

- DECISION -

Claimant:
SCARLETTE L BROWN

Decision No.: 4516-BR-13

Date: October 30, 2013

Appeal No.: 1320682

S.S. No.:

Employer:
PRINCE GEORGES BOARD EDUCATION

L.O. No.: 65

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: November 29, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the hearing examiner's findings of fact but reaches different conclusions of law. The decision of the hearing examiner is reversed.

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*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

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 past 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. *Gilliam v. Board of Education of Baltimore County, 174-BR-88*.

In the instant case, the claimant received correspondence from the employer on May 31, 2013 notifying her that there would be positions available to her as a substitute teacher for the upcoming school year. (See *Employer Exhibit #1*) The correspondence directed the claimant to return a confirmation that she had an intention to return to a substitute teacher position for the employer. The claimant received the correspondence but never returned the confirmation. The claimant testified that she had no intention of returning to the position for the upcoming academic year.

The claimant was a substitute teacher who was employed on an on-call basis. The claimant worked for the employer approximately 100 days in the previous academic year. The employer witness testified that full-time teachers are employed approximately 192 days during the academic year. As noted in *Gilliam, supra* factors established for substitute teachers to determine if there is a reasonable expectation of performing services is the history of the employment relationship.

The weight of the credible evidence supports a finding that the claimant was regularly used by the employer as a substitute teacher. The weight of the credible evidence supports a finding that the employer intended to continue the claimant's employment. The separation from this employer was not because the claimant did not have reasonable assurance in returning in that capacity but because the claimant had no intention of returning as a substitute teacher. The claimant was tasked to return the confirmation that she intended to return as a substitute teacher. The claimant specifically testified that she would not be returning as a substitute teacher and had no intention of doing so.

The Board refers the separation issues which arose in this case to the Agency for an initial determination if the Agency has not already rendered one.

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 had reasonable assurance or 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 disqualified for receiving unemployment insurance benefits based upon employment with this employer from the week beginning June 2, 2013 through the week ending August 24, 2013.

However, the claimant may be eligible for unemployment insurance benefits under other covered employment, but the wages from the employer in this case will not be used to determine the claimant's weekly benefit amount.

The decision shall be reversed for the reasons stated herein.

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 2, 2013 through the week ending August 24, 2013.

The Hearing Examiner's decision is reversed



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

VD/mr

Copies mailed to:

SCARLETTE L. BROWN
PRINCE GEORGES BOARD EDUCATION
SUSAN BASS DLLR
PRINCE GEORGES BOARD EDUCATION
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

SCARLETTE L BROWN

SSN #

Claimant

vs.

PRINCE GEORGES BOARD EDUCATION

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: 1320682

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

August 13, 2013

For the Claimant: PRESENT

For the Employer: PRESENT , ROLAND OTEY

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, Scarlette Brown, commenced her employment with this employer, the Prince George's County Board of Education, on April 19, 2004 and her last physical day worked was May 31, 2013. During the 2012 -- 2013 academic year the claimant worked as a substitute schoolteacher and a flat rate of \$100 per day taught. The claimant worked an on call, as needed basis. During the period commencing January 1, 2013 and ending May 31, 2013, the claimant worked as a substitute schoolteacher for the above-noted employer for approximately 100 days.

The employer mailed the claimant a "reasonable assurance letter" on or about May 31, 2013 (employer exhibit number one). This letter contains a representation form for the claimant to detach, complete, sign and date and return to the employer by June 28, 2013, whereby the claimant certifies that she plans to return to employment as a substitute schoolteacher for the 2013 -- 2014 school year.

This letter states the following: "If you intend to return to work at PGCPS for the 2013 -- 2014, you must respond by June 28, 2013. Failure to respond or notify the Substitute Office with your intent to return to work at PGCPS will result in a total separation of service."

The claimant has never responded to the foregoing letter, has never completed or returned the above described representation form, and has never notified the Substitute Office of her intent to return to work as a substitute schoolteacher. The claimant has no intention of returning to work as a substitute schoolteacher, or as any type of schoolteacher, for the upcoming academic year, except as a last resort, if she can find no other employment.

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 two successive academic years;
 - (ii) a similar period between two 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 two academic years or terms; and
 - (ii) has a contract or reasonable assurance the individual will perform the services in an instructional, research, or principal administrative capacity for any educational institution in the second of the two academic years or terms.

To meet the "reasonable assurance" standard, an employer need not demonstrate an employee is guaranteed the job in the next academic semester. Rather, the employer must establish the employee has a reasonable expectation of being recalled to perform the same or similar services.

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 past 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 Section 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.

The claimant worked as a substitute teacher for the Howard County Public Schools since 1985. In May, 1988, the claimant received a letter from her employer giving her reasonable assurance that she would return to her position as a substitute teacher for the 1988-89 school year. The claimant returned the postcard contained with this letter, indicating her intent to continue as a substitute teacher for the 1988-89 school year. During the 1986-87 school year, the claimant worked 95 days. During the 1987-88 school year, the claimant worked 91 school days. The school year consists of 190 days. 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. The claimant's employment history and the statements of the claimant and the employer are sufficient to find that the claimant had reasonable assurance of returning to her employment for the 1988-89 school year. Thompson v. Howard County Board of Education, 497-BR-89.

Where the claimant was not only on a "reasonable assurance" list, but also worked 170 out of the 180 school days in the previous year, 80% for this employer, the claimant had reasonable assurance. Twigg v. Mineral County Board of Education, 42-BR-93.

EVALUATION OF EVIDENCE

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."

The preponderance of the credible evidence of the instant case establishes that the above-captioned employer, which is an educational institution, employed the claimant, but does not establish that the claimant had reasonable assurance of returning to her instructional, research or principal administrative position for the 2013 -- 2014 academic year within the meaning and intent of the above-cited legal authority. This is so for two reasons: To begin with, the employer mailed the claimant a "reasonable assurance letter" on or about May 31, 2013 (employer exhibit number one). This letter contains a representation form for the claimant to detach, complete, sign and date and return to the employer by June 28, 2013, whereby the claimant certifies that she plans to return to employment as a substitute schoolteacher for the 2013 -- 2014 school year. This letter states the following: "If you intend to return to work at PGCPS for the 2013 -- 2014, you must respond by June 28, 2013. Failure to respond or notify the Substitute Office with your intent to return to work at PGCPS will result in a total separation of service." The claimant has never responded to the foregoing letter, has never completed or returned the above described representation form, and has never notified the Substitute Office of her intent to return to work as a substitute schoolteacher. The employer witness, Mr. Otey, contended at the hearing that notwithstanding the foregoing, the claimant has reasonable assurance of returning to work for the Prince George's County Board

of Education as a substitute schoolteacher for the upcoming school year is she so desires. This hearing examiner does not find this testimony to be persuasive since it renders meaningless the language quoted above to the effect that failure to respond will result in the total separation of service. In addition, the claimant testified credibly to the effect that she has no intention of returning to work as a substitute schoolteacher, or as any type of schoolteacher, for the upcoming academic year, except as a last resort, if she can find no other employment.

Accordingly, I hold that an educational institution employed the claimant but that the claimant has no reasonable assurance of returning to her instructional, research or principal administrative position for the 2013 – 2014 academic year, as described above and that unemployment insurance benefits are therefore allowed as described below.

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 2, 2013, provided 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 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.



A. Scheinberg, 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

This is a final decision of the Lower Appeals Division, . Any party who disagrees with this decision 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 August 26, 2013. 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 02,2013
THJ/Specialist ID: USB37
Seq No: 001
Copies mailed on August 09, 2013 to:
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