



# DEPARTMENT OF HUMAN RESOURCES

EMPLOYMENT SECURITY ADMINISTRATION  
1100 North Eutaw Street  
Baltimore, Maryland 21201  
Telephone: 383-5032

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## —DECISION—

	DECISION NO:	899-BH-83
	DATE:	July 21, 1983
CLAIMANT: James C. Penley	APPEAL NO:	02203
	S.S.NO.:	
EMPLOYER: Mt. St. Joseph High School	LO.NO.:	1
	APPELLANT	EMPLOYER

**ISSUE** Whether services performed by the Claimant were in covered employment within the meaning of § 20(g)7(v) (B). of the Maryland Unemployment Insurance Law; and whether the Claimant is eligible for benefits within the meaning of § 3(b) 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 August 20, 1983

## —APPEARANCE—

**FOR THE CLAIMANT:**

James C. Penley - Claimant  
Douglas Pfeiffer - Attorney

**FOR THE EMPLOYER:**

John O. Herrmann -  
Attorney  
Brother Peter  
Campbell - Attorney  
Brother Kirby  
Boone - Principal

EMPLOYMENT SECURITY ADMINISTRATION  
Jack Hand - Chief of Contributions  
John Roberts - Legal Counsel

INTRODUCTION

This case came before the Board of Appeals on appeal by the Employer, Mt. St. Joseph High School (hereinafter referred to as "St. Joseph") from a decision by the Appeals Referee granting benefits to the Claimant, James C. Penley, pursuant to the procedures set forth in § 7 of the Law for appeals regarding claims for benefits. However, in order to determine whether the Claimant is entitled to benefits, the Board must determine whether the services performed by the Claimant were in employment covered by the statute, within the meaning of § 20(g)(7)(v)(B).

The Board is cognizant of the fact that the Employer was previously determined to be exempt from unemployment insurance law, within the meaning of that very same section of the law, in a letter from the Agency's Chief of Contributions, dated October 6, 1982. No appeal under § 8 of the statute was taken from that determination, since the determination was favorable to the Employer, and it became final fifteen days after it was mailed pursuant to § 8(g) of the Law. (The Board notes that neither the Claimant nor any other employee of the Employer received notice of this determination; however, such notice is not required under the statute.)

The Claimant applied for benefits, with a benefit year effective January 30, 1983 and was initially disqualified by the Claims Examiner under § 4(e) of the Law, because he did not have sufficient qualifying wages, since his wages from St. Joseph were excluded in determining his weekly benefit amount. The Claimant appealed this decision, under § 7, and the Appeals Referee reversed the Claims Examiner's decision and determined that the Claimant's wages from the Employer were in covered employment, basing his decision on a recent decision of this Board, Georgetown Preparatory School, Board decision no. 10-EA-82. The Georgetown case, was a case that originated under § 8 of the Law (the section of the law under which the Employer here would have appealed the determination of October 6, 1982, if it had not been favorable to the Employer) and addressed the issue of whether Georgetown was exempt from unemployment insurance coverage pursuant to § 20(q)(7)(v)(B). However, the Appeals Referee correctly determined that the issue to be decided in Mr. Penley's case was, in essence, the same issue decided in Georgetown.

Although the issue of whether St. Joseph is exempt pursuant § 20(g)(7)(v)(B) appears to have been settled, at least for the time being, by the agency determination of October 6, 1982, the Claimant has a right, under § 7 of the statute, to have his claim fully adjudicated. In the case, Secretary, Department of Human Resources v. Wilson, 286 Md. 639, 409 A.2d 713 (1979), the Court of Appeals made it clear that:

There can be no question but that within the Employment Security Administration, only the Board has final authority to determine the applicability of the law to facts involved in claims for weekly benefit amounts.

Wilson, supra at 718.

Therefore, the Board must make a decision under § 7, regarding the Claimant's claim for weekly benefits. To what extent, if any, this will affect the Employer's rights under § 8, is not before the Board at present; therefore, the Board will not rule on that issue in this decision.

As a preliminary matter, the attorney for the Employer raised an objection to the sufficiency of the notice given for the prior hearing before the Appeals Referee, since it failed to notify the Employer (who did not appear at that hearing) that the appeal involved "a question as to whether services were performed by Claimant in employment or for an employer," as required by § 7(e). The Employer argued that the lack of special notice was unfair to the Employer, who would have appeared before the Appeals Referee if such notice had been given.

The Board recognizes some merit in the objection. But, since the Claimant agreed to and did testify fully at the hearing before the Board, and since the Employer and Executive Director (through his representative) also had an opportunity to fully litigate this issue, the Board concludes that no prejudice resulted from this possible insufficiency in the previous notice.

#### EVIDENCE CONSIDERED

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 into this case, as well as Employment Security Administration's documents in the appeal file.

The Board of Appeals notes that in a recent Court of Appeals decision, Employment Security Administration v. Baltimore Lutheran High School Association, Inc. et. al., 291 Md. 750 (1981) the Court, in remanding part of that case to the Board, set out specific and detailed findings of fact to be adduced by the Board and upon which the Board was to formulate conclusions of law regarding whether each school was exempted or covered by § 20(g)(7)(v)(B). Since the issue in this case is identical, the Board has considered the guidelines of the Court of Appeals in evaluating the evidence in this case.

#### FINDINGS OF FACT

The Claimant, James Penley, was employed by St. Joseph as a music teacher from September, 1981 until January, 1983, when his contract expired. The Claimant is not a Catholic and was given no special instructions in the Catholic religion when he was hired. However, he was asked if his beliefs would conflict with Catholicism, to which he replied in the negative. In addition to teaching music, while at St. Joseph, he organized several bands and attempted to organize a chorus.

Mt. St. Joseph High School was founded in 1876 by the Brothers of St. Frances Xavier, known as the Xaverian Brothers. At that time it was known as St. Joseph's College and at one time was an approved college. However, at all times relevant to this case, it has functioned as a private, secondary, catholic school for young men.

St. Joseph is owned by a corporation, Mt. St. Joseph's College, Inc. The stated purpose of the corporation is:

To carry on, conduct and maintain a school and educational institution for the purpose of teaching men , women and children. . .in any and all branches of learning; to give instructions by lectures, correspondence and by any and all other means that may properly be prevailing, and to give and confer diplomas and certificates upon such persons as may qualify for them by reason of their successful pursuit of a course of studies in the school or by reason of their eminence in life.

(See, Employer Exhibit B-8, the Amended and Restated Charter of Mt. St. Joseph's College, Inc.)

The goals of the school as set out in the student handbook for 1982-1983 (Employer's Exhibit B-13) are:

1. To challenge each student to develop his intellectual potential.
2. To direct and supervise the students in their use of unstructured time.
3. To expand the student's education beyond the confines of his classroom.
4. To support and nurture the growth of the Mount [St. Joseph] community of faith.
5. To develop a sense of respect for property among the students.
6. To increase the student's awareness of the christian principles of social justice.

The congregation of Xaverian Brothers was founded in 1839 as a pontifical congregation of laymen, who live under vows in a community life, under the control of the Roman Catholic Pope in Rome. St. Joseph is one of several educational ministries established by the Xaverian Brothers.

St. Joseph is run by a non-profit Maryland corporation. The corporation is controlled and governed by its members, who may number from 5 to 25, but all of whom must be Xaverian Brothers and serve on the Executive Committee of the Sacred Heart Province of the Xaverian Brothers, the governing body of the congregation of Xaverian Brothers.

The members of the corporation elect a Board of Directors, who in turn elect the Secretary and Treasurer of the corporation. However, the President and Chairman of the Board is always the Brother Provincial of the Sacred Heart Province of the Xaverian Brothers. The members of the Board of Directors are approximately two thirds Xaverian Brothers; the remaining one third are lay Catholics.

The school is principally funded through tuition and fees, with additional funds from contributions of alumni, friends and other sources .

The school population is composed of male high school students, 85-90 per cent of whom are Catholic.

The faculty of the school is composed of 1 sister, 10-11 Xaverian Brothers, 2 priests and over 50 lay persons, the majority of whom are Catholic.

In order to graduate, a student must satisfactorily complete 22 credits over a four year period, 4 of which are in religious classes. The other credits are in the following subjects: English (4 credits); Social Studies (3 credits); Mathematics (3 credits); Science (2 credits); Physical Education (1 credit); Modern Foreign Language (2 credits); Elective in other areas (3 credits); and Composition ( $\frac{1}{2}$  credit). Most courses meet five out of six days; religious classes meet three out of six days.

The official policy is that each class should begin with a prayer, but this does not always occur in practice. There is a compulsory mass at the beginning of each school year and on Catholic Holy Days when the school is in session. Additional prayers may be said occasionally in a memorial service. Daily masses are available, but not compulsory. Each year students are required to participate in a retreat, a time to consider one's relationship with God. There are many religious symbols throughout the school grounds.

In non-religious courses, academic freedom is practiced as far as teaching methodology is concerned. There is an expectation, however, that all teachings conform to the principles of the Catholic Church. However, non-Catholic teachers are given no special instructions in regard to teaching secular subjects. The search for truth in all subjects is considered in conformity with the doctrines of the Catholic religion.

There is a large choice of extra-curricular activities for students to participate in, including several athletic teams, music and marching band, forensics and drama and other clubs.

#### CONCLUSIONS OF LAW

As the Board stated above, the essential issue that must be determined in order to decide if the Claimant is eligible for benefits, is whether the services performed by this Claimant for St. Joseph are services in covered employment, within the meaning of § 20(g)(7)(v)(B) of the Maryland Unemployment Insurance Law.

Under § 20(g)(7)(v)(B) services performed by an individual for an Employer may be exempt from the statute if either one of two tests are met: the service is performed in the employ of a church or convention or association of churches, or the services are performed for an organization which is operated primarily for religious purposes and which is operated, supervised, controlled or principally supported by a church or convention or association of churches.

As to the first part of the test, the Supreme Court held that the word "church" means the congregation or the hierarchy itself, that is, the church authorities who conduct the business of hiring, discharging, and directing the church employees." St. Martins Evangelical Church v. South Dakota, 449 U.S. 950 (1981).

The Employer here argued that the corporation is merely a formality, undergone to reap the advantages awarded by as well as meeting the requirements of civil law. As the Board responded to a similar argument raised in the Georgetown case, supra:

This argument misses the point. One of the requirements of the civil law, of course, is for corporate employers to pay unemployment insurance taxes to protect their employees, unless exempted by law. The question is not whether the civil law applies, but whether it provides an exemption from unemployment insurance coverage.

Although the Members of the Xaverian Brothers are members of a congregation within the meaning of the Supreme Court's decision, the corporation for establishing this school is clearly not a church. Therefore, the Employer is not exempted by the first part of the test. (See also, Baltimore Lutheran High School Association, Inc., supra, at 766, where the Court of Appeals held that Catholic private schools that are separately incorporated must satisfy both requirements of 26 U.S.C. § 3309(b)(1)(B), the federal statute upon which § 20(g)(7)(v)(B) is based.)

The second statutory test has two parts. The Employer appears to meet the second part, namely it is operated, supervised and controlled by a church, the Xaverian Brothers. The order of Xaverian Brothers has complete control over memberships in the corporation and over the Board of Directors. Therefore, since the Board of Directors run the school, the school is controlled by the Xaverian Brothers.

Further, the Board concludes that the congregation of the Xaverian Brothers is a church within the meaning of the statute. Several recent cases in other jurisdictions support this conclusion, see, e.g. Christian School Association v. Commonwealth of Pennsylvania, 423 A.2d 1340 (1980) and Young Life Campaign v. Patino, 122 Cal. App 3d 559, 176 Cal Rpt. 23 (1981). For a more detailed discussion of this question, see also, the Board's decision in Georgetown Preparatory School, supra.

The Board concludes, however, that St. Joseph is not operated "primarily for religious purposes." The primary purpose of St. Joseph is to operate a secondary school and impart a secondary education to its students. Religious subjects constitute less than 20 per cent of the required credits and even a smaller percentage of the total curriculum of the school. Further, the non-religious classes are not significantly affected by religion in either content or methodology. This is amply demonstrated by the fact that the non-Catholic teachers are given no special instruction in teaching their non-religious courses. These are crucial factors in determining the primary purpose of the school, in the opinion of this Board. See, Georgetown, supra; see also, Baltimore Lutheran High School Association, Inc. Board decision 5-EA-83.

The Board also concludes that the religious atmosphere of the school, together with any restriction on academic freedom, do not so permeate the life of the institution that the entire purpose of this school is primarily religious. See, the Board's detailed discussion of the Supreme Court decisions, Tilden v. Richardson, 403 U.S. 672 (1971) and Board of Education v. Allen, 392 U.S. 236 (1968) in Baltimore Lutheran High School, supra. The Board concludes here, as it did in that case: since the overwhelming percentage of time (and presumably, money and effort) is spent on non-religious affairs, and since whatever influence the religious ambiance may have on the whole life of the school is not sufficient to imbue the secular courses with a primarily religious character, we conclude that Mt. St. Joseph High School is not "an organization which is operated primarily for religious purposes" within the meaning of § 20(g)(7)(v)(B).

The Board is aware that a decision that the employees of St. Joseph are covered by unemployment insurance, raises the spectre of excessive governmental entanglement with religion. The Board concludes, however, that any entanglement would be minuscule. See, the Board's detailed discussion of this issue in the Georgetown case and the Baltimore Lutheran High School case, supra.

The Board concludes that services performed by employees for Mt. St. Joseph High School, excluding, of course, those performed by members of a religious order, are services in covered employment. Therefore, since the Claimant was an employee and not himself a member of a religious order, these services were in covered employment, and any wages he earned from those services in his benefit year should be counted in determining his weekly benefit amount, pursuant to § 3(b) of the Law. Since there is no evidence that the Claimant had a prior benefit year, the Board concludes that no ruling on § 4(e) is appropriate in this case.

DECISION

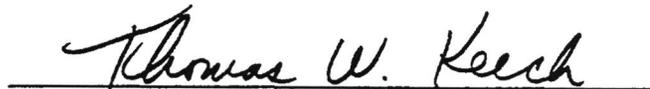
It is held that services performed by the Claimant for Mt. St. Joseph's College, Inc. T/A Mt. St. Joseph High School, were in covered employment pursuant to the provisions of § 20(g)(7)(v)(B) of the Maryland Unemployment Insurance Law, and 26 U.S.C. § 3309 B (1)(b) of the Federal Law.

A weekly benefit amount shall be established pursuant to the provisions of this decision and as required by § 3(b) of the Maryland Unemployment Insurance Law.

The decision of the Appeals Referee is affirmed.

  
Associate Member

  
Associate Member

  
Chairman

W:D:K  
dp

DATE OF HEARING: June 28, 1983

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Douglas B. Pfeiffer, Esquire

Peter E. Campbell, Esquire

John Roberts - Legal Counsel

Jack Hand - Chief of Contributions

John O. Herrmann, Esquire

UNEMPLOYMENT INSURANCE - BALTIMORE



DEPARTMENT OF HUMAN RESOURCES  
 EMPLOYMENT SECURITY ADMINISTRATION  
 1100 NORTH EUTAW STREET  
 BALTIMORE, MARYLAND 21201  
 383 - 5040

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 Secretary

— DECISION —

**CLAIMANT:** James C. Penley  
**DATE:** Mar. 28, 1983  
**APPEAL NO.:** 02203  
**S.S.NO.:**  
**EMPLOYER:** Mt. St. Joseph High School  
**LO.NO.:** 1  
**APPELLANT:** Claimant

**ISSUE:** Whether the claimant has earned the qualifying amount of wages after the beginning of a prior benefit year under Provisions of Section 4(e) of the Law.

**NOTICE OF RIGHT OF FURTHER APPEAL**

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL MAYBE 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 FURTHER APPEAL EXPIRES AT MIDNIGHT ON April 12, 1983

**—APPEARANCES—**

**FOR THE CLAIMANT:**  
 Claimant-Present  
 Douglas B. Pfeiffer, Esquire

**FOR THE EMPLOYER:**  
 Not Represented

A letter was received from John O. Herrman, Esquire representing Mt. St. Joseph High School. The employer's attorney asserts that the employer would not appear nor be represented at the hearing of the appeal because it is not required to provide unemployment coverage on the basis of a letter from John E. Hand, Chief of Contributions of the Maryland Unemployment Insurance Agency. The

issue before the Appeals Referee is whether the claimant is monetarily eligible for benefits and whether his services were services performed in covered employment, within the meaning of Section 20(g) 7(v)(b) of the Unemployment Insurance Law, and Title 26 USC 3309(b)1 of the United States Code.

#### FINDINGS OF FACT

The claimant filed an original claim for unemployment insurance benefits at Baltimore effective January 30, 1983.

The claimant is a high school Music Teacher, and was employed by Mt. St. Joseph College, Inc. t/a Mt. St. Joseph High School, between September 1981 and January 1983. The claimant's contract was not renewed and his resignation was accepted. Mt. St. Joseph High School is operated by the brothers of a religious sect, affiliated with the Archdiocese of Baltimore. The purpose this school is to provide an excellent high school education to high school students who may choose to apply. The school is open to all races and religious denominations and is privately endowed by tuition fees and supplemented with scholarships from the Catholic Church or the Archdiocese of Baltimore. One of the courses given is a course in religion which is mandatory for all students. Otherwise 6/7's of the time spent in school is spent in secular non-religious courses. The high school is a separately incorporated entity. The Board of Directors consists of sixteen members, ten of which are religious brothers. A catholic priest is head of the English Department. The claimant's paychecks are signed by a Treasurer of the Mt. St. Joseph High School. His checks do not come from either St. Joseph Catholic Church or the Archdiocese of Baltimore. The claimant was never engaged in religious activities at the high school. His services were solely to provide music instruction to high school students. The purpose for which Mt. St. Joseph College, Inc. is established was to impart an excellent education to high school students. The purpose was not primarily religious. The one mandatory religious instruction course given does not establish that the function of Mt. St. Joseph College, Inc. was for religious purposes.

#### CONCLUSIONS OF LAW

The Appeals Referee notes with interest and is persuaded by the Board of Appeals decision #10 EA-82 in the matter of the appeal of Georgetown Preparatory School. The Georgetown Preparatory School is an educational institution for young men. It has functioned as a private secondary catholic school. It's stated

purpose is to provide a christian learning environment, professing the teachings and principles of the Roman Catholic Church for the purpose of providing an education aimed at the formation of the human person, both with respect to his ultimate goal and at the same time with respect to the good of those societies which, as a human being, he is a member and for whose responsibilities he will, as an adult, have a share. The corporation which owns the school has as its purpose maintenance of an independent school for the mental, moral and physical training of youth and education in the liberal arts and sciences. It is a non-profit Maryland corporation, and the corporation is governed by members of the religious society. The principal portion of the school finances are supplied by tuition and fees. The rest of the funds are supplied by gifts, personal contributions and support from the religious order. Religious classes are taught in such a way as not to require the non-catholic students to violate their consciences. But the course is mandatory. Non-catholic students are not required to attend any religious ceremonies as is the case with Mt. St. Joseph High School. Some of the employees of Georgetown Preparatory School as in the case of Mt. St. Joseph High School are employees of a church. But, the claimant and other laypersons are neither members nor employees of any "church" as heretofore defined by the United States Supreme Court and this Board of Appeals. The Supreme Court has held that the word "church" means "The congregation or the hierarchy itself, that is the church authorities who conduct the business of hiring, discharging, and directing the church employees." See St. Martins Evangelical Church vs. South Dakota, 449 US 950 (1981). As in the Georgetown case and the St. Martins Evangelical Church case, the essential question at issue is whether the school meets the requirements of Section 3309 B(1) of the United States Code and Section 20(g)7(v)(b) of the Maryland Unemployment Insurance Law. If it can be shown that the organization is operated primarily for religious purposes and that it is operated, supervised, controlled or principally supported by a church or convention or association of churches. It is clear and established that the Mt. St. Joseph High School is a separate legal entity having been organized under the corporate laws of the State of Maryland as Mt. St. Joseph College Inc. It is operated supervised, controlled and principally supported by a Board of Directors, who are members of a religious order, owing allegiance to the Catholic Archdiocese of Baltimore. But, the school finances come principally from tuition fees, gifts and personal contributions. The school is operated primarily for educational purposes and lastly for any religious purpose, as only 1/7 of the curriculum involves a religious course. As the Board of Appeals noted in the Georgetown case, it is obvious that St. Joseph Church or the controlling religious members of the Board can to some degree indirectly control membership in the corporation or the school. But, the organization is a separate legal entity organized under the Laws of the State of Maryland and is operating as such.

It must be concluded that the primary purpose of the school is to impart a secondary education recognized by the State of Maryland to high school students. The students do not have to be catholic. The teachers do not have to be catholic. Accordingly, it is concluded that the primary purpose of the Mt. St. Joseph College was for the teaching of secondary education courses to persons of all races and denominations who may seek such education.

With respect to services performed by employees of Mt. St. Joseph College, Inc. it is concluded that these services are in covered employment. However, since Section 20(g)7(v) (c) excludes the services of members of religious orders from coverage, their particular services for Mt. St. Joseph College Inc., will remain uncovered and untaxable.

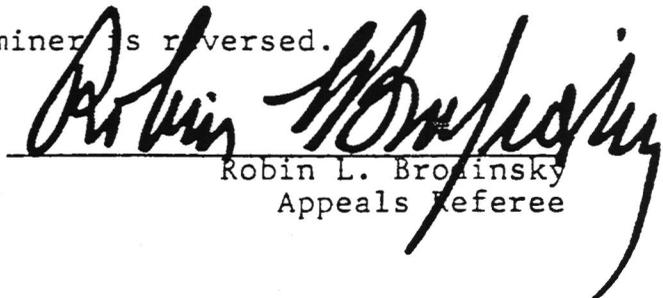
DECISION

It is held that services performed by the claimant for Mt. St. Joseph College, Inc. T/A Mt. St. Joseph High School, was in covered employment pursuant to the provisions Section 20(g) 7(v)(b) of the Maryland Unemployment Insurance Law, and Title 26 USC Section 3309 B (1)(b) of the Federal Law.

A weekly benefit amount shall be established by the Claims Examiner pursuant to the provisions of this decision and as required by Section 3(b) of the Maryland Unemployment Insurance Law.

Services performed by members of the religious order affiliated with Mt. St. Joseph College, Inc. are not in covered employment within the meaning of Section 20(g) 7(v)(b) and 20(g) 7(v)(c) of the Maryland Unemployment Insurance Law.

The determination of the Claims Examiner is reversed.

  
Robin L. Brodinsky  
Appeals Referee

Date of Hearing: 3/11/83  
rc

(1418 & 1419)-Schuman

Copies mailed to:

- Claimant
- Employer
- Unemployment Insurance - Baltimore

Douglas B. Pfeiffer, Esquire