

-DECISION-

Claimant:
PEGGY F NICHOLSON

Decision No.: 3491-BH-12

Date: August 06, 2012

Appeal No.: 1140176

Employer:
PRINCE GEORGES BOARD EDUCATION

S.S. No.:

L.O. No.: 63

Appellant: Claimant

Issue: Does reasonable assurance of returning to a part-time substitute teacher job (obtained after the loss of a full-time substitute teacher job) disqualify the claimant from benefits attributable to the full-time job on the facts of this case?

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200*.

The period for filing an appeal expires: September 05, 2012

- APPEARANCES -

FOR THE CLAIMANT:

FOR THE EMPLOYER:

EVALUATION OF THE EVIDENCE

The Board scheduled a hearing for June 26, 2012. None of the parties appeared. The Board, therefore, decided this case on the evidence presented to the hearing examiner after a review of the record.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*; *COMAR 09.32.06.04*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

This is a case of first impression for the Board. In this case, the claimant's long term full time teacher's aid job for the employer was no longer available to her. In order to ameliorate her economic losses, the claimant procured a job as a part-time substitute teacher. The question before the Board is whether unemployment benefits awarded as the result of the claimant's full time job are affected by the fact that the claimant has reasonable assurance resulting from unemployment between academic years from her part-time job; a job the claimant accepted only because her full-time substitute teaching position was no longer available. The Board finds that the intent of the unemployment insurance law regarding the reasonable assurance disqualification related to wages from the claimant's part-time job in this case does not operate to disqualify the claimant from benefits related to the claimant's wages resulting from the loss of her full-time teacher's aid position. To do so would punish the claimant for taking a part-time teaching position to mitigate her unemployment. Had the claimant taken any other non-educational part-time job, the reasonable assurance disqualification would not have arisen. The employer should not be able to use the claimant's part-time position to disqualify her from benefits resulting from the loss of her full-time job on the facts of this case.

FINDINGS OF FACT

The claimant was previously employed as a full-time designated teacher aid for this employer through June 30, 2010. The claimant filed for unemployment benefits establishing a benefit year beginning September 19, 2010 after the claimant was informed that her full time position would no longer be available.

The claimant subsequently began a part-time substitute teaching position and continued to be employed in that capacity during her benefit year. The new part-time job and the prior full-time job were separate and distinct jobs.

On October 25, 2011, an Agency claims specialist determined that the claimant had reasonable assurance of returning to work as a substitute teacher and denied the claimant benefits from the week beginning June 12, 2011 through the week ending August 28, 2011. The Agency disqualified the claimant from all unemployment insurance benefits including wages attributable to the loss of her full-time job.

The claimant received reasonable assurance that she would return to a similar part-time teaching position in the following academic year (2011-2012). The claimant did not receive reasonable assurance relating to her prior full-time job.

CONCLUSIONS OF LAW

Md. Code Ann., Lab. & Empl. Art., § 8-909 provides:

Employees of governmental entities or charitable, educational or religious organizations

(a) In general. -- Subject to the provisions of this section, benefits based on service in covered employment under §§ 8-208(a) and 8-212(c) of this title 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 in covered employment.

(b) Educational institutions; services performed in instructional, research, or principal administrative capacity. --

(1) With respect to services performed in an instructional, research, or principal administrative capacity for an educational institution, benefits may not be paid based on those services for any week of unemployment that begins during:

- (i) a period between 2 successive academic years;
- (ii) a similar period between 2 regular but not successive terms; or
- (iii) a period of contractually provided paid sabbatical leave.

(2) This subsection applies only to any individual who:

- (i) performs the services in an instructional, research, or principal administrative capacity in the first of 2 academic years or terms; and
- (ii) has a contract or reasonable assurance that the individual will perform the services

in an instructional, research, or principal administrative capacity for any educational institution in the second of the 2 academic years or terms.

(c) Educational institutions; services performed in instructional, research, or principal administrative capacity -- Services performed in other capacities. --

(1) With respect to services performed for an educational institution in any capacity other than instructional, research, or principal administrative, benefits may not be paid on the basis of the services for any week of unemployment that begins during a period between 2 successive academic years or terms.

(2) This subsection applies to any individual who:

(i) performs the services described in this subsection in the first of 2 academic years or terms; and

(ii) has a reasonable assurance that the individual will perform the services in the second of the 2 successive academic years or terms.

(3) Before July 1 of each year, each educational institution shall provide the Department with the name and Social Security number of each individual who has a reasonable assurance of performing covered employment described under this subsection in the next academic year.

(4) If an individual whose name and Social Security number are required to be submitted to the Department under paragraph (3) of this subsection is not given an opportunity to perform the services for the educational institution for the next successive year or term, the individual shall be eligible for benefits retroactively if the individual:

(i) files a timely claim for each week;

(ii) was denied benefits solely under this subsection; and

(iii) is otherwise eligible for benefits.

(d) Educational institutions; services performed in instructional, research, or principal administrative capacity -- Vacations and holidays. --

(1) With respect to services described in subsections (b) and (c) of this section, an individual may not be eligible for benefits based on the services for any week that begins during an established and customary vacation period or holiday recess.

(2) This subsection applies to any individual who:

(i) performs the services in the period immediately before the vacation period or holiday recess; and

(ii) has a reasonable assurance that the individual will perform the services in the period immediately following the vacation period or holiday recess.

(e) Educational service agencies. --

(1) In this subsection, "educational service agency" means a governmental entity that is established and operated exclusively to provide educational service to one or more educational institutions.

(2) If any service described in subsection (b) or (c) of this section is performed by an individual in an educational institution while in the employ of an educational service agency, the individual is subject to subsections (b), (c), and (d) of this section and benefits may not be paid if not allowed under subsection (b), (c), or (d) of this section.

(f) Services provided on behalf of educational institutions. -- If any service described in subsection (a) of this section is provided by an individual to or on behalf of an educational institution, the individual is subject to subsections (b), (c), and (d) of this section and benefits may not be paid if not allowed under subsections (b), (c), and (d) of this section.

The legislative intent is clear from the plain language and statutory scheme as well as the legislative history; the General Assembly sought to deny unemployment benefits to school employees during scheduled and anticipated holidays, vacations, and breaks between academic terms when the employee has a reasonable assurance of continued employment. As one court has explained, "[t]he rationale for this limitation is that school employees can plan for those periods of unemployment and thus are not experiencing the suffering from unanticipated layoffs that the employment-security law was intended to alleviate." *Thomas v. DLLR*, 170 Md. App. 650, 665-66 (2006), citing *Baker v. Dep't of Employment and Training Bd. of Review*, 637 A.2d 360, 363 (R.I. 1994); See also *University of Toledo v. Heiny*, 30 Ohio St. 3d 143, 30 Ohio B. 454, 507 N.E.2d 1130, 1133 (Ohio 1987) (stating that the provisions of that state's unemployment compensation legislation, which allowed benefits to unemployed nonprofessional employees of educational institutions "whose employment prospects for the ensuing academic year are doubtful," "was not enacted to 'subsidize the vacation periods of those who know well in advance that they may be laid off for certain specified periods'" (quoting *Davis v. Commonwealth, Unemployment Compensation Board of Review*, 39 Pa. Commw. 146, 394 A.2d 1320, 1321 (Pa. 1978))).

Md. Code Ann., Lab. and Empl. Art., § 8-101(n) defines "educational institution" as "an institution that offers participants, students, or trainees an organized course of study or training that is academic, technical, trade-oriented, or preparatory for gainful employment in a recognized occupation," and includes "an institution of higher education." In contrast, § 8-909(e) defines "educational service agency" as "a governmental entity that is established and operated exclusively to provide educational services to one or more educational institutions."

To meet the "reasonable assurance" standard, an employer need not demonstrate that an employee is guaranteed the job in the next academic semester. Rather, the employer must establish that the employee has a reasonable expectation of being recalled to perform the same or similar services. *Wenner v. Frederick County Board of Education, 42-BR-93.*

In this case, the Board bifurcates the applicability of the facts. The wages attributable to the loss of the claimant's full-time job are not affected by this decision. While the Board finds sufficient evidence to support a finding that the claimant had reasonable assurance of returning to her part-time substitute teaching job, she did not receive reasonable assurance of returning to her prior full-time job because that job was not available to her as of the commencement of the prior academic year. The Board finds no compelling or rational basis to impute the disqualification relating to reasonable assurance of returning to the the part-time job to the wages related to the loss of the full-time job. Therefore, the Board shall modify the hearing examiner's decision accordingly.

DECISION

THE BOARDS HOLDS that the claimant had reasonable assurance of returning to her part-time substitute teaching job, or similar employment, with this employer for the next academic year within the meaning of *Section 8-809.*

THE BOARD HOLDS that any disqualification resulting from this decision does not operate to disqualify the claimant from benefits attributable to wages resulting from the loss of her full-time job as a dedicated aid for this employer. The applicability of the disqualification from this decision is limited to the claimant's part-time substitute teaching position for which she had reasonable assurance of returning in the 2011-2012 academic year.

The Hearing Examiner's decision is modified.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

RD

Date of hearing: June 26, 2012

Copies mailed to:

PEGGY F. NICHOLSON

PRINCE GEORGES BOARD EDUCATION

SUSAN BASS DLLR

PRINCE GEORGES BOARD EDUCATION

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

PEGGY F NICHOLSON

SSN #

Claimant

Vs.

PRINCE GEORGES BOARD EDUCATION
EMPLOYEE & LBR RLTN #107

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation
Division of Appeals**
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

Appeal Number: 1140176
Appellant: Claimant
Local Office : 63 / CUMBERLAND
CLAIM CENTER

January 30, 2012

For the Claimant: PRESENT

For the Employer:

For the Agency: PRESENT, VICKI GRAVES

ISSUE(S)

Whether the claimant is unemployed between academic years or terms, or during a customary vacation period, from an educational institution and has reasonable assurance of returning to work within the meaning of MD Annotated Code, Labor and Employment Article, Title 8, Section 909.

FINDINGS OF FACT

The employer in this case, Prince George's Board of Education, is an educational institution. The claimant, Peggy Nicholson, began working for it on March 21, 1990. The claimant last worked for it on June 17, 2011, corresponding to the last day of the spring 2011 semester.

The claimant was employed as a substitute teacher, which is either an instructional, research or principal administrative position. She began working as a substitute teacher after she lost her full-time job as a dedicated aid at the end of the 2009-2010 school year.

On June 6, 2011, the employer sent the claimant a letter informing her that work as a substitute teacher was available to her for the 2011-2012 school year. The claimant was instructed to sign and return the letter by June 30, 2011 if she intended to work as a substitute teacher during the 2011-2012 school year. The

claimant signed the letter and returned it to the employer on June 17, 2011

The next successive semester began on August 22, 2011, and the claimant had reasonable assurance of returning to work in the claimant's previous position at that time. Since August 22, 2011, the employer contacted her at least 100 times to offer work as a substitute teacher, but the claimant has not accepted any work.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-909(b) provides:

(1) With respect to services performed in an instructional, research, or principal administrative capacity for an educational institution, benefits may not be paid based on these services for any week of unemployment that begins during:

- (i) a period between 2 successive academic years;
- (ii) a similar period between 2 regular but not successive terms; or
- (iii) a period of contractually provided paid sabbatical leave.

(2) This subsection applies only to an individual who:

- (i) performs the service in an instructional, research, or principal administrative capacity in the first of 2 academic years or terms; and
- (ii) has a contract or reasonable assurance that the individual will perform the services in an instructional, research, or principal administrative capacity for any educational institution in the second of the 2 academic years or terms.

To meet the "reasonable assurance" standard, an employer need not demonstrate that an employee is guaranteed the job in the next academic semester. Rather, the employer must establish that the employee has a reasonable expectation of being recalled to perform the same or similar service.

EVALUATION OF EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record in reaching this decision. Where the evidence was in conflict, the Hearing Examiner decided the Facts on the credible evidence as determined by the Hearing Examiner.

It is clear and essentially undisputed that (a) the claimant was employed by an educational institution, (b) had unemployment that occurred between successive academic terms or years, and that (c) the claimant was employed in a capacity covered by Section 8-909.

Because it is found that the claimant had reasonable assurance of returning to work in the same capacity for the next academic term or year, benefits shall be denied pursuant to the requirements set forth in Section 8-909.

DECISION

IT IS HELD THAT the claimant has reasonable assurance of returning to the same or similar employment with an educational institution in the next academic year within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-909. The claimant is disqualified from receiving unemployment insurance benefits based upon employment with the above-identified employer from the week beginning June 12, 2011 and until the start of the successive academic year commencing with the week beginning August 21, 2011. The claimant will then be eligible for benefits so long as all other eligibility requirements are met. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at ui@dllr.state.md.us, or call 410-949-0022 from the Baltimore region or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at 410-767-2727, or outside the Baltimore area at 1-800-827-4400.

However, the claimant may be eligible for unemployment insurance benefits under other covered employment, even though wages from the above employer may not be used to determine the claimant's weekly benefit amount.

The determination of the Claims Specialist is affirmed.



R M Tabackman, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-767-2404. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.

Notice of Right to Petition for Review

Any party may request a review either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A (1) appeals may not be filed by e-mail. Your

appeal must be filed by February 14, 2012. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing: January 18, 2012
AEH/Specialist ID: WCU4C
Seq No: 003
Copies mailed on January 30, 2012 to:

PEGGY F. NICHOLSON
PRINCE GEORGES BOARD EDUCATION
LOCAL OFFICE #63
VICKI GRAVES