DUA, effective July 7, 2019, which was denied in a determination issued on October 10, 2019. 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 November 2, 2019. We accept 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 ineligible for benefits under G.L. c. 151A, § 28A. Our decision is based upon the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

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, where the employer had cancelled courses offered to the claimant in the prior two semesters and enrollment at the college continued to decline.

Findings of Fact

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

1. The claimant worked for the employer, a community college, as an Adjunct Instructor since 2003.

2. In 2009, enrollment at the community college was at 4,894, hit its peak in 2012 at 5,926, and was at a low in 2018 at 4,861.
3. The claimant feels that course cancellations due to low enrollment are tied to the overall low enrollment trend of the community college as a whole.
4. The claimant, despite asking the employer, does not know how many students are required to enroll in a course for the course not to be cancelled.
5. For the fall 2017 semester, the claimant was offered three courses, one was canceled due to low enrollment, but the claimant picked up a course due to another instructor becoming unavailable for a total of three courses actually taught.
6. In the spring 2018 semester, the claimant was initially offered two courses, but the claimant picked up another course for a total of three courses actually taught.
7. For the fall 2018 semester, the claimant was initially offered three courses, but one was cancelled due to low enrollment for a total of two courses actually taught.
8. For the spring semester of 2019, the claimant was initially offered three courses, but one course was cancelled due to low enrollment for a total of two courses actually taught.
9. Course cancellations due to low enrollment typically occurred a week prior to the start of the semester, but could take place within the first week of classes due to add-drop.
10. On January 11, 2019, the employer emailed the claimant an offer of re-employment in the fall 2019 semester (September 4, 2019 to December 17, 2019) for three courses, MAT 090, MAT 098, and MAT 100. The offer stated that the course(s) may be cancelled if the tuition-paying enrollment is insufficient.
11. The claimant has the ability to monitor the course enrollment as the semester approaches.
12. In mid-August of 2019, the claimant communicated with a tenured faculty member regarding her course and enrollment. The MAT 090 course enrollment at that time was five students. The claimant was questioning whether it made sense to put together a syllabus if it will be cancelled. The tenured faculty told the claimant to hold off until after a student orientation took place in the following week.

13. One of the courses offered to the claimant in the fall 2019 semester ended up being cancelled due to low enrollment. The claimant is currently teaching two courses.

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 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 reject 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; . . .

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), 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 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.

Although the review examiner's decision does not actually state that the relevant period at issue is the summer of 2019, his decision affirms DUA's determination, which disqualified the claimant from receiving benefits from July 7 through August 31, 2019. Thus, the question before us is whether, during this period of time, the employer had provided the claimant with reasonable assurance of re-employment in the upcoming fall, 2019 semester.

The claimant is an adjunct instructor. *See* Finding of Fact # 1. Finding of Fact # 10 provides that in January, 2019, the employer offered to re-employ the claimant to teach three courses in the fall 2019 semester. In her testimony, the claimant described Exhibit 3 as an email containing this offer, which appears to be signed by the employer's Interim Vice President for Academic Affairs.¹ Since the claimant acknowledges this is an employment offer, we accept that the Interim Vice President is a person with authority to offer employment. It is also apparent that the offer was for the same professional teaching work that the claimant had been performing.

The employer's offer was contingent upon sufficient tuition-paying student enrollment. *See* Finding of Fact # 10. Student enrollment is a factor that is deemed to be beyond the employer's control. *See* UIPL 5-17 at part 4(c), p. 6. Thus, we must decide whether the totality of circumstances 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.

For some reason, the review examiner also failed to render any findings about the economic conditions of the offer, even though Exhibit 3 includes this information. Nor did he inquire about the claimant's compensation in prior semesters. Because the economic conditions of the work offer is a necessary component to our reasonable assurance analysis, we would ordinarily have to remand the case to obtain this evidence. In this case, that is not necessary, because we reverse on other grounds.

Specifically, the DOL requires that we consider whether the totality of circumstances show that it is highly probable that the offered job will be available in the next academic period. The findings show that in each of the last two semesters, the employer offered the claimant three courses, then cancelled one of them due to insufficient enrollment. *See* Findings of Fact ## 7 and 8. Moreover, the college's overall student enrollment has shown a steady decline since 2013. *See* Finding of Fact # 2 and Exhibit 12. This declining enrollment trend coupled with the claimant's recent course cancellations do not reflect a high probability that the claimant would end up teaching the offered courses in the fall.

We, therefore, conclude as a matter of law that the employer has not shown that during the summer of 2019, the claimant had reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, for the fall, 2019 academic term.

¹ 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).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period July 7 through August 31, 2019, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 19, 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.

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