DEPARTMENT OF EMPLOYMENT AND TRAINING

BOARD OF APPEALS
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5032

STATE OF MARYLAND
HARRY HUGHES
Governor

— DECISION —

Decision No.: 205-BR-85

Date: March 27, 1985

Claimant: Loren G. Ritchie

Appeal No.: 09012

S. S. No.:

Employer: Allegany County Board of Education

L.O. No.: 3

Appellant: CLAIMANT

Issue: Whether the claimant is eligible for benefits within the meaning of §4(f)(4) 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 April 26, 1985

— APPEARANCES —

FOR THE CLAIMANT:

FOR THE EMPLOYER:

REVIEW ON THE RECORD

This case was heard en masse with the cases of four other substitute custodians (appeal nos. 09008, 09010, 09014 and 09015) and, although many of the facts were the same for each claimant, there were significant differences. Nevertheless, the Appeals Referee issued almost identical decisions in each case using identical facts that were not correct for all the claimants. The

Board has reviewed the entire record and will issue a separate decision in each case. However, the testimony of each of those claimants is part of the entire record for each individual claimant's case.

Upon review of the record in this case, the Board of Appeals reverses the decision of the Appeals Referee and concludes that the claimant should not be disqualified under §4(f)(4) of the law.

The claimant was a substitute custodian employed by the Board of Education of Allegany County. There are approximately 25 substitute custodians on the employers list and during the year approximately 15 are called for work. Custodians generally work on a twelve month basis but substitute custodians may not be called during all 12 months. Although the employer's testimony is somewhat vague on this matter, the Board finds, based on our review of the evidence, that many substitute custodians do work at least part of the summer and they are not strictly ten month employees.

The school year ended on June 30, 1984. The claimant continued to work until July 2, 1984 when he was replaced by a permanent custodian who had been "bumped" due to the closing of some schools. As a result, the claimant filed for unemployment insurance with a benefit year beginning July 1, 1984. On July 20, 1984, he was notified by the agency by a written determination that he was not eligible for benefits because he had reasonable assurance of work in the fall semester pursuant to §4(f)(4) of the law. However, on July 31, 1984, the agency, based on new information, issued a second determination finding that the claimant did not have reasonable assurance under §4(f)(4) because he had been "separated from employment due to being 'bumped' from his job by a more senior employee, not because school closed for the summer." (See agency document DHR/ESA 222.) The claimant had been called back to work on August 21, 1984 and was still working at the time of the Appeals Referee hearing on September 7, 1984.

The Appeals Referee based his decision on the erroneous conclusion that the second determination of the agency on July 31, 1984 was invalid under recent Board precedents, most notably Leftwich, 140-BH-83. Leftwich, however, is not applicable here because §4(f)(4), as amended in 1984, specifically provides for a claimant who initially has reasonable assurance that he will perform services in the next academic year:

> If, however, that individual is not offered an opportunity to perform the service for the educational institution for the next successive year or term, the individual shall be paid retroactively, provided the individual:
>
> (i) Filed a timely claim for each week;
> (ii) Is otherwise eligible, and
> (iii) Was denied benefits solely under this paragraph.

This amendment to §4(f)(4) obviously is an exception to the general rule of finality of decisions under §7 of the statute and Leftwich, supra.

Moreover, in this case, the agency redetermination was made within 15 days of the original determination. Therefore, even if Leftwich was applicable here, under the Board's reasoning in that case, since the original determination was not final under §7(c)(ii) (because the 15 day appeal period had not expired) when the redetermination was made, this redetermination would not be found invalid by the Board.

With regard to the merits of the case, under §4(f)(4), the Board agrees with the agency that this is not really a 4(f)(4) case at all but a case where the claimant was essentially laid off, "bumped" by a permanent employee, with the possibility of recall at some later unspecified date. This is not a case of a claimant who regularly worked during an academic year and was regularly unemployed during the summer. The evidence shows that the custodians, including substitute custodians were needed and worked at least part of each summer. The claimant was not bumped until July 2, 1984, and he was recalled on August 21, 1984. We note that this was during a year when substitute custodians had been bumped by senior custodians.

In McCahon v. Loyola College, 607-BR-82, the Board concluded that where the claimant taught periodic short term courses and her employment or unemployment was not related to successive academic terms or any established and customary vacation period, a disqualification under §4(f)(3) or §4(f)(5) was not appropriate.

Here, the Board also concludes that the claimant's unemployment has no relationship to the period between two successive academic years. His employment, though by its very nature somewhat sporadic, since he was a substitute, was potentially ongoing throughout the year and when he was replaced by a permanent employee he did not have a reasonable assurance within the meaning of §4(f)(4).

DECISION

The claimant did not have reasonable assurance of returning to work. No disqualification is imposed based upon his separation from employment with the Allegany County Board of Education.

The claimant may contact his local office concerning the other eligibility requirements of the law.

The decision of the Appeals Referee is reversed.

Hazel A. Warnke
Associate Member

Thomas W. Keech
Chairman

W:K
kmb
COPIES MAILED TO;

CLAIMANT

EMPLOYER

James Stuller

UNEMPLOYMENT INSURANCE - CUMBERLAND

DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE OF MARYLAND
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5040

— DECISION —

Date: mailed Sept. 27, 1984

Claimant: Loren G. Ritchie

Appeal No.: 09012 EP

S. S. No.:

Employer: Allegany County Board of Education

L.O. No.: 03

Appellant: Employer

Issue: Whether the claimant is eligible for benefits within the meaning of Section 4(f)(4) of the Law.

— NOTICE OF RIGHT OF FURTHER APPEAL —

ANY INTERESTED PARTY TO THIS DECISION MAY REQUEST A FURTHER APPEAL AND SUCH APPEAL 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 October 15, 1984.

— APPEARANCES —

FOR THE CLAIMANT:
Present

FOR THE EMPLOYER:
Represented by
Leona Lung,
Personnel Technician
& James Stuller,
Gibbens Company

FINDINGS OF FACT

The claimant was a substitute custodian employed by the Board of Education of Allegany County. He filed for unemployment insurance benefits on or about July 3, 1984 and was initially disqualified pursuant to the provisions of Section 4(f)(4) of the Maryland Unemployment Insurance Law for the week beginning July 1, 1984 and until he would no longer have reasonable assurance of returning to his employment in the second year or term.

When a substitute custodian is hired, he is advised, and the claimant acknowledged, that he would be called and work as needed among the various schools in Allegany County. School for the children ended on or about June 6, 1984. Permanent employees who have contracts with the Board of Education are under said contract from July 1 through June 30 of each year. This year, the claimant was requested to continue working through the month of June and through July 2, 1984. The claimant received reasonable assurance that he would be recalled to his same employment in the Fall. The claimant notified the Board of Education in writing that he was interested in continuing as a substitute and will be available for work during the next school year. The notice further added that the claimant agreed to work when requested or will inform the school of reason for refusal.

During the summer of 1984, the employer permanently closed four of its schools. The local office learned of this fact and because permanent employees would be required to fill some of the positions which substitute custodians held, the initial determination issued on July 11, 1984 was rescinded by the local office, and a "corrected determination" was issued August 3, 1984 allowing benefits to the claimant on the basis that he did not have reasonable assurance of returning to his employment pursuant to the provisions of Section 4(f)(4) of the Maryland Unemployment Insurance Law. Permanent custodians are employed during 12 months of the year. Substitute custodians may also work during the summer as needed. The claimant was recalled August 21, 1984 and has been working regularly since then.

The Appeals Referee finds as fact that the corrected determination as issued by the Claims Examiner is invalid pursuant to the provisions of Section 7(c)(ii) of the Maryland Unemployment Insurance Law. The Appeals Referee further finds as fact that the claimant had reasonable assurance that he will perform service in the second year or term as he had performed in the first year or term.

CONCLUSIONS OF LAW

The Board of Appeals has made it clear in the matter of John J. Malloy, 184-BH-83 and Darlene Leftwich, 140-BH-83, that Section 7(c) governs the issue of initial determinations, both monetary and non-monetary. Section 7(c)(ii) clearly and unambiguously states: "A determination shall be deemed final unless a party entitled to notice thereof files an appeal within 15 days after the notice was mailed to his last known address, or otherwise delivered to him; provided, that such period may be extended by the Board of Appeals for good cause." The only provisions of the Law which vest in the agency the right and discretion to modify determinations are in Section 17(d) of the Maryland Unemployment Insurance Law where the Secretary may recover benefits from an individual where it has been determined that said person has been overpaid, and the Secretary may reconsider his decision at any time within one year after the date when it was made. Aside

from this sub-section of the Statute, the agency has the discretion to modify prior determinations only in the instance of indefinite disqualifications imposed as conditions prerequisite for entitlement to benefits, such as under Sections 4(a), 4(b) and 4(c) of the Maryland Unemployment Insurance Law. In the Leftwich case, the Board opined: "The Board concludes therefore, that Section 7(c)(ii) is conclusive for monetary and non-monetary determinations and provides no exceptions, other than for good cause." No clerical error existed when the agency attempted to issue a "Corrected Determination". The agency had what it thought was a new set of facts, or a misinterpretation of the Statute. In either instance, in the absence of a clerical error, it would have been incumbent upon the agency to appeal its own determination to an Appeals Referee for a judicial decision as to the application of the Law where new facts arose, or where it was discovered that the agency had misinterpreted the Law.

The agency issued a corrected determination more than 15 days from the date it issued its initial determination under Section 4(f)(4) of the Law. Unless an appeal is noted by the agency with respect to modification of its initial determination with good cause shown for such late filing of an appeal, the initial determination must stand undisturbed pursuant to the provisions of Section 7(c)(ii) of the Statute and pursuant to the prior holdings of the Board of Appeals as set forth above.

The Appeals Referee hence, need not reach a decision as to the claimant's eligibility for unemployment insurance benefits pursuant to the provisions of Section 4(f)(4) of the Maryland Unemployment Insurance Law, but the Findings of Fact above disclose that the claimant had reasonable assurance of returning to employment in the second year or term under the same terms and conditions of employment as he had in the first year or term, and as set forth under Section 4(f)(5) of the Maryland Unemployment Insurance Law: "An individual may not be paid benefits based on service described in paragraphs 3 and 4 for any week of unemployment that begins during an established and customary vacation period, or holiday recess if the individual performs a service in the period immediately before the vacation period, or holiday recess and there is a reasonable assurance that the individual will perform the service in the period immediately following the vacation period of holiday recess." Since the claimant's unemployment began during a period between two successive academic years or terms and he has reasonable assurance that he will perform the service in the second year or term, the claimant must also be disqualified pursuant to the provisions of Section 4(f)(4) of the Maryland Unemployment Insurance Law.

DECISION

It is held that the Corrected Determination or re-determination of the Department of Employment and Training is invalid, as the initial determination issued in mid-July 1984 became final in the absence of an appeal by any party entitled to notice thereof within 15 days as required by Section 7(c)(ii) of the Maryland Unemployment Insurance Law.

The initial determination as issued by the Claims Examiner shall therefore be reinstated and the claimant shall be disqualified for benefits for any week of unemployment that begins during the established and customary vacation period, as he has reasonable assurance of performing a service in the period immediately following the vacation period, pursuant to the provisions of Section 4(f)(4) and 4(f)(5) of the Maryland Unemployment Insurance Law.

The determination of the Claims Examiner is reversed.

Robin L. Brodinsky
Appeals Referee

Date of hearing: September 7, 1984
jlt
(6692-C.M. Wolf)

Copies mailed on Sept. 27, 1984 to:
Claimant
Employer
Unemployment Insurance - Cumberland

Gibbens Company