Maryland
Department of Economic & Employment Development

William Donald Schaefer, Governor
Mark L. Wasserman, Secretary

Board of Appeals
1100 North Eutaw Street
Baltimore, Maryland 21201

Telephone: (410) 333-5032

— DECISION —

Decision No.: 226-BH-93

Date: February 5, 1993

Claimant: William A. Riall

Appeal No.: 9201962

S. S. No.:

Employer: Town of Berlin

L. O. No.: 12

Appellant: EMPLOYER

Issue: Whether the claimant has received dismissal payments or wages in lieu of notice, within the meaning of §8-1009 of the Labor and Employment Article.

— 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, IF YOU RESIDE IN BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES March 7, 1993

— APPEARANCES —

FOR THE CLAIMANT: William A. Riall - Claimant

FOR THE EMPLOYER: Raymond. D. Coates, Esq.

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all the documentary evidence introduced in this case, as well as the Department of Economic and Employment Development's documents in the appeal file.

FINDINGS OF FACT

The claimant was employed by the Town of Berlin as town engineer, from April 2, 1990 until he was discharged for failing to properly perform his job, on or about December 8, 1991. At the time of his hire, the claimant entered into a three year contract with the employer. Included in the terms of the contract was a provision allowing the employer to terminate the contract for unsatisfactory job performance.

The employer grew increasingly dissatisfied with the claimant's work and after several discussions and warnings, the employer notified the claimant on or about October 14, 1991 that he was being terminated, effective December 8, 1991. The claimant considered this a breach of contract and threatened to sue the employer. After some negotiations, the parties reached an agreement. In return for the payment of $42,500.00 (plus the continuation of the claimant's health insurance for a limited time), the claimant agreed to terminate the contract. This sum of money was equivalent to 39 weeks of pay.

The claimant had been Berlin's first town engineer. Prior to his hiring, the employer hired engineers on a contractual basis, as needed for a particular job. After the claimant's discharge, the employer returned to this method of hiring engineers, although it was still exploring the possibility of hiring another full time engineer, such as the claimant, in the future. The claimant was discharged because of his work performance; he was not terminated because his job was abolished.

CONCLUSIONS OF LAW

The issue to be decided in this case is whether the payment of $42,500.00 is deductible from unemployment insurance benefits, within the meaning of §8-1009 of the Labor and Employment Article. Under that section of the law, dismissal payments or wages in lieu of notice are deductible from benefits, unless the claimant's unemployment resulted from abolishment of the claimant's job.

The Board concludes that the exception for job abolishment is not applicable here because the claimant's unemployment did

not result from the abolishment of his job; it resulted from his discharge for unsatisfactory job performance. Although the employer did not immediately replace the claimant, the services he was hired to perform were still being performed, although on as "as needed" basis. If the claimant had performed his job to the employer's satisfaction, he would have still been employed. This is not unemployment resulting from abolishment of his job, as contemplated by the statute.

This case also raises another issue. Does the fact that the payment made to the claimant was part of an agreement with the employer to end his contract make the payment something other than dismissal pay or wages in lieu of notice, within the meaning of §8-1009? The Board concludes that in this case it does not.

The employer here had the right under the terms of the contract to terminate the claimant's services for "unsatisfactory performance." That is exactly what the employer did. The claimant objected and threatened to sue the employer for breach of contract. The employer, wishing to avoid a lawsuit, negotiated with the claimant and agreed to pay him $42,500.00. This was substantially less than what the employer would have paid the claimant had he continued to work until the expiration of the contract.

The Board concludes that this payment is dismissal pay, as contemplated in §8-1009. In so concluding, the Board is distinguishing the facts here from those in the Board precedent, Bohager v. Waste Management, Inc. , 522-BH-85.

In Bohager, the employer did not have contractual grounds to terminate the claimant's employment. The employer however, wished for a parting of the ways for business reasons. The employer and claimant entered into an amended agreement. In consideration for terminating the original contract and for agreeing to extend the non-competition clause beyond the date of the claimant's termination, the employer paid the claimant the sum of $50,000.00. The Board held that that payment was consideration for the cancellation of an employment contract and therefore not dismissal pay.

In this case however, the employer did not have to negotiate an amended contract. The employer's decision to terminate the claimant was within the provisions of the contract. Further, in Bohager, the payment was also in consideration for the claimant agreeing not to compete with the employer for a certain period of time. There is no such additional consideration for the payment in this case.

For these reasons, the Board concludes that the payment made by the employer to the claimant is dismissal wages and

deductible from the claimant's unemployment insurance benefits.

§8-1009(c) provides that "dismissal payment or wages in lieu of notice shall be allocated to a number of weeks following separation from employment that equals the number of weeks of wages received." The claimant received 39 weeks of wages (his annual salary was $56,000.00). Therefore, the claimant is not eligible for unemployment benefits for the 39 weeks following his separation on December 8, 1991.

DECISION

The claimant received dismissal pay within the meaning of s8-1009 of the Labor and Employment Article. He is disqualified from the receipt of unemployment insurance benefits from the week beginning December 8, 1991 and the following 38 weeks.

The decision of the Hearing Examiner is reversed.

Hoyle A. Ward

Donna P. Watts
Associate Member

Thomas W. Keech
Chairman

W:W:K

DATE OF HEARING: November 10, 1992
COPIES MAILED TO:

CLAIMANT

EMPLOYER

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Telephone: (410) 333-5040

—DECISION—

Date: Mailed 3/11/92

Claimant: William A. Riall

Appeal No.: 9201962

S. S. No.:

Employer: Town of Berlin

L. O. No.: 12

Appellant: EMPLOYER

Issue: Whether the claimant is receiving or has received dismissal payments or wages in lieu of notice under the MD Code, Labor and Employment Article, Title 8, Section 1009.

— NOTICE OF RIGHT TO PETITION FOR REVIEW —

ANY INTERESTED PART)' TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY OFFICE OF THE DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT, OR WITH THE BOARD OF APPEALS, ROOM 515, 1100 NORTH EUTAW STREET. BALTIMORE MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES ON March 26, 1992

NOTE: APPEALS FILED BY MAIL, INCLUDING SELF-METERED MAIL, ARE CONSIDERED FILED ON THE DATE OF THE U.S. POSTAL SERVICE POSTMARK.

—APPEARANCES—

FOR THE CLAIMANT:
Present

FOR THE EMPLOYER:
Represented by Raymond Coates, Jr., Esquire; accompanied by Ronald Bireley; and Jean Holloway

FINDINGS OF FACT

The claimant was discharged by the Town of Berlin from his job as town engineer. After his discharge, he entered into settlement

negotiations with the town and an agreement was reached where-by the claimant accepted $42,500.00 as full payment of all monies due him under his contract of hire. When the employer had terminated the claimant, the claimant had threatened legal action, based upon the face that the employer had no right to terminate him, and that he had honored the contract.

Prior to April, 1990, the Town of Berlin hired specific engineers for specific problems. That is, if they had a water problem, they hired a civil engineer, or if they had a mechanical problem, they hired a mechanical engineer or electrical engineer. The claimant, in April, 1990, entered into a three-year employment agreement for his engineering services. He was to be paid $56,000.00 a year until April 1, 1993. One of the conditions of employment was satisfactory performance by the claimant. The employer notified the claimant that his performance was unsatisfactory and he was discharged (a separate case involving that has been decided elsewhere).

The town urges that the $42,500.00 settlement paid to the claimant constitutes 39 weeks' wages, in lieu of notice. The employer urges that his job was abolished. The town no longer hires a person as town engineer, but has reverted to the system of hiring specific engineers for specific problems. It, therefore, has no position of town engineer.

CONCLUSIONS OF LAW

The attorney on behalf of the City of Berlin argues quite forcibly that the claimant was separated from employment for alleged misconduct, and he was, therefore, not separated because of abolition of his job.

Section 1009 of Title 8 under Subsection (a) of the Maryland Code, Labor and Employment Article states: that "This Section does not apply to unemployment that results from abolishment of an individual's job." The town's attorney, therefore, argues that this section should apply and the claimant should be barred from the receipt of unemployment insurance benefits for at least 39 weeks. The facts concerning abolition of the job are that the town no longer has someone in the position of a town engineer, and has reverted to the system it used before the claimant was hired, that is hiring engineers for each individual problem. While it is alleged that the claimant was discharged for misconduct, that is not proven, and the claimant, therefore, must be found to be entitled to keep the unemployment insurance benefits, as well as the dismissal payment, or wages in lieu of notice that he received as a result of his enforcement of his

contract rights when he was separated from employment.

DECISION

The claimant received dismissal payments or wages in lieu of notice, but they are not a bar to his receipt of unemployment insurance benefits under Section 1009 of Title 8 of Maryland Code, because the claimant's job was abolished.

The determination of the Claims Examiner is affirmed.

Martin A. Ferris
Hearing Examiner

Date of Hearing: 2/25/92
Specialist ID: 12627
cd/CASSETTE IN FILE

COPIES MAILED ON 3/11/92 TO:

Claimant
Employer
Unemployment Insurance - Salisbury (MABS)

Coates, Coates & Coates, P.A.