



DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE OF MARYLAND

HARRY HUGHES
Governor

BOARD OF APPEALS
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5032

BOARD OF APPEALS

THOMAS W. KEECH
Chairman

HAZEL A. WARNICK
MAURICE E. DILL
Associate Members

SEVERN E. LANIER
Appeals Counsel

MARK R. WOLF
Chief Hearing Examiner

— DECISION —

Decision No.: 522-BH-85

Date: July 19, 1985

Claimant: Bernard C. Bohager

Appeal No.: 05782

S. S. No.:

Employer: Waste Management, Inc.

L.O. No.: 9

Appellant: CLAIMANT

Issue: Whether the claimant is receiving or has received dismissal payments or wages in lieu of notice within the meaning of §6(h) of the law, and whether the claimant was actively seeking work, within the meaning of §4(c) of the law.

— NOTICE OF RIGHT OF APPEAL TO COURT —

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT ON August 18, 1985

— APPEARANCES —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

Bernard C. Bohager - Claimant
James Whattam - Attorney at Law

Jack Twema -
General Manager

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Employment and Training's documents in the appeal file.

Since the claimant clearly admitted at the hearing that he had not been actively seeking work, no purpose would be served by further notice or hearing concerning this issue.

FINDINGS OF FACT

The claimant was a principal officer in a corporation that was bought over by Waste Management, Inc. In accord with this takeover, on or about September 1, 1982, the claimant entered into a contract with Waste Management, Inc., the terms of which included that the claimant was to be employed as the General Manager at an annual salary of \$45,000.00 and that the contract would be in effect from September 1, 1982 through September 1, 1985.

Prior to the expiration of this contract, however, there came a time when the employer wished for a parting of the ways with the claimant. Consequently the employer and the claimant entered into an amended employment agreement. In consideration for terminating the original employment contract on December 31, 1983, instead of September 1, 1985, the claimant agreed to accept \$50,000 as payment from the employer. The claimant also agreed to have the non-competition clause that was in the original agreement (which was for a period of two years ending September 1, 1987) to be extended forward so that he would not be allowed to compete with the employer under the terms of that contract clause from December 31, 1983, the date of the amendment, until September 1, 1987, a period of three years and eight months from his termination. As a result of this new amendment, the claimant's employment ceased as of December 31, 1983 and he received a \$50,000 payment.

The claimant filed for unemployment insurance benefits with a benefit year beginning April 8, 1984. However, since the time of his separation from Waste Management, Inc., the claimant has been consistently providing consulting services at least several times per week for G.S.A., a corporation he created eight to ten years ago and of which he owns 10 to 20 percent of the stock. The claimant does not get wages for this service. In addition, the claimant, since his separation from Waste Management Corporation, has been limiting his work search to information or contacts he gets from friends when they hear of an opening that might be right for him.

CONCLUSIONS OF LAW

After reviewing all the testimony and evidence in this case, as well as the argument, the Board concludes that the \$50,000 that the claimant received from the employer was not a dismissal payment or wages in lieu of notice within the meaning of §6(h) of the law. It was consideration for the cancellation of an employment contract. Although the Board is not bound by the Internal Revenue Service revenue ruling submitted as part of the claimant's legal argument, it does note that revenue ruling 58-301 supports our interpretation of the facts. In that revenue ruling, it was held that:

... a sum payment received by an employee as consideration for the cancellation of his employment contract constitutes gross income to the recipient in the taxable year of receipt. However, such amount is not subject to the federal employment and income tax withholding provisions of §3121 of the Federal Insurance Contributions Act and §3402 of the Code. (Chapter 21 and 24 respectively, Subtitle C Internal Revenue Code of 1954). Revenue Ruling 58-301.

In accord with 26 C.F.R. 31.3121(a), Revenue Ruling 74-252 states that a case where a person was paid money in return for the early termination of his contract, under the provisions of the contract which specifically provided for dismissal payments in the event of early termination, is distinguished from the situation discussed in Revenue Ruling 58-301 because "the payments in this case were in the nature of dismissal payments and were not consideration for the cancellation of the employment contract of the individual as in that revenue ruling."

Mr. Bohager's case is one of having received consideration for the cancellation of the contract and not dismissal payments as part of the terms of the contract. In addition, even without looking at the Internal Revenue rulings, the clear and unambiguous intent of §6(h) is to provide for a disqualification when wages in lieu of notice or dismissal wages are paid and not when a claimant receives money in consideration for assets that he has given up.

However, the claimant's own testimony before the Board makes it clear that he has not been meeting the requirements of §4(c) of the law since the time he first applied for unemployment benefits in April of 1984. In addition to the fact that he has spent considerable amount of time doing consulting work for another corporation, GSA, his own description of his job seeking efforts falls far short of what is required under §4(c). See e.g., the Board decision in Bartkiewicz v. Industrial Fleet Management, Inc., 712-BR-81 where the Board held that a claimant was not meeting the eligibility requirements of §4(C) where he was spending 25 hours per week trying to set up his own business and contacting only two to three employers per week in his job search. Although a claimant is not required to completely divest himself of his business to meet the requirements of §4(c), a claimant who spent as much time as 25 hours per week promoting his business while only making two to three contacts in his job search was not meeting the requirements of §4(c).

While in Mr. Bohager's case it was not clear how many hours he spent on this other business, he did indicate that it was a substantial amount. But even if it were not as extensive as the claimant in the Bartkiewicz case, the claimant's failure to make a reasonable and active search for work, without question, would disqualify him under §4(c) of the law. See, the Board's decision in Poole, 145-BH-84, and Smith, 684-BR-83. Further Mr. Bohager's

case is distinguished from Fisher v. Fisher Products Corporation, 1043-BH-81, where the Board found that although as a corporate officer the claimant spent up to one-half a day once every three weeks on corporate business, he was otherwise energetically seeking work and he was therefore not disqualified under §4(c) of the law.

DECISION

The claimant did not receive dismissal wages or payments in lieu of notice within the meaning of §6(h) of the Maryland Unemployment Insurance Law. No disqualification is imposed under this Section of the law.

The claimant is not actively seeking work, within the meaning of §4(c) of the Maryland Unemployment Insurance Law. He is disqualified from receiving benefits from the April 8, 1984, when he first filed for benefits and until he is otherwise actively seeking work within the meaning of §4(c) of the Law.

The decision of the Appeals Referee is reversed.



Hazel A. Warwick
Associate Member



Maurice E. O'Neil
Associate Member

W:D:K

kmb

DATE OF HEARING: January 29, 1985

COPIES MAILED TO:

CLAIMANT

EMPLOYER

James R. Whattam, Esquire
Weinberg and Green
100 S. Charles St.
Baltimore, MD 21201

UNEMPLOYMENT INSURANCE - TOWSON



DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE OF MARYLAND
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

STATE OF MARYLAND
HARRY HUGHES
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BOARD OF APPEALS
THOMAS W. KEECH
Chairman

- DECISION -

Date: July 16, 1984
Appeal No.: 05782

HAZEL A. WARNICK
MAURICE E. DILL
Associate Members
SEVERN E. LANIER
Appeals Counsel
MARK R. WOLF
Chief Hearing Examiner

Claimant: Bernard C. Bohager

S. S. No.:

Employer: Waste Management, Inc. L.O. No.: 9

Appellant: Claimant

Issue: Whether the Claimant is receiving or has received dismissal payments or wages in lieu of notice within the meaning of Section 6(h) of the Law.

- NOTICE OF RIGHT TO PETITION FOR REVIEW -

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST ARE VIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON July 31, 1984

- APPEARANCES -

FOR THE CLAIMANT:

Bernard C. Bohager - Claimant

FOR THE EMPLOYER:

Not Represented

FINDINGS OF FACT

The claimant was employed by Waste Management, Inc., from September 1, 1982, until December 31, 1983. Immediately prior to this, the claimant was a principal corporate officer in, a company engaged in the same type of business as the employer involved in this decision. This business was purchased by the claimant's most recent employer. At or about the time of purchase, the claimant and employer entered into a written contract of employment under which the claimant was to be employed as the general manager at \$45,000 annually and the duration of this contract was from September 1, 1982 through September 1, 1985.

Sometime later, the claimant was relieved of some of his duties and these duties were assumed by another individual. It was the employer's desire to terminate the claimant's contract of employment. The claimant's employment contract still had about 1 and 3/4 years to run when the employer proposed to terminate the contract in return for which the claimant would be paid \$50,000 with the stipulation that the claimant was not to engage in a competing business for two years. The claimant accepted this offer, effective December 31, 1983, received the \$50,000 payment and became unemployed as a result.

CONCLUSIONS OF LAW

The question involved is whether the \$50,000 payment made to the claimant as a settlement for the termination of his contract of employment was a bar to the receipt of unemployment insurance benefits.

Section 6(h) of the Maryland Unemployment Insurance Law provides that an individual shall be disqualified for any week for which he received remuneration in the form of "dismissal payment or wages in lieu of notice." Such payments are to be allocated to a number of weeks following separation from employment equal to the number of weeks' pay received.

As a consideration for the claimant's dismissal prior to the expiration of the written contract of employment, the employer agreed to pay the claimant \$50,000. I construe this payment to fall within the purview of dismissal pay as that term is contemplated by the Law.

At his pay rate of \$45,000 per year, the claimant was earning \$865.38 weekly. On this basis, the \$50,000 dismissal payment extends for 58 weeks, from January 1, 1984 through February 9, 1985.

DECISION

The claimant has received dismissal pay in the amount of \$865.38 per week for 58 weeks. This dismissal payment amount disqualifies the claimant under Section 6(h) of the Maryland Unemployment Insurance Law from receiving benefits for the week beginning January 1, 1984 through the week ending February 9, 1985.

The determination of the Claims Examiner dated May 2, 1984, is affirmed, but is amended as to the dates of disqualification.

Bernard Street/cx
Bernard Street
Appeals Referee

Date of hearing: 6/8/84

cdg/7282

(Scarboro)

4266

Copies mailed to:

Claimant
Employer
Unemployment Insurance - Towson