

- DECISION -

Claimant:
PATRICIA MURRAY

Decision No.: 564-BR-15

Date: March 18, 2015

Appeal No.: 1417365

S.S. No.:

Employer:
BOARD OF EDUCATION OF BALTO CO

L.O. No.: 63

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: April 17, 2015

PRELIMINARY STATEMENT

Appeal Nos. 1417365 and 1417366 are consolidated for the purposes of this decision. Only this one consolidated decision which addresses the issues in each of the appeals is being issued.

REVIEW OF THE RECORD

The claimant has filed a timely appeal to the Board from the Unemployment Insurance Lower Appeals Decisions issued on August 20, 2014 in Appeal Nos. 1417365 and 1417366. Those decisions held the claimant had reasonable assurance of returning to the same or similar work, in an academic institution, in the second of two consecutive terms, within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-909*. Benefits were denied, based on this employment, for the week beginning June 15, 2014 through the week ending July 12, 2014 and from the week beginning July 27, 2014 through the week ending August 23, 2014. In each decision it was held that the claimant may be eligible for unemployment benefits under covered employment, even though wages from this employer could not be used to determine the claimant's weekly benefit amount. The Board affirms the Decisions of the hearing examiner but modifies the disqualification dates.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's 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. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

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)*.

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearings. The records are complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered the opportunity to present closing statements. The necessary elements of due process were observed throughout the hearings. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing, or allow additional argument. Sufficient evidence exists in the records from which the Board may make its decision.

The Board finds that the hearing examiner's Findings of Fact (the same Findings of Fact were made in each case) are supported by substantial evidence in the records. Those facts are sufficient to support the hearing examiner's decisions. The Board adopts the hearing examiner's Findings of Fact and Conclusions of Law in both cases.

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 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 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 her appeals, the claimant requests an appeal and argues that the law is “unjust”, her situation is “unique” and she is unemployed from “June 20th 2014 thru August 21st 2014”.

The claimant had reasonable assurance of working in the same, or similar, capacity in the second of two academic semesters. The concept of reasonable assurance does not require a guarantee of employment. It requires that the parties’ understanding be that the employment relationship will resume on essentially the

same basis as before, after the end of a regular break between academic terms. Here, the claimant's return was due to occur with the start of the 2014-2015 school year.

Reasonable assurance is not a contract and is not binding on either party. It is an agreement and understanding that the employer will have a position available of a similar nature to the claimant's most recent position, and that the claimant intends to return to that position. Neither party is bound by this and if something occurs which causes the claimant to not be able to return at the end of the break between terms, the reasonable assurance dissolves and the claimant could then be eligible for benefits for that period between terms.

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 Board finds, based on a preponderance of the credible evidence, that the claimant did have reasonable assurance of 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*. The claimant is not entitled to receive unemployment insurance benefits based upon employment with this employer from the week beginning June 15, 2014 through the week ending August 23, 2014.

The claimant may be eligible for unemployment insurance benefits based upon wage credits earned from other covered employment. However, the wages from the employer in this case will not be used to determine the claimant's weekly benefit amount.

DECISION

The Board holds that the claimant did have reasonable assurance within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 8-909*. Benefits are denied as of the week beginning June 15, 2014 through the week ending August 23, 2014.

The Hearing Examiner's decision is modified.



Donna Watts-Lamont, Chairperson



Eileen M. Rehrmann, Associate Member

VD

Copies mailed to:

PATRICIA MURRAY

BOARD OF EDUCATION OF BALTO CO

SUSAN BASS DLLR

JAMES A. STULLER

BOARD OF EDUCATION OF BALTO CO

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

PATRICIA MURRAY

SSN #

Claimant

vs.

BOARD OF EDUCATION OF BALTO CO

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: 1417365

Appellant: Claimant

Local Office : 63 / CUMBERLAND

CLAIM CENTER

August 20, 2014

For the Claimant: PRESENT

For the Employer: PRESENT, JAMES A. STULLER, MERV MAWHINNER

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 claimant, Patricia Murray, began working for this employer, Board of Education of Balto. Co, an educational institution, on August 24, 2012, and her last day worked at the close of the 2013-2014 academic year was June 16, 2014. The claimant also worked part time as a school bus driver during the 2014 summer session.

The claimant worked full time as a school bus driver during the 2013-2014 academic year and has worked every school year since 2012. The claimant worked from July 7, 2014 to August 1, 2014, during the summer session.

At the conclusion of the spring 2014 semester, the claimant was given reasonable assurance by the

employer of returning to work in the 2014-2015 academic year when the employer provided her with a letter stating that the employer anticipated utilizing her services in the upcoming academic year. The employer also provided the claimant with a "Will or Will Not" form which asked the claimant whether she intended to return to work and keep the same bus route. The claimant indicated that she intended to return to work.

The claimant is expected to return to work with the employer on August 21, 2014, and the school year is scheduled to begin on August 27, 2014.

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 services.

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

(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 service 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 reasonable assurance that the individual will perform the services in the second of the 2 successive 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 services.

EVALUATION OF EVIDENCE

The employer had the burden to show, by a preponderance of the credible evidence that an educational institution employed the claimant and the claimant had reasonable assurance of returning to her instructional, research or principal administrative or other position for the 2014-2015 academic year. In the case at bar, the employer met this burden.

In the case at bar, the claimant had reasonable assurance from the employer that she would be returning to work in the upcoming academic year. The employer notified the claimant by letter and the claimant indicated she intended to return. Moreover, the claimant has worked for the employer for the past two academic years. The claimant also worked during the summer session from July 7, 2014 to August 1, 2014, and still had reasonable assurance that she would be returning to work in the upcoming academic year.

Accordingly, the employer met its burden in this case, demonstrating an educational institution employed the claimant and the claimant had reasonable assurance of returning to her other position for the 2014-2015 academic year, and benefits are, therefore, denied.

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 this employer from the week beginning June 15, 2014 through July 12, 2014. 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.



C A Applefeld, 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

This is a final decision of the Lower Appeals Division. Any party who disagrees with this decision 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 September 04, 2014. 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 07, 2014
DAH/Specialist ID: WCU1J
Seq No: 001
Copies mailed on August 20, 2014 to:
PATRICIA MURRAY
BOARD OF EDUCATION OF BALTO CO
LOCAL OFFICE #63

SUSAN BASS DLLR
JAMES A. STULLER