



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 01, 2021

IN THE MATTER OF:

Appeal Board No. 616024

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 616024 and 616025, the claimant appeals from the decisions of the Administrative Law Judge filed May 7, 2021, insofar as they sustained the initial determinations, holding 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 (11); 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; and charging the claimant with an overpayment of Lost Wages Assistance benefits of \$1,800.00 recoverable pursuant to 44 CFR Sec. 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 on behalf of the claimant and the employer.

The Board considered the arguments contained in the written statement submitted on behalf of the claimant.

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 paraprofessional during the 2019-2020

school year. The claimant was paid at the rate of \$157.87 per day. She worked 37 days out a possible 188 days in the 2019-2020 school year.

In the 2019-2020 school year, the claimant accepted 12 days of work via Sub-Central (IVR offers, web offers, and administrator initiated offers recorded in Sub-Central) and accepted 25 additional days directly from the schools which were not recorded in Sub-Central. The NYCDOE offered the claimant 186 days of work via IVR telephone calls, web offers, and administrator initiated offers recorded in the Sub-Central system database. Due to the Covid-19 pandemic, all schools closed on March 18, 2020. The DOE then switched to entirely remote instruction which began on March 23, 2020. The DOE also informed substitutes of work opportunities at regional enrichment centers that served children of essential workers; positions at these centers were to be filled through Sub-Central. After March 17, 2020, the claimant was offered assignments for the period between March 18 and June 26, 2020 in the regional enrichment centers, but she was afraid to take them because she had a pre-existing medical condition that affected her lungs; she received no offers for remote work.

The Sub-Central registry is an automated system that is used to fill paraprofessional absences by automatically calling substitutes at a contact number they have provided to the system. Through its IVR telephone system, Sub-Central calls substitutes to replace absent paraprofessionals by running through the list of eligible substitutes in several phases. Any paraprofessionals who were put on a priority list by a school are called first. If no one on the priority list accepts the position, Sub-Central then runs through the list of paraprofessionals who have noted a preference to work in the school's location and teach the required subject. If no substitute is found, the registry goes to general pool of substitutes registered, whether they prefer to work in that district or teach that subject matter. 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.

The number of schools, regular, substitute paraprofessionals, 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 percent of absences in

2019-2020 and expects the fill rate to remain about the same in 2020-2021.

In June 2020, a report was created by the New York City Independent Budget Office indicating that there would be \$475 million in reductions in spending and staffing in the NYC schools. The report indicated that the proposed budget intended to cut \$322 million from general education instruction through a variety of means including a hiring freeze intended to encourage the use of permanent employees.

On June 9, 2020, the Chancellor of the New York City schools sent an email to the claimant regarding the situation in the schools as a result of the COVID-19 pandemic and the 2020-2021 school year. On the issue of reopening in the fall, the Chancellor wrote:

...Today I am writing with an important update about how the reopening of school buildings in the fall (sic).

We started planning for this return the moment we closed buildings in March. While there are still significant uncertainties with respect to COVID-19 and its impact on New York City in the months ahead, one thing is for sure: it will take all of us working together to rise to the occasion to support student learning, address the trauma of COVID-19 disruption and loss, and keep our children on a path to success.

Since we cannot yet predict what September will look like, we can - and we must - be prepared for a range of possibilities. Our job is to be ready and nimble. ...

The Chancellor went on to present an 8-point set of principles to guide reopening the schools in the fall, which included the following:

3.Blended Learning: Our schools have done a tremendous job adapting to remote learning over the past three months. We know that this has helped to close the digital divide, and we are incredibly proud and grateful for the heroic work of our students, families, and educators in keeping learning going amidst these unprecedented conditions. Even when we return to a traditional school day, we can prepare for a restart in the fall by leveraging approaches of both in-person and remote instruction - what I refer to as blended learning - to support our transition from remote learning and maximize both face-to-face and online instruction.

4.School Start Date: We are wholeheartedly working towards a September start date, while working closely with DOHMH to monitor health indicators to ensure that it is safe to return to school buildings and offices.

5.Rolling/Phased Starts: Traditionally, all staff and students begin their respective school years at the same time. We are seeing so far that other countries are modifying schedules, and/or starting groups of students in person at different times. This year for us, the timing of return to buildings, and under what circumstances buildings might be closed or have limited access, will be established in close coordination with NYC Health and based on health and safety indicators.

On June 17, 2020, NYCDOE sent the claimant an emailed letter stating that 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 stated 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 occasional per diem substitute paraprofessionals during the 2020-2021 school year as was available in the 2019-2020 school year. The claimant acknowledged reading the letter on June 17, 2020.

On July 1, 2020, the Chancellor sent an email to all school personnel, including the claimant, discussing the NYC's Adopted Budget for Fiscal Year 2021 which, he stated, was created in a climate of unprecedented financial challenges for the City. As it related to the DOE specifically, the impact of the budget reductions over Fiscal years 2020 and 2021 was over a billion dollars. He also noted that Mayor De Blasio had said only a few days ago that the situation could require furloughs or layoffs across city government; the Chancellor said that they did not yet know how those would be implemented across city agencies and that this uncertainty was very worrisome.

The 2020-2021 school year was to begin on September 10, 2020. There would be no changes in the way Sub-Central operates to offer work. Per contract, the pay rate for the 2020-2021 school year for substitute paraprofessionals would be \$157.87 per day until May 2020, when it was increased to \$161.82 per day.

The claimant filed for Unemployment Insurance on March 27, 2020. She received

\$2400.00 in FPUC benefits and \$1800 in LWA benefits over the summer months.

OPINION: Pursuant to Labor Law § 590 (11), 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 paraprofessional. (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 § 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 ninety percent of the amount the claimant earned in the first academic year or term. The United State Department of Labor has determined that the following contingencies are within the employer's control: allocation of available funding. (See UIPL 5-17).

In the case at hand, the claimant offered evidence of significant staffing and budget cuts raising a rebuttal to reasonable assurance. As to the budget, the claimant presented evidence that the DOE knew of cuts to funding prior to the issuance of the employer's letter of reasonable assurance. The Chancellor then sent multiple emails to all employees in July and August acknowledging even

more significant cuts in funding. The employer did not refute the claimant's rebuttal with competent testimony (See Appeal Board Nos. 551663 and 614612). The employer witness failed to explain the basis for his testimony that any budgetary constraints for the 2020-2021 school year would not impact on the number of substitutes needed and to whether he had personal knowledge of the budgets such that his testimony was more than just hearsay and conjecture. The employer's witness, JT, conceded that he was personally unfamiliar with the budget issues and further conceded that he had no conversation about the pandemic's impact on per-diem substitutes with PC who issued the reasonable assurance letter prior to its issuance, and was told, in a bare statement, after the issuance of the letter, only that there would be no cuts to the per diem budget. As JT failed to establish the basis for the employer's contention that budget cuts would not substantially adversely affect the economic terms and conditions in the new school year, it has not been established that the bona fides of the offer contained in the June 17, 2020 letter to the claimant could be met and that the offer contained in the June 17, 2020 letter was made in good faith (See Appeal Board Nos. 615635, 614612, 551949 and 545567).

In the absence of a competent factual basis to support the conclusion that there was reasonable assurance of employment, we conclude that the claimant did not receive reasonable assurance of continued substantially similar employment in the 2020-2021 school year. Thus, the exclusionary provisions of Labor Law § 590 (11) do not apply to the claimant. Accordingly, the claimant

was eligible to receive benefits and there is no overpayment of benefits.

DECISION: The decisions of the Administrative Law Judge, insofar as appealed from, are reversed.

In Appeal Board Nos. 616024 and 616025, the initial determinations holding 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 (11); 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; and charging the claimant with an overpayment of Lost Wages Assistance benefits of \$1,800.00 recoverable pursuant to 44 CFR Sec. 206.120 (f)(5), are overruled.

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

JUNE F. O'NEILL, MEMBER

TO EMPLOYERS: The employer account of an employer liable for contributions under Article 18 of the Labor Law shall not be charged for the duration of the claim for benefits paid to a claimant during the COVID-19 pandemic. Such charges shall be made to the general account. This applies to 100% of benefits attributable to employers liable for contributions and to 75% of benefits attributable to employers liable for payments in lieu of contributions. Any charges covered by this order and previously applied to an employer's account are canceled by this order and shall instead be applied to the general account.