THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

Charles F. Hurley Building • 19 Staniford Street • Boston, MA 02114
Tel. (617) 626-6400 • Fax (617) 727-5874

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BOARD OF REVIEW DECISION

BR-117509-A (Mar. 27, 2012) - If an on-call substitute teacher receives reasonable assurance to work as a substitute teacher for any school employer in the fall, he is precluded under G.L. c. 151A, § 28A from collecting benefits during the summer based upon any of the wages that he earned from substitute teaching.

Introduction and Procedural History of this Appeal

The employer appeals a decision 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 reverse.

The claimant last worked for the employer on October 29, 2009. He filed a claim for unemployment benefits with the DUA, which initially approved his claim, but subsequently issued a Notice of Redetermination and Overpayment on September 24, 2010, requiring the claimant to repay benefits for weeks ending July 3, 2010 through July 31, 2010 and the week ending August 21, 2010. The claimant appealed the redetermination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's redetermination and awarded benefits in a decision rendered on February 3, 2011. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not have reasonable assurance of reemployment for the next academic term and, thus, was not disqualified, under G.L. c. 151A, § 28A. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue on appeal is whether an on-call substitute teacher, who performed the same services for multiple school employers, is disqualified from benefits during the summer months, irrespective of whether he performed work for this employer in the academic term directly preceding the summer break, because he did perform similar services for other schools during that term and did receive reasonable assurance of reappointment from those educational employers in the subsequent school year as an on-call substitute teacher.

Findings of Fact

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

1. The claimant filed his claim for benefits effective Sunday, 8/16/09. He was thereafter paid benefits. The benefits here in issue and paid pertain to the [week ending] 7/3/10 through 7/31/10 plus the [week ending] 8/21/10. The claimant's weekly benefit rate was $136.00 (no dependency allowances)(plus $25.00 per week stimulus money).

2. Subsequent thereto, additional information was received which made necessary a notice of redetermination and overpayment which disqualified the claimant from receiving benefits for the [week ending] 7/3/10 through 9/4/10.

3. That redetermination was issued on 9/24/10, under Section 28A and 71 of the Law. An overpayment in the amount of $966.00 for the above weeks was established. Misrepresentation was not indicated and no surcharge was levied on the balance of the overpayment.

4. The claimant was originally employed as a full-time Title 1 Math teacher, but this ended in 2008. He did not have reasonable assurance of reemployment in the same capacity at that time and was eligible to collect benefits on that claim

5. Since then, the claimant has worked as an on-call substitute teacher for several different school departments. The instant claim is based on wages earned only as a substitute teacher.

6. The claimant was called for work by the instant employer (Town of [ ] Ma. School Dept [sic]) several times in the 2008-2009 school year. He was retained on the substitute teacher list for the next school year.

7. During the 2009-2010 school year, the instant employer called the claimant for one day assignments on 9/23/09, 10/15/09, and 10/29/09. He was not called for work again for the remainder of the school year.

8. The claimant received a letter from the instant employer on 6/14/10; however, notifying him that his name would again be retained on the substitute list for the 2010-2011 school year.

Ruling of the Board

The Board adopts the review examiner's findings of fact. In so doing, we deem them to be supported by substantial and credible evidence. However, we reach our own conclusions of law, as are discussed below.

G.L. c. 151A, § 28A, 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; . . . (emphasis added.)

The review examiner concluded that the employer's June 14, 2010 letter of reappointment as a substitute teacher did not constitute reasonable assurance of reappointment for the next academic term because after October, 2009, the claimant had not performed any work for the employer during the remainder of the 2009-2010 school year. We disagree, because the claimant performed the same services in the spring academic term for other school districts and received reasonable assurance of reemployment in the upcoming fall term from several of those districts.

The review examiner found that the claimant had performed on-call substitute teaching work for several school districts during the 2009-2010 academic year. In a *nota bene* at the end of his decision, the review examiner called attention to the fact that disqualifications under G.L. c. 151A, § 28A, issued by the DUA for each of these other school department employers are handled separately. Although the DUA handles each of these cases separately, G.L. c. 151A, § 28A(a), provides for disqualification during the summer period if the claimant had reasonable assurance to perform instructional services on substantially the same terms and conditions for *any* educational employer during the subsequent academic period.

The U.S. Department of Labor (DOL) defines "reasonable assurance" as "[A] written, oral, or implied agreement that the employee will perform services in the *same or similar capacity* during the ensuing academic year, term, or remainder of a term." DOL Unemployment Insurance Program Letter (UIPL) No. 4-87 (Dec. 24, 2986)(emphasis added). " 'The same or similar capacity' refers to the type of services provided; i.e., a 'professional' capacity as provided by clause (i) or a 'nonprofessional' capacity as provided by clause (ii)." Id.[1] DOL further interprets reasonable assurance to require that the economic terms and conditions of the position in the second academic period not be substantially less favorable. Id. Thus, we must consider whether the claimant had reasonable assurance to perform instructional services as a substitute teacher on an on-call basis for any of his other school district employers during the fall of 2010.

In BR-117571-OP, BR-117572-OP, BR-117576-OP and BR-117579-OP, we disqualified the claimant from receiving benefits during the summer of 2010 under G.L. c. 151A, § 28A(a), due to his offers of reasonable assurance of reemployment as an on-call substitute teacher from each of these other school district employers. Since the claimant had reasonable assurance that he would perform instructional services in the same capacity—as a substitute teacher—for an educational institution under substantially the same on-call terms and conditions in the subsequent academic period, G.L. c. 151A, § 28A(a), disqualifies him from receiving benefits during the summer based upon substitute teaching wages earned during the base period. Therefore, he is disqualified from receiving benefits during the summer of 2010 based upon the wages earned from this employer in October, 2009.

We, therefore, conclude as a matter of law that the claimant, who performed the same services for multiple school employers, is disqualified under G.L. c. 151A, § 28A(a), from receiving benefits during the summer based upon wages earned from this employer, because he received reasonable assurance of reappointment in such capacity in the subsequent school year from another educational employer.

[1] G.L. c. 151A, § 28A(a) and (b) are modeled after 26 U.S.C. § 3304(a)(6)(A)(i) and (ii), respectively, and referred to in UIPL 4-87 as clauses (i) and (ii).

The review examiner's decision is reversed. In conjunction with BR-117571-OP, BR-117572-OP, BR-117576-OP, and BR-117579-OP, the claimant is denied benefits for the weeks ending June 26, 2010 through September 4, 2010, and he must repay these benefits to the unemployment compensation fund, without interest.

BOSTON, MASSACHUSETTS
DATE OF MAILING - March 27, 2012

John A. King, Esq.
Chairman

Sandor J. Zapolin
Member

Stephen M. Linsky, Esq.
Member

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS DISTRICT COURT
(See Section 42, Chapter 151A, General Laws Enclosed)

LAST DAY TO FILE AN APPEAL IN COURT- April 26, 2012

ab/jv