STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 28, 2021

IN THE MATTER OF:
Appeal Board No. 614852

PRESENT: MICHAEL T. GREASON, MEMBER

In Appeal Board Nos. 614852 and 614853, the claimant appeals from the decisions of the Administrative Law Judge filed March 15, 2021, insofar as the combined decisions sustained the initial determinations holding, effective June 22, 2020, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (10);

charging the claimant with an overpayment of $3,000.00 in Pandemic Unemployment Assistance (PUA) recoverable pursuant to

§ 2102 (h) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of

2020 and 20 CFR § 625.14 (a); and charging the claimant with an overpayment of

Lost Wages Assistance benefits of $300.00 recoverable pursuant to 44 CFR §

206.120 (f)(5).

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer. The Board considered the arguments contained in the written statement submitted on behalf of the employer.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant has worked as a per diem substitute teacher for the employer for over two years. The school district uses the "Absence Management System" to assign substitute teachers to available jobs. In the 2019 through 2020 school year, the claimant worked 29 days and the school year was scheduled to end by the third week in June 2020.

The school year started on September 1, 2019, but due to COVID-19, however, the schools went to remote learning in mid-March. Substitutes, including the claimant, did not work after the district went to remote learning. As a result, the claimant applied for unemployment insurance benefits on April 24, 2020, and her claim was made effective as of March 9, 2020. The claimant received the unemployment insurance benefits at issue.

On June 15, 2020, the school district sent the claimant a letter stating that she would perform services for the school district as a substitute teacher for the 2020-2021 school year and that as long as her availability remained the same. The letter further explained that the claimant could expect to receive substantially the same economic terms and conditions of employment. The letter made no reference to COVID-19, whether there would be any changes in the methods of instruction during the 2020-2021 school year, or what impact any such changes might have on the availability of assignments.

OPINION: Pursuant to Labor Law § 590 (10), reasonable assurance exists when

the employer expresses a good-faith willingness to consider the possibility of offering work to the claimant and the economic terms and conditions in the new school year are not expected to be substantially less favorable than in the prior year.

The United States' Department of Labor Employment & Training Administration Unemployment Insurance Program Letter (UIPL) 5-17, dated December 22, 2016, gives guidance with respect to interpreting the meaning of reasonable assurance under Sections 3304(a)(6)(A)(i) - (iv) of the Federal Unemployment Insurance Tax Act (FUTA). Pursuant to UIPL 5-17, in order for a claimant to have reasonable assurance in the following year or term, the offered employment must satisfy three prerequisites: (1) the offer of employment may be written, oral, or implied, and must be a genuine offer; that is, an offer made by an individual with actual authority to offer employment; (2) the

employment offered in the following year or term, or remainder of the current academic year or term, must be in the same capacity; and (3) the economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof). The Department interprets "considerably less" to mean that the economic conditions of the job offered will be less than 90 percent of the amount the claimant earned in the first academic year or term.

The credible evidence fails to establish that the employer provided the claimant with reasonable assurance of employment in the 2020-2021 school year. Although the employer's letter of June 15, 2020 advised the claimant that she would be employed under substantially the same economic terms and conditions, we note that the employer had not afforded the claimant any assignments once the school shifted to virtual learning as of March 2020. We note too, that there is insufficient evidence that the employer had finalized its plans for the fall as to the method of instruction prior to the issuance of its June 2020 letter of reasonable assurance. In so concluding, we note that the employer's witness, the human resource administrator, testified initially that the school district had submitted a final plan in April. He then testified that the plan "crystallized" near the end of the school year. In light of this inconsistency, we do not conclude that a final plan existed when the letter of reasonable assurance was sent to the claimant as of mid-June 2020.

As a result, we find that the employer could not provide the claimant with reasonable assurance of continued employment in the 2020-2021 school year. Accordingly, we cannot conclude, under these circumstances, that the employer afforded the claimant with reasonable assurance. (See Appeal Board No. 614252) We further find that as the claimant did not have reasonable assurance of employment in the 2020-2021 school year, she was eligible for the unemployment insurance benefits which she received.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is reversed.

In Appeal Board Nos. 614852 and 614853, the initial determinations, holding, effective June 22, 2020, that the wages paid to the claimant, a professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590

(10); charging the claimant with an overpayment of $3,000.00 in Pandemic Unemployment Assistance (PUA) recoverable pursuant to § 2102 (h) of the

Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR §

625.14 (a); and charging the claimant with an overpayment of Lost Wages Assistance benefits of $300.00 recoverable pursuant to 44 CFR § 206.120

(f)(5), are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER