

- DECISION -

Claimant:	Decision No.:	5193-BR-12
DENNIS M KEICHER	Date:	January 31, 2013
	Appeal No.:	1227856
	S.S. No.:	
Employer:	L.O. No.:	63
ANNE ARUNDEL COMMUNITY COLLEGE	Appellant:	Claimant

Issue: 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.

- 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: March 4, 2013

REVIEW OF THE RECORD

After a review of the record, and after deleting "or about" from the third sentence of the first paragraph, the Board adopts the hearing examiner's modified findings of fact and conclusions of law. The Board makes the following additional findings of fact:

As of the last day of the academic semester, or term, (June 27, 2012) the claimant did not have reasonable assurance of returning in the same or a similar capacity in the next successive semester, or term. The claimant received a letter establishing reasonable assurance of returning for that successive term on August 6, 2012.

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)*.

Md. Code Ann., Lab. & Empl. Art., §8-909 provides in pertinent part, as follows:

- (c) (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.

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 rational 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 A2d 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 A2d 1321, 1321 (Pa. 1978)).

Md. Code Ann., Lab. & 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 educations 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 his appeal, the claimant expresses some confusion of the provisions of the law concerning eligibility for educational personnel and questions the legislative intent of the relevant statute, §8-909. The claimant contends his appeal, “... is less for seeking a week of benefits than for arguing principle.”

The Board has thoroughly reviewed the evidence of record from the Lower Appeals Division hearing. The evidence establishes that, as of the last date of the first semester (June 27, 2012), the claimant had no reasonable assurance of returning to employment as required under §8-909. The claimant was, at that time, eligible to receive benefits based upon his employment with this educational institution. Assuming the claimant remained otherwise eligible, he was entitled to benefits until he received the letter of reasonable assurance of returning to employment on August 28, 2012. The reasonable assurance was effective August 6, 2012, and removed the claimant from eligibility as of the first day of that week.

In her decision, the hearing examiner did not clearly state the time periods. The Board clarifies the decision, herein. The claimant did not have reasonable assurance of future employment from the week beginning July 1, 2012 through the week ending August 4, 2012. The claimant was entitled to benefits, based upon these wages, during this period, to the extent the claimant was otherwise qualified and

eligible. The claimant had reasonable assurance of returning to the same or similar employment, and therefore was ineligible for benefits, as of the week beginning August 5, 2012 through the week ending August 25, 2012.

The legislative intent supporting the reasonable assurance provisions is historically based and well established. Persons employed by an educational institution, who are off work during a regular break between semesters, or terms, and who have reasonable assurance of returning to the same or similar work, are not found to be unemployed as that term is commonly used. Those persons are not expected to be seeking or accepting other work. Additionally, these periods of non-work are generally considered to have been calculated into the computation of the professional's salary for an academic year.

The claimant also notes that, "...the amount of work sometimes is much less than had been scheduled." If the claimant is working less and, consequently, earning less, he may be entitled to partial unemployment benefits. The claimant should contact his local claims office to determine whether he meets the criteria for this.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

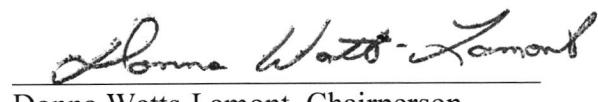
The decision shall be affirmed, as modified, for the reasons stated herein and in the hearing examiner's decision.

DECISION

The Board finds, based on a preponderance of the credible evidence, that the claimant did not have reasonable assurance or returning to the same or similar employment with an education institution in the next academic year within the meaning of *Md. Code Ann., Lab. & Empl. Art.*, §8-909, from the week beginning July 1, 2012 through the week ending August 4, 2012. The claimant is entitled to benefits based upon these educational wages for those weeks if he is otherwise eligible and qualified. The Board further finds that the claimant had reasonable assurance or returning to the same or similar employment with an education institution in the next academic year within the meaning of *Md. Code Ann., Lab. & Empl. Art.*, §8-909, as of August 6, 2012. The claimant is disqualified for receiving unemployment insurance benefits based upon employment with this employer from the week beginning August 5, 2012 through the week ending August 25, 2012.

However, the claimant also may be eligible for unemployment insurance benefits under other covered employment, but the wages from the employer in this case will not be used to determine the claimant's weekly benefit amount for the week beginning August 5, 2012 through the week ending August 25, 2012.

The hearing examiner's decision is affirmed as modified.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

DENNIS M. KEICHER
ANNE ARUNDEL COMMUNITY COLLEGE
SUSAN BASS DLLR
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

DENNIS M KEICHER

SSN #

Claimant

vs.

ANNE ARUNDEL COMMUNITY COLLEGE

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: 1227856
Appellant: Claimant
Local Office : 63 / CUMBERLAND
CLAIM CENTER

September 13, 2012

For the Claimant: PRESENT

For the Employer:

For the Agency:

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, Anne Arundel Community College, is an educational institution. The claimant, Dennis M. Keicher, began working for the college in August of 2005. The claimant last worked there on or about June 27, 2012.

Anne Arundel Community College offers two abbreviated summer sessions between its regular fall and spring semesters. June 27, 2012 was the last day of the Summer I session. The claimant was employed as an adjunct professor, which is an instructional position. When the claimant completed teaching his Summer I session classes, the claimant did not know if or when he would be returning to teach another class.

The next regular successive semester, Fall 2012, began on August 28, 2012. On August 6, 2012, the claimant became aware that he had a reasonable expectation of returning to work in the same position to

teach for the Fall 2012 semester.

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 that (a) the claimant was employed by an educational institution, (b) had unemployment that occurred between two regular but not successive academic terms, and that (c) the claimant was employed in a capacity covered by Section 8-909.

Further, the claimant credibly testified that he did not know that he would be returning to work in the same capacity for this employer during the Fall 2012 semester until he was notified of this on August 6, 2012. Therefore, as of August 6, 2012, the claimant had a reasonable assurance of returning to work within the meaning of Md. Code Ann., Labor & Emp. Article, Section 8-909.

Because it is found that the claimant had reasonable assurance of returning to work in the same capacity for the next regular academic term, benefits shall be denied from August 5, 2012 through September 1, 2012, pursuant to the requirements set forth in Section 8-909.

DECISION

IT IS HELD THAT the claimant had reasonable assurance of returning to the same or similar employment with an educational institution in the next regular academic semester 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 August 5, 2012 and until the start of the successive academic year commencing with the week beginning September 2, 2012. 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 modified as to the start date of the penalty only.



J. Nappier, 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 of Further Appeal

Any party may request a further appeal 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 September 28, 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: August 30, 2012

BLP/Specialist ID: WCU22

Seq No: 001

Copies mailed on September 13, 2012 to:

DENNIS M. KEICHER
ANNE ARUNDEL COMMUNITY COLLEGE
LOCAL OFFICE #63
SUSAN BASS DLLR