



THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF LABOR AND WORKFORCE DEVELOPMENT
BOARD OF REVIEW

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SECRETARY, LABOR AND
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**BOARD OF REVIEW
DECISION**

JOHN A. KING, ESQ.
CHAIRMAN

DONNA A. FRENI
MEMBER

SANDOR J. ZAPOLIN
MEMBER

BR-109037-OP (Aug. 4, 2009) -- Claimant laid off from a full-time teacher position during the base period subsequently worked as an on-call substitute with reasonable assurance of returning to work as a substitute after summer vacation. Because the entire base period employment is considered; not just the last job before summer break, she was eligible for benefits based upon the full-time teacher wages.

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Division of Unemployment Assistance (DUA), to deny the claimant benefits following her separation from employment on August 4, 2008. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

Benefits were denied after the review examiner determined that the claimant was ineligible for benefits under G.L. c. 151A, § 28A(a), concluding that the claimant had reasonable assurance of reemployment in the next academic year.

On July 30, 2008, the agency initially determined that the claimant was ineligible for benefits. The claimant appealed and both parties attended the hearing. In a decision rendered on September 3, 2008, the review examiner affirmed the agency determination.

After considering the recorded testimony and evidence from the DUA hearing, the review examiner's decision, and the claimant's appeal, we accepted the case for review. Our decision is based upon a review of the entire record.

The issue on appeal is whether "reasonable assurance of reemployment" exists when an individual who had been a full-time teacher during the base period, but was subsequently laid off from that job and began working as an on-call substitute teacher, is given an offer of continued employment in the next term solely as an on-call substitute.

Findings of Fact

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

1. The claimant worked most recently for the employer during the 2007-2008 academic year, beginning in March 2008 and last working on June 24, 2008, at the end of the school year.
2. For 2007-[2008], the claimant worked as a Day-to-Day Substitute Teacher in the employing municipality's school system. The claimant worked on-call, performing services at different school locations, as needed by the employer.
3. On May 12, 2008, the employer's Assistant Superintendent of Human Resources issued the claimant a letter indicating that her services were appreciated for the 2007-2008 school year. The letter went on to state, "Since we will need your services as a substitute teacher/substitute nurse in the coming school year, we consider that you have reasonable assurance of employment as a substitute teacher/substitute nurse."
4. The substitute teacher pay rate will be the same for the 2008-2009 school year as it had been for 2007-2008; no changes were planned for the new school year.
5. During the 2007-2008 academic year, the claimant also worked as a full time teacher for another employer, a charter school, until her lay off for budgetary reasons in January 2008.
6. On July 8, 2008, the claimant filed a claim for unemployment benefits, effective on July 6, 2008.
7. On August 4, 2008, the claimant notified the employer's Acting Director of Staffing that she was resigning from her employment.

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.

The primary issue before the Board is whether the claimant is disqualified under G.L. c. 151A, § 28A, which provides, 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 only on the substitute teaching work that the claimant was performing just prior to the summer of 2008. We must, however, look back at the claimant's entire base period employment history. In prior cases where a claimant has had a mix of different types of educational employment during the base period preceding a new academic term, the Board has looked at the claimant's *primary* base period employment in determining whether the employment available in the upcoming academic term constitutes "reasonable assurance of reemployment," within the meaning of G.L.c. 151A, § 28A. As such, if there is no reasonable assurance of reemployment in the claimant's primary base period employment, then he or she has established his or her eligibility under § 28A. If there is nonetheless reasonable assurance of reemployment in the claimant's *secondary* job, then we exclude the wages from the secondary job when establishing the amount of the claimant's benefit rate and credit.

The Board has ruled consistently in the following Board decisions.

In BR-104694 (February 29, 2008), we held that a phys-ed teacher who was laid off in June and not offered a comparable job in the fall was eligible under G.L. c. 151A, § 28A. In establishing the amount of the claimant's benefit award, however, we excluded the base period wages from a secondary job he held as a part-time basketball coach, because he had reasonable assurance of reemployment in that job in the next academic year.

In BR-104747 (February 22, 2008), we ruled that a claimant who had worked as both a full-time teacher and a part-time substitute, but did not receive reasonable assurance of reemployment in his full-time job during the upcoming term, was eligible under G.L. c. 151A, § 28A. We excluded from the calculation of his benefit entitlement the wages he earned as a substitute teacher during the base period, because the same work was offered to him during the subsequent academic year.

The approach described above is broadly consistent with the decisions of appellate courts in the great majority of jurisdictions which have considered the question of how to apply the "reasonable assurance" standard to people who hold both primary and secondary educational

jobs. These include cases from Minnesota, Washington, Oregon, Pennsylvania, and West Virginia¹. See Sparrow v. Indiana School Dist., 534 N.W.2d 551 (Minn. Ct. App. 1995) (court allowed benefits during the summer based upon claimant's base period wages as a full-time custodian, but did not count his part-time bus driver wages because the claimant had reasonable assurance of reemployment for the latter); Pechman v. Employment Security Dept., 893 P.2d 677 (Wash. Ct. App. 1995), *review denied*, 907 P.2d 296 (Wash. 1995) (claimant was entitled to benefits based upon her base period full-time teaching wages when the offer of reemployment was for substitute teaching, though the amount of her benefits were to be reduced by the amounts she earned as a substitute); Hutchinson v. Employment Division, 870 P.2d 847 (Or. Ct. App. 1994) (court held that a claimant offered sporadic academic advisor work after losing her full-time teaching position could receive benefits during the following summer based upon earnings from the full-time teaching work she had performed during the base period); Albert Gallatin School Dist. v. Bd. of Review, 632 A.2d 614 (Pa. Commw. Ct. 1993) (custodian receiving benefits before the summer recess based upon his prior base period part-time earnings was disqualified during the summer recess due to reasonable assurance of reemployment as a part-time per diem substitute custodian the following academic year); Exec. Dir. Workforce W. Va. Unemployment Comp. Div. v. Bd. of Review, No. 08-AA-124, (W.Va. Circuit Court, March 13, 2009) (CCH DOC, UI-WV ¶8817) (court allowed unemployment payments during the summer based upon base period full-time teaching income and non-school income, but excluded any interim substitute teaching or school tennis coaching wages due to reasonable assurance of reemployment in those positions in the next academic term).

In this case, the claimant had worked as a full-time teacher during the base period prior to becoming a substitute teacher. Although she received reasonable assurance of returning to work as an on-call substitute teacher for the employer during the 2008-2009 school year, she was not offered reappointment as a full-time teacher. We, therefore, conclude as a matter of law that G.L. c. 151A, § 28A(a) does not disqualify her from receiving benefits based upon those full-time earnings during the base period.

We note that the DUA review examiner's decision characterized the claimant as having "resigned" on August 4, 2008 from her on-call substitute teaching position and placed a note at the end of her decision directing the agency to adjudicate the claimant's eligibility from August 9, 2008 forward under G.L. c. 151A, § 25(e)(1). We see no need for such adjudication, however, because we rule today that the claimant is not subject to disqualification, under G.L. c. 151A, § 25(e)(1) — or, for that matter, under G.L. c. 151A, § 25(c). First, there could be no "resignation" on August 4, 2008, as the school was on summer recess at the time and the claimant had not yet started working. Thus, the resignation is more accurately categorized as a refusal of an offer of employment. As such, however, it was non-disqualifying, because employment as a part-time on-call substitute teacher is not suitable work for a full-time teacher.

¹ One lower court decision in New York took a different approach. See Abramowitz v. City University of NY, 550 N.Y.S.2d 75 (N.Y. App. Div. 1989), *appeal denied*, 556 N.E.2d 1117 (N.Y. 1990) (in deciding whether claimant had reasonable assurance of reemployment, court disregarded the claimant's base period employment as a full-time registrar because she subsequently began working as an adjunct professor).

The review examiner's decision is reversed. The claimant is entitled to benefits for the week ending July 12, 2008 and for subsequent weeks if otherwise eligible. In determining the amount of her benefit entitlement, wages earned from her employment as an on-call substitute teacher are to be excluded from consideration.

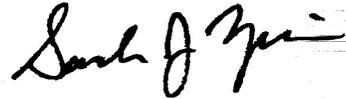


John A. King, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF MAILING - August 4, 2009



Donna A. Freni
Member



Sandor J. Zapolin
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 – September 3, 2009