THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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BOARD OF REVIEW DECISION

BR-121907-A (July 31, 2012) - Under G.L. c. 151A, § 28A, an on-call substitute teacher who worked during the spring academic term was not entitled to benefits over the summer, because she had reasonable assurance of reemployment as an on-call substitute teacher under the same economic terms and conditions for the fall. It makes no difference that she had worked very few days during the spring term.

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 separated from her position with the employer on June 22, 2011. She filed a claim for unemployment benefits with the DUA, which was initially approved, but was then subsequently denied in a re-determination issued on September 21, 2011. The claimant appealed the re-determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's re-determination and awarded benefits in a decision rendered on January 25, 2012. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that, while the claimant had been provided with reasonable assurances of re-employment for the next academic term, she had not worked for the employer during the period immediately preceding the summer vacation period and, thus, was not disqualified 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 take additional evidence on the claimant's entire base-period employment. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the claimant, a substitute teacher, is ineligible for benefits during the summer of 2011 under G.L. c. 151A, § 28A, where she received reasonable assurance of employment in the same capacity in the next fall term, even though she did not work during much of the spring 2011 term.

Findings of Fact

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

1. The claimant reopened a claim for benefits on 08/12/11.

2. The claimant worked for [Town A] as a substitute teacher during the 2010/2011 school year.

3. During the 2010/2011 spring academic term, the claimant performed on-call substitute teacher services for the instant employer on 01/06/11, 01/10/11, 01/14/11, 01/19/11, 04/29/11 and 06/14/11.

4. During the 2010/2011 school year the claimant also performed substitute teacher services for the [Town B] on 01/31/11.

5. The 2010/2011 academic term ended on 06/22/11.

6. The claimant did receive a letter of reasonable assurance with the [Town A] (Exhibit 5) stating that she would be placed on the on call substitute list for the 2011/2012 school term.

7. The claimant signed and returned to the employer a Substitute Response Form indicating she wanted the employer to retain her name on the substitute teacher list for the 2011/2012 school term.

8. During the 2011/2012 school year, the claimant performed substitute teaching work for the employer on 09/21/11 – 09/23/11, 09/28/11, 09/30/11, 1213/11-12/15/11, 12/20/11, 01/06/12, 01/09/12, /10/12, 01/12/12, 01/18/12, 01/19/12, 01/25/12, 01/30/12, 01/31/12, 02/02/12, 02/03/12, 02/08/12-02/10/12, 03/07/12, 03/08/12, 03/21/12, 04/02/12-04/04/12, 04/10/12 and 04/12/12.

9. The claimant has not performed services for any other educational employer during the 2011-2012 school year.

10. On 09/21/11, the local office issued a Notice of Redetermination and Overpayment to the claimant determining that the claimant was subject to the disqualifying provisions of Section 28(A) of the law for the ten weeks ending 07/02/11 through 09/03/11. As a result, it was determined that the claimant had received benefits to which she was not entitled. Fraud was not determined and no interest was charged.

11. On 09/22/11, the claimant appealed the Notice of Redetermination and Overpayment.

12. On 01/24/12, a hearing was held.

Both parties participated in the remand hearings. The claimant's testimony at the remand hearing conflicted with the testimony she provided to the Review Examiner at the original hearing. The testimony provided by both parties at the remand hearing established the claimant worked for the instant employer as a substitute teacher immediately preceding the close of the 2010/2011 academic term and that she was called back at the beginning of the 2011/2012 academic term.

Ruling of the Board

The Board adopts the review examiner's consolidated 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; . . .

The review examiner based her decision to award the claimant benefits on the fact that the claimant had not received any substitute teaching assignments in the weeks immediately preceding the summer vacation period. In applying G.L. c. 151A, § 28A, however, we must consider all 52 weeks of base period employment. *See* BR-109037-OP (August 4, 2009). In particular, where, as here, the nature of the services for which reasonable assurance has been given is the same as those the claimant previously performed, then we look also to see if these services had been performed in the *previous academic term*.

That the claimant, who worked on-call, did not perform services during much of the spring 2011 academic term is of no importance to this analysis. An on-call substitute teacher, by the very nature of the job, works only episodically. If she worked at some point during the 2011 spring term, and received reasonable assurance of reemployment in the same capacity in the fall of 2011, then the claimant is precluded by G.L. c. 151A, § 28A, from claiming benefits against that employment during the summer months. *See* Jordan v. Department of Employment and Training, 37 Mass. App. Ct. 1102 (Rule 1:28 decision) (2003) (G.L. c. 151A, § 28A applies to substitute teachers who work on-call).

Following the additional evidence presented at the remand hearing, the review examiner found that the claimant performed services in an instructional capacity for the employer, an educational institution, at various times during the base period as an on-call substitute teacher, and was provided with reasonable assurances of re-employment in the same capacity for the following term, with the same economic terms and conditions. Thus, under G.L. c. 151A, § 28A, the claimant is ineligible for benefits based upon the earnings from those services.

We, therefore, conclude as a matter of law that under G.L. c. 151A, § 28A, benefits may not be paid to the claimant during the period between academic terms in the summer of 2011 based upon the services that she performed for this employer during the base period.

The review examiner's decision is reversed. The claimant is denied unemployment benefits for the weeks ending July 2, 2011 through September 3, 2011. The claimant is required to return the overpaid benefits in the amount of $164.00. No interest shall be charged on the balance.

BOSTON, MASSACHUSETTS
DATE OF MAILING - July 31, 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- August 30, 2012

A.M./ jv