



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: JULY 27, 2021

IN THE MATTER OF:

Appeal Board No. 614856

PRESENT: MICHAEL T. GREASON, MEMBER

.In Appeal Board Nos. 614856, 614857 and 614858, the claimant appeals from the decisions of the Administrative Law Judge filed March 22, 2021, which sustained the initial determinations holding, effective June 29, 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 Federal Pandemic Unemployment Compensation of \$2,400.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Lost Wages Assistance benefits of \$600 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5);

and holding the claimant ineligible to receive benefits, effective March 31, 2020 through April 3, 2010, on the basis that the claimant was not totally unemployed.

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.

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

FINDINGS OF FACT: The claimant worked for the New York City Department of Education (DOE) as a per diem substitute teacher during the 2019-2020 school year. The claimant was paid at the rate of \$188.75 per day. In May 2020, the pay rate was increased to \$193.47. The claimant received no fringe benefits. She worked 71 days out a possible 188 days in the 2019-2020 school year.

On March 18, 2020, the school buildings closed due to the COVID-19 pandemic. Instruction began remotely on March 23, 2020. In addition, the employer open 148 Regional Enrichment Centers (REC Centers) that offered in-person instruction to the children of first responders. Remote and REC Center work was available to substitutes through Sub Central following the school buildings' closure. The fill-rate for absences in the 2019-2020 school year was 85%, meaning 15% of assignments remained unfilled. The claimant continued to work for a time after March 18, 2020.

The claimant received 40 days of work through offers recorded in Sub Central (including IVR offers, website offers, and administratively assigned offers reported to Sub Central). She received the remainder of her work in the 2019-2020 school year from administrators who did not report the assignments to Sub Central. In the 2019-2020 school year, the DOE offered the claimant 99 days of work through the Sub Central system as a substitute teacher.

On June 17, 2020, the employer sent the claimant an email which indicated that the DOE anticipated the need for substitutes in the 2020-2021 school year; that the claimant's name is on an electronic register, which has been used to grant access to assignments during the 2019-2020 school year and will continue to be used to grant access to assignments in the 2020-2021 school year. The letter also states that the economic terms and conditions are expected to be the same in the 2020-2021 school year as in the 2019-2020 school year and that the employer anticipates as much work for per diem substitute teachers/paraprofessionals during the 2020-2021 school year as was available in the 2019-2020 school year. The claimant acknowledged reading the letter on June 27, 2020. The 2020-2021 school year began on September 11, 2020.

Sub Central is an automated system that is used to fill teachers' absences and offer work to substitute teachers. Substitute teachers register with the system, giving their name, phone number, the locations or districts in which they prefer to work, and the classifications/subject matter that they are willing to teach.

The Sub Central Registry offers work to substitutes in several ways. First, Sub Central uses an automated calling process, known as an Interactive Voice Response (IVR) system. When a full-time teacher notifies Sub Central of an absence, Sub Central generates a series of lists using, first, school-created priority lists, then matching subject and location classifications, and finally a general list for the borough in which the school is located. All calls within the various lists are made randomly. When a substitute answers a telephone call from Sub Central, she enters her identification number and PIN number. The system then relays the job offer with school, location, subject matter, date, and start time of the job. The substitute can then accept or decline the offer. Second, schools may hire substitutes directly and register the assignment with Sub Central. Third, substitutes may also find work themselves from the Sub Central database by searching for assignments on the Sub Central website. The employer also hires substitutes directly through schools without reporting the assignments to Sub Central. Once an assignment has been registered with Sub Central, the IVR system will not continue to call substitutes for the same days of work.

The number of schools, teachers and students in the DOE was expected to remain approximately the same in 2020-2021 as in the 2019-2020 school year. The DOE covered approximately 85 per cent of absences in 2019-2020 and expects the fill rate to remain about the same in 2020-2021. The per diem pay rate for substitute teachers in the 2020-2021 will remain at \$193.47.

The claimant applied for benefits on March 25, 2020. She worked for the DOE in a REC Center on March 31, April 1, 2 and 3, 2020; she did not claim benefits for those days. Between June 29, 2020 and September 6, 2020, the claimant received \$2400.00 in FPUC benefits and \$600.00 in LWA benefits.

The employer's witness, KH, has worked for Sub Central as a Manager of School-based Services for over four years. He manages the office that hires all substitute teachers and substitute paraprofessionals. He also manages the Sub Central office, which is the system used to maintain records of all substitute teachers and paraprofessionals, all absences reported by regularly employed teachers and paraprofessionals, and generates offers of work to all active substitutes through that system. He also trains new substitute teachers and substitute paraprofessionals, as well as all new staff in the Sub Central office in the use of the Sub Central system.

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

employer expresses a good-faith willingness to consider the possibility of offering per diem 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. It is the responsibility of the employer to demonstrate with competent testimony from witnesses with knowledge of the employer's personnel practices and procedures that these basic conditions have been met. Absent proof that these conditions have been satisfied there is no reasonable assurance of employment in instructional capacity as a per diem substitute teacher (See Appeal Board Nos. 552093 and 551885).

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 establishes that the employer's witness established himself, through training and experience, as competent to testify as to the compilation and use of the Sub Central registry system. The credible evidence also establishes that the claimant worked on 71 days in the 2019-2020 school year. To establish, based on evidence through Sub Central, that the economic terms and conditions will be substantially similar in the 2020-2021 school year, the employer must show that Sub Central offered the claimant at least 90% of that number, or 63.9 days. The Court has held that all offers registered in Sub Central may be considered in determining whether Sub Central offered at least 90% of the number of days the claimant worked. (Matter of Enman, 161 AD3d 1368 [3d Dep't 2018]). According to the employer's detail report, 99 days of offered work were registered with Sub Central, which

exceeds 90% of the number of days the claimant worked.

Due to the COVID-19 pandemic, there were changes to the way that work was done by substitutes. The employer's witness, however, credibly testified that the absence fill rate was 85%, a fill rate comparable to the previous school year, meaning that 15% of assignments were unfilled. Moreover, the claimant continued to work after the schools were closed in March. There is adequate proof that, at the time the offer was made, it

was anticipated that the claimant's expected earnings in the 2020-2021 school year would be at least 90% of the claimant's earnings in the 2019-2020 school year. As a result, the employer has established that it will make a good-faith effort to hire the claimant in the 2020-2021 school year and that there was an offer of reasonable assurance made to the claimant in June 2020. Accordingly, the provisions of Labor Law § 590 (10) did apply to the claimant. The wages

earned with the employer are excluded during the period between academic years 2019-2020 and 2020-2021.

Pursuant to Section 2104 (f)(2) of the CARES Act of 2020, as amended by Section 261 of the Continued Assistance for Unemployment Workers Act of 2020, Federal Pandemic Unemployment Compensation (FPUC) benefits are recoverable if the claimant was not entitled to receive such benefits.

The credible evidence establishes that the claimant received FPUC benefits in the amount of \$2,400 and that the claimant was not entitled to receive those FPUC benefits because she had reasonable assurance of continuing employment in the 2020-2021 school year so the wages earned with the employer are excluded from during the period between academic years 2019-2020 and 2020-2021 and may not be used to establish a valid original claim for benefits. Accordingly, consistent with federal law, the FPUC benefits are recoverable.

Pursuant to 44 CFR Sec. 206.120 (f)(5), the state is responsible for the recovery of Lost Wages Assistance benefits that were "obtained fraudulently, expended for unauthorized items or services, expended for items for which assistance is received from other means, and awards made in error.

The credible evidence establishes that the claimant received Lost Wages Assistance of \$600.00 and that the LWA benefits were awarded in error benefits because the claimant had reasonable assurance of continuing employment in the

2020-2021 school year so the wages earned with the employer are excluded from during the period between academic years 2019-2020 and 2020-2021 and may not be used to establish a valid original claim for benefits. Accordingly, the LWA benefits are recoverable.

Pursuant to Labor Law Section 591(1), a claimant must be totally unemployed in order to be eligible to receive benefits. The credible evidence also establishes that the claimant worked for the DOE on March 31, April 1, 2, and 3, 2020. She was therefore not totally unemployed for that statutory week. Accordingly, we conclude that she was not eligible to receive benefits for that statutory week.

DECISION: The decisions of the Administrative Law Judge are affirmed.

In Appeal Board Nos. 614856, 614857 and 614858, the initial determinations, holding, effective June 29, 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

Federal Pandemic Unemployment Compensation of \$2,400.00 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of Lost Wages Assistance benefits of \$600 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5); and holding the claimant ineligible to receive benefits, effective March 31, 2020 through April 3, 2020, on the basis that the claimant was not totally unemployed, are sustained.

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

MICHAEL T. GREASON, MEMBER

Federal law provides that New York State can waive repayment of Pandemic Emergency

Unemployment Compensation (PEUC), Federal Pandemic Unemployment Compensation (FPUC), Lost Wages Assistance (LWA), Mixed Earners Unemployment Compensation (MEUC) or Pandemic Unemployment Assistance (PUA) benefits overpaid to the

claimant if the overpayment was not the claimant's fault and repayment would be contrary to equity and good conscience. For more information on the overpayment waiver process and instructions to request a waiver, please visit the New York State Department of Labor's website, <https://dol.ny.gov/overpayment-waiver-and-appeal-process>.