

- DECISION -

Claimant: CHERYL C POLLINS	Decision No.: 5362-BR-12
	Date: January 16, 2013
	Appeal No.: 1223477
	S.S. No.:
Employer: ACCOMAC BOARD OF EDUCATION	L.O. No.: 65
	Appellant: Claimant

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: February 15, 2013

REVIEW OF THE RECORD

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

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 in pertinent part, as follows:

- (c) (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.

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 A2d 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 A2d 1321, 1321 (Pa. 1978)).

Md. Code Ann., Lab. & 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.

In her appeal, the claimant restates her testimony from the hearing. She also contends she has a financial need for benefits. The Board notes that the economic conditions of a claimant are not a factor to be considered in determining eligibility for unemployment benefits.

The Board has thoroughly reviewed the evidence of record and finds the claimant did not have reasonable assurance of returning to her position as a substitute teacher. The hearing examiner found, as a fact, that the claimant had not received a letter of reasonable assurance. However, in the analysis, the hearing examiner found that the claimant had received some information about training and came to the conclusion that this was sufficient to establish reasonable assurance. The Board does not agree.

The process of providing reasonable assurance is straight-forward. The employer, as school district, certainly should have been capable of providing such assurance to the claimant. There was no evidence such a letter was ever sent to the claimant or that she was otherwise provided with actual reasonable assurance. Reasonable assurance, under the law, is not implied or inferred. It must be given, clearly and specifically. In this case, the employer did not appear and offer any evidence that it provided the claimant with reasonable assurance of returning, in the same or a similar capacity, for the next academic term or semester.

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 decision shall be reversed for the reasons stated herein.

DECISION

The Board finds based on a preponderance of the credible evidence that the claimant had no reasonable assurance of 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's wages from this employment may be used to support her claim for benefits.

The hearing examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

TBW

Copies mailed to:

CHERYL C. POLLINS
ACCOMAC BOARD OF EDUCATION
SUSAN BASS DLLR
Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

CHERYL C POLLINS

SSN #

Claimant

Vs.

ACCOMAC BOARD OF 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: 1223477

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

August 03, 2012

For the Claimant: PRESENT

For the Employer:

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, Cheryl Pollins, has been employed in an instructional capacity as a substitute teacher at a salary of \$40.00 per day, on an as needed basis. The claimant was first employed September 1, 2009 and has been re-employed at the beginning of each school year since then.

The claimant's unemployment commenced between two successive academic years in June 2012, two days prior to the conclusion of the 2011/2012 school year on June 7, 2012. The 2012/2013 School Year is scheduled to begin on September 4, 2012.

Although the employer has not yet sent the claimant a letter of reasonable assurance, the claimant has received the employer's letter regarding training for the upcoming school year. The claimant has worked for the employer the last two school years and is aware that this is how the process operates for those

employees the school wishes to have back for the upcoming school year. The claimant plans on returning to the employer to work this upcoming school year and the employer has indicated, informally, that they plan to have the claimant back.

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.

Md. Code Ann., Labor & Emp. Article, Section 8-909(c) provides:

(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 service 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 reasonable assurance that the individual will perform the services in the second of the 2 successive 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 EVIDENCE

The Hearing Examiner considered the testimony of the claimant, employer and the exhibits accepted into evidence in reaching this decision. Where the evidence was in conflict, the hearing examiner decided the facts on the credible evidence as determined by the hearing examiner.

Although the employer was not present for the hearing, the claimant acknowledged that she has reasonable assurance of returning to work for the employer for the 2012/2013 school year. The claimant has received a letter from the employer regarding training for the upcoming school year. Additionally, the claimant acknowledged that because she has worked for the employer for several years, she is aware that this is the process for employees expected to return to work. Moreover, the claimant was told, informally, by the employer that it wished to have her back and the claimant acknowledged that she wishes to return.

The claimant offered credible testimony that she has been a substitute teacher for the employer for the past two years, ceased working at the end of the 2011/2012 school year and expects to return at the beginning of the 2012/2013 school year.

The evidence establishes that the claimant was employed in an instructional capacity for an educational institution and became unemployed between academic terms.

The evidence further establishes that the claimant has reasonable assurance that the employer will return her to this employment at the beginning of the 2012/2013 School Year beginning at the end of August 2012.

DECISION

IT IS HELD THAT the claimant has 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 disqualified from receiving unemployment insurance benefits based upon employment with Wicomico County Board of Education from the week beginning June 3, 2012, and until the start of the successive academic year commencing with the week beginning September 8, 2012. The claimant will then be eligible for benefits so long as all other eligibility requirements are met. 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.

However, the claimant may be eligible for unemployment insurance benefits under other covered employment, even though wages from the above employer may not be used to determine the claimant's weekly benefit amount.

The determination of the claims specialist is affirmed.

H. Abromson

H Abromson, 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 to Petition for Review

Any party may request a review 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 20, 2012. 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: July 24, 2012
AEH/Specialist ID: RWD2Q
Seq No: 004
Copies mailed on August 03, 2012 to:

CHERYL C. POLLINS
ACCOMAC BOARD OF EDUCATION
LOCAL OFFICE #65