

- DECISION -

Claimant: LINDA L HAYES	Decision No.: 668-BR-11
	Date: February 04, 2011
	Appeal No.: 1030726
	S.S. No.:
Employer: BOARD OF EDUCATION OF BALTO CO	L.O. No.: 63
	Appellant: Employer

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 07, 2011

REVIEW ON THE RECORD

After a review on the record, the Board adopts the hearing examiner's findings of fact. However the Board concludes that these facts warrant a different conclusion of law and reverses the hearing examiner's decision and conclusions of law.

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(H)(1)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02(E)*.

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.

The most important indications of whether a substitute teacher has a reasonable expectation of performing services are the history of the employment relationship and the stated intentions of the parties. An employment history showing a relatively stable utilization of the claimant's services during one academic year will tend to show that a claimant does have reasonable assurance; conversely, a history showing scarcely any employment will tend to show that there is no reasonable assurance. Merely placing a teacher's name on a list of eligible substitutes does not establish reasonable assurance. Since the employer presented no other evidence, reasonable assurance has not been shown. No disqualification is imposed under § 8-909(b) for the period between academic terms which began in June 1987 and ended in September 1987. *Gilliam v. Board of Education of Baltimore County, 174-BR-88.*

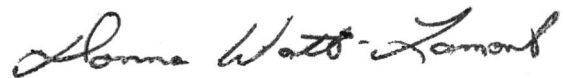
In the case at bar, the employer did more than just place the claimant's name on a list of eligible substitutes. The employer issued a letter to the claimant indicating that she had reasonable assurance of returning to work the following academic year. The actions of both the employer and the claimant established an intent to continue the employment relationship.

The evidence established that the claimant's employment history was sufficient to support a finding that she had reasonable assurance of returning to this employer in the same or similar capacity following the break between school terms.

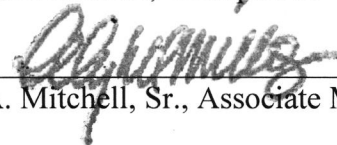
DECISION

The claimant had a reasonable assurance of working in an instructional capacity at the beginning of the next following academic term, within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 909(a)(2) of the law. The claimant is disqualified from the receipt of benefits based on service performed for the employer from June 13, 2010 through the week ending September 4, 2010.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

RD

Copies mailed to:

LINDA L. HAYES
BOARD OF EDUCATION OF BALTO CO
SUSAN BASS DLLR
JAMES STULLER
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

LINDA L HAYES

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: 1030726

Appellant: Claimant

Local Office : 63 / CUMBERLAND
CLAIM CENTER

September 27, 2010

For the Claimant: PRESENT

For the Employer: PRESENT , SHAWN STAHL

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 began working for this employer, an educational institution, in January 2010, and her last day worked was June 18, 2010. The claimant worked primarily as a substitute para-educator during the 2009-2010 academic year, earning gross hourly wages of approximately \$9.00. She also worked on a substitute basis as a building service worker and personal assistant.

The claimant worked sporadic and irregular hours during the 2009-2010 academic year. She did not have a regular or dependable schedule and her hours depended solely on the absence of other employees at the school. The claimant earned only \$4000.00 during the academic year as a substitute para-educator.

At the conclusion of the Spring 2010 school year, the employer issued the claimant a letter indicating she had reasonable assurance of returning to work the following academic year, and if she did not intend to return the following year, to notify the employer. The claimant intended to return if work was available, but, just prior to the start of the 2010-2011 academic year, the hiring authority for the school where she worked informed that her that she was no longer needed.

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.

EVALUATION OF THE EVIDENCE

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

In Comminos v. Baltimore City Schools, 264-BH-83, the Board of Appeals held "Although reasonable assurance is something less than a guarantee, it must be based on something more than merely being on a list." In Gilliam v. Board of Education of Baltimore County, 174-BR-88, the Board of Appeals elaborated on this initial holding, specifically addressing "reasonable assurance" as it relates to substitute teachers. Although the Board in Gilliam v. Board of Education of Baltimore County reiterated "Merely placing a teacher's name on a list of eligible substitutes does not establish reasonable assurance," the Board further held "The most important indications of whether a substitute teacher has a reasonable expectation of performing services are the history of the employment relationship and the stated intentions of the parties. An employment history showing a relatively stable utilization of the claimant's services during one

academic year will tend to show a claimant does have reasonable assurance; conversely, a history showing scarcely any past employment will tend to show there is no reasonable assurance.”

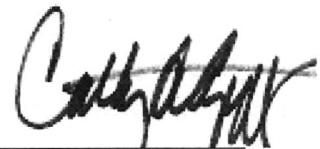
In the case at bar, the employer’s letter to the claimant indicating she has a reasonable assurance of returning in the next academic year only places her on an active sub list. This evidence alone does not support a finding of reasonable assurance, according to Comminos v. Baltimore City Schools and Gilliam v. Board of Education of Baltimore County. Moreover, the credible evidence shows the employer did not regularly utilize the claimant’s services during the 2009-2010 school year, tending to show the claimant does not have reasonable assurance, as required by Gilliam v. Board of Education of Baltimore County. Finally, the claimant was notified by the hiring authority of her school that her services were no longer needed. The evidence shows the claimant did not have reasonable assurance of returning to work.

Accordingly, the employer did not meet its burden in this case, demonstrating an educational institution employed the claimant and the claimant had reasonable assurance of returning to her instructional, research or principal administrative position for the 2010-2011 academic. Benefits are, therefore, allowed.

DECISION

IT IS HELD THAT the claimant did not have 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 not precluded from receiving benefits under Section 8-909, from the week beginning June 13, 2010, provided that the claimant meets the other eligibility requirements of the Maryland Unemployment Insurance Law. The claimant may contact claimant Information Service concerning the other eligibility requirements of the Maryland Unemployment Insurance Law. 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.

The determination of the Claims Specialist is reversed.



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 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 October 12, 2010. 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 : September 17,2010
CH/Specialist ID: WCU6H
Seq No: 002
Copies mailed on September 27, 2010 to:
LINDA L. HAYES
BOARD OF EDUCATION OF BALTO CO
LOCAL OFFICE #63
SUSAN BASS DLLR
BOARD OF EDUCATION OF BALTO CO