Given the employer's history of cancelling courses offered to other adjunct instructors, the employer's offer to the claimant to teach two courses in the next academic term did not come with a high probability that she would teach the offered courses. And given the employer's policy allowing it to pro-rate salaries for under-enrolled courses, the offer did not present reasonable assurance of substantially similar economic conditions as the courses she taught in the prior term. For this reason, she may not be disqualified from receiving benefits between semesters under G.L. c. 151A, § 28A.

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Issue IDs: 0028 7163 27
0028 9856 32

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals two decisions by a review examiner of the Department of Unemployment Assistance (DUA) to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and we affirm both decisions.

The claimant separated from her position with the employer on or about December 20, 2018. She re-opened an existing claim for unemployment benefits with the DUA (2018-01) and sought benefits for the period from December 30, 2018, through January 5, 2018. When that claim expired, she opened a new claim (2019-01), and sought benefits for the period from January 6, 2019, through January 19, 2019. The DUA denied the payment of benefits under both claims in determinations issued on May 15, 2019. The claimant appealed the determinations to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determinations and awarded benefits in separate decisions rendered on June 14, 2019.[1] We accepted the employer's applications for review.

Benefits were denied after the review examiner determined that the claimant had not been given reasonable assurance of re-employment for the subsequent academic period and, thus, she was eligible for benefits under G.L. c. 151A, § 28A.[2] After considering the recorded testimony and evidence from the hearings, the review examiner's decisions, and the employer's appeals, we remanded the case to the review examiner to obtain further evidence about when and how the claimant was offered employment for the spring 2019 semester and the employer's history of

[1] Issue ID 0028 7163 27 covers the requested weeks of benefits sought under the 2018-01 claim. Issue ID 0028 9856 32 covers the requested weeks under the 2019-01 claim.

[2] Because the review examiner's decisions in Issue ID 0028 7163 27 and 0028 9856 32 are identical except as to the relevant weeks at issue, we have reviewed them together and render this one consolidated decision.

cancelling courses or pro-rating salaries. Both parties attended the consolidated remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record in both cases.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not receive reasonable assurance of re-employment for the spring 2019 semester before she received a written contract on the day the semester began, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant applied for unemployment benefits and received an effective date of January 6, 2019.

2. The employer is a college that operates on a traditional September through May academic year, with a fall and a spring semester.

3. The claimant began working for the employer in January 2018. The claimant is still employed as an adjunct professor in Mathematics and Physics.

4. The claimant taught one course at the employer college in the spring 2018 semester.

5. The claimant taught two courses at the employer college in the fall 2018.

6. The employer has no knowledge of the Dean of the college verbally offering a specific course or courses to the claimant for the spring 2019 semester.

7. Prior to January 23, 2019, the employer notified the claimant in writing of specific courses it wanted the claimant to teach in the spring 2019 semester.

    a. On December 17, 2018, the employer notified the claimant by e-mail of two different math courses it wanted the claimant to teach in the spring 2019 semester.

8. The claimant's salary for each course is not established in a collective bargaining agreement.

    a. The claimant's salary for the fall 2018 semester was $6,300.
    b. If fully enrolled, the claimant's salary for spring 2019 courses would be $3,150 each.
    c. The employer considers a class with 11 students or more to be fully enrolled.
    d. If a class has 6-10 students, the salary offered is $2,950.
    e. If a class has under 6 students enrolled, it is usually cancelled.

9. The employer has cancelled a course offered to the claimant.

    a. The employer cancelled a general physics class that was supposed to happen during summer session 2 (July 5, 2019 through August 9, 2019).

        i. The class was cancelled due to under enrollment.

10. The employer has never pro-rated the claimant's pay for a course that it offered to her.

11. In the last two years, the college has cancelled 158 courses that the employer had offered to adjunct professors, which it then had to cancel due to low enrollment.

    a. In the last two years, the college has cancelled 51 courses in the claimant's department that the employer had offered to adjunct professors, which it then had to cancel due to low enrollment.

12. The employer is not aware of how many courses it pro-rated adjunct professors' salaries due to low enrollment.

13. The employer may not cancel or pro-rate the salary for a particular math of [sic] physics course taught by the claimant in order to avoid discouraging students from taking the course or if a specific student needs to take a certain course in order to graduate.

14. An adjunct professor is paid a full fee for teaching a course if fully enrolled. If fewer students enroll and the class still goes forward, the adjunct is paid less.

15. The employer has the ability to cancel classes at any time due to low enrollment.

16. The last day of the Fall 2018 semester was on or about December 20, 2018.

17. The claimant did not receive any contracts for Spring 2019 classes until after the Fall 2018 semester ended.

18. The claimant returned to work for the employer on January 23, 2019.

19. The claimant signed the contract on January 23, 2019, accepting two out of the three offered classes, and returned it to the employer.

20. On May 15, 2019, DUA sent out a Notice of Disqualification to the claimant and the employer, stating that it was concluded that since [sic] the claimant had performed services for an educational institution during the most recent

> academic year and there is reasonable assurance that she will perform services for the educational institution following a customary vacation period or holiday recess. It further states that she may not receive benefit[s] based wages earned working for an educational institution for the weeks commencing during the established and customary vacation period or holiday recess. The Notice additionally states that, because of insufficient wages to meet the eligibility requirements of Mass. Gen. Laws c. 151A, § 24(a), she is not eligible to receive benefits for the period beginning December 30, 2018 through January 5, 2019.[3]

21. The claimant appealed the disqualification.

Ruling of the Board

In accordance with our statutory obligation, we review the record and decisions 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. Consolidated Finding # 1 reflects the effective date of January 6, 2019, which is for the 2019-01 claim. The 2018-01 claim had an effective date of January 7, 2018. Based upon the employer's testimony, we interpret Consolidated Finding # 13 to mean that, in theory, the employer might decide not to cancel or pro-rate the salary for a course out of concern that it might discourage students from enrolling in such courses at the school or because a student needed the course to graduate.[4] In adopting the remaining findings, we deem 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 eligible for benefits, but for a different reason.

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

[3] Consolidated Finding # 20 in Issue ID 0028 9856 32 substitutes the period beginning January 13, 2019, through June 8, 2019.

[4] This interpretation, based upon the employer's explanation during the hearing, 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).

> 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 its Unemployment Insurance Program Letter (UIPL) 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.

In her decision, the review examiner decided that the claimant did not receive any reasonable assurance of re-employment before the employer gave her a written contract on January 23, 2019, to teach her two spring 2019 semester courses. *See* Consolidated Finding # 19. After remand, the record shows that the employer had sent her an email as early as December 17, 2018, offering two math courses for the spring semester. *See* Consolidated Finding # 7. This email came from the Dean's office, and we have no reason to question that this office had the authority to offer these courses. *See* Remand Exhibit 11.[5] Since the employer made this offer before the fall semester ended, the employer argues that the claimant had reasonable assurance of re-employment for the spring term. We disagree.

The consolidated findings show that the employer's offer for the claimant to teach these courses was contingent upon sufficient enrollment. *See* Consolidated Finding # 8. 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.[6]

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. Consolidated Finding # 11 shows that the employer has cancelled 158 courses that had been offered to adjunct professors in the last two years. Although we do not have enough information to know what percentage this figure represents of the total number of adjunct courses offered, we can reasonably infer that such cancellations were commonplace.[7]

Moreover, the employer can also decide to proceed with an under-enrolled course, but to reduce the instructor's pay. *See* Consolidated Finding # 8. In the year that the claimant had worked for the employer, she had not had to teach a course with a pro-rated salary, but the record indicates

[5] Remand Exhibit 11 is also part of the unchallenged evidence in the record.
[6] *See* UIPL 5-17, p. 6.
[7] Although Consolidated Finding # 9 shows that the employer cancelled a course offered to the claimant, this was in the summer of 2019. Because this happened after the winter 2019 weeks at issue, it is not relevant to our analysis.

that the employer has pro-rated the salaries of other adjunct professors in the past. *See* Consolidated Findings ## 10 and 12.

Given the employer's history of cancelling courses, we cannot say that the December, 2017, written offer came with a high probability that the claimant would teach her offered courses. And in light of the employer's policy to pro-rate the amount it pays an adjunct professor to teach an offered course that turns out to be under-enrolled, we do not believe that the claimant's offer came with reasonable assurance of teaching under substantially similar economic conditions as the prior academic term.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that it provided the claimant with reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, for the spring 2019 academic term.

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the weeks beginning December 30, 2018 through January 19, 2019, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 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