STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: AUGUST 05, 2022

IN THE MATTER OF:
Appeal Board No. 623057

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 623056 and 623057, the claimant appeals from the decisions of the Administrative Law Judge filed April 8, 2022, insofar as they sustained the initial determinations holding, effective June 29, 2020, that the wages paid to the claimant, a non-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 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 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 by the claimant and on behalf of the employer.

The Board considered the arguments contained in the written statements 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 worked for the employer school district as a

substitute teachers' assistant during the 2019-2020 school year. She worked 51 days and earned $12.50 per hour, earning $5662.58 in the 2019-2020 school year. Due to the pandemic school buildings closed in March 2020 and the school went to remote learning; from that time through the end of the school year in June 2020, the claimant was not offered any work.

The employer relies on a substitute placement service provided by the area Board of Cooperative Educational Services ("BOCES") to coordinate substitute services for its district. Substitutes register with the BOCES system upon hire and approval by the school district school board. Each substitute creates an account with the service when they register. Personal information, approved districts, availability, certifications, education and classifications, are among the information maintained within the service for each substitute to assist them in obtaining appropriate substitutes for absences within their client school districts. The claimant registered with the system in October 2008. Employees at the school district may input their own absences into the system or BOCES staff can input absences into the system. Once the system is aware of an absence, the information regarding that position is listed on the BOCES website so that substitutes may search the website for work. Additionally, the system starts calling substitutes via an automated telephone service to offer work to appropriate substitutes. The calls are made twice a day according to a specific pattern. First, the calls are made to substitutes who have been specified by the teacher of the class where the teachers' assistant is absent. If the position is not filled, the system next calls substitutes listed on preferred lists who have a classification that matches the needs of the vacant position. If the position is not filled, the system then calls any substitute approved to work in the building location. When the substitute is called, the automated call provides the job and its location and provides an option to decline or accept. If the substitute simply hangs up, that is considered a declination.

On or about June 3, 2020 the claimant received a letter from the employer signed by Deborah Marriott, Director of Student and Staff Support Services for Niskayuna Central School District which stated that the letter was providing her with reasonable assurance that she would perform services in the capacity of substitute for the school year beginning on July 1, 2020 and ending on June 30, 2021. The letter also stated that the district did not anticipate that the economic terms and conditions of the work available to her in the 2020-2021 school year as a substitute would be substantially less favorable than in the 2019-2020 school year.

In the 2019-2020 school year, the employer had 1011 teachers' assistant absences. Of those, 616 absences were filled, while 298 remained unfulfilled; 97 of the absences did not need substitutes. The employer's 2019-2020 budget for substitutes was $130,000 and was $160,000 for the 2020-2021 school year. For the 2020-2021 school year, the pay rate for teachers' assistants was raised to $12.75 per hour.

The claimant filed a claim for unemployment insurance benefits and subsequently received $2,400 in FPUC benefits and $1,800 in LWA benefits for the week ending July 5, 2020 through the week ending September 6, 2020.

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 as a per diem substitute teachers' assistant (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 fails to establish that the employer gave the claimant reasonable assurance of continued substantially similar employment in the 2020-2021 school year. While the claimant admitted receipt of the employer's letter of June 3, 2020, the claimant cannot establish that she was given reasonable assurance by the mere acknowledgment of this letter. The claimant cannot know, with firsthand knowledge, what the actual intent of the School District was with respect to rehiring her as a substitute for the 2020-2021 school year, or if the School District was in fact capable of rehiring her as a substitute for the next school year at that time (see Appeal Board Nos. 603168 and 569239 A). The employer failed to present any witnesses involved in the decision to send the purported letter of reasonable assurance to the claimant, the drafting or mailing of said letter and did not produce the person who signed it. None of the witnesses presented worked for the employer at the time the letter was sent, thus none have the requisite knowledge to authenticate the document submitted and it may not be relied upon as probative evidence (See Appeal Board Nos. 606507 and 602352).

Additionally, even if we were able to reach beyond the letter, the employer failed to present competent testimony and evidence that the terms and conditions for the 2020-2021 school year would be at least 90 per cent of that earned in 2019-2020 school year. Although the employer's witness, SR, established herself as a competent witness as to the compilation of the BOCES registry based on her training and experience with the registry, the employer did not sufficiently establish, through the witness's testimony, how the system operates to call substitute teachers' assistants to fill in for the absences of full-time teachers' assistants. The court has held that both the compilation and use of the list to call substitutes must be explained on the record. (See Matter of Sandick, 197 AD2d 737 [3rd Dept. 1993]). Use refers to the procedure involved in calling substitute teachers' assistants to cover absences. Significantly, the witness testified that registry was utilized to call substitutes in three phases but did not explain in what order substitutes are called within each phase. Without evidence of a random order of calls in the three phases of calls, there is no basis to conclude that this claimant has as much chance of receiving an offer of work as does any other substitute on the BOCES registry. Absent testimony or evidence as to how the calls to substitutes are made in all phases of calls, the record fails to establish a

good faith effort to offer substantially the same work to the claimant in the next school year (see Appeal Board Nos. 608382 and 593461).

Further, the employer has not submitted any evidence of the number of days of work offered to the claimant in the 2019-2020 school year. We note that that figure was within their capability to produce since they did produce that number for the 2020-2021 school year. The employer's case was largely made up of data drawn from the 2020-2021 school year. However, neither the actual number of days of work offered by the time of the hearing, the number of actual days worked, nor amount of earnings for the claimant in the subsequent year by the time of the hearing may be read back to the date of the offer to establish reasonable

assurance (See Appeal Board No. 531085, which held that even though a claimant may have worked in

excess of 90% of the days she worked in her prior school year at the time of the hearing, this did not establish that, at the time of the offer of employment for the 2005-2006 school year, June 14, 2005, there was any assurance of there being substantial work for substitute teachers beginning September 2005. (See also, Appeal Board Nos. 591152 A, and 588584)).

Therefore, based on this record, we cannot find that the employer intended to make a good faith effort to offer substantially the same work to the claimant in the next school year (See Matter of Maass, 77 AD 2d 765 [3rd Dept. 1980]; Appeal Board No. 593461). Accordingly, the exclusionary provisions of § 590

(11) of the Labor Law do not apply to the claimant and she is eligible to receive benefits. There is no overpayment of benefits.

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

In Appeal Board Nos. 623056 and 623057, the initial determinations, holding, effective June 29, 2020, that the wages paid to the claimant, a non-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 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 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