

- DECISION -

Claimant:
EUNICE I TAYLOR

Decision No.: 113-BR-15

Date: January 21, 2015

Appeal No.: 1416819

S.S. No.:

Employer:
BOARD OF TRUSTEES-PRINCE

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: February 20, 2015

REVIEW OF THE RECORD

The employer has filed a timely appeal to the Board from an Unemployment Insurance Lower Appeals Decision issued on August 12, 2014. That Decision held the claimant did not have reasonable assurance of returning to the same or similar work, in an academic institution, in the second of two consecutive terms, within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-909*. Benefits were allowed, based on this employment, for the week beginning May 11, 2014 through the week ending August 30, 2014, so long as other eligibility requirements were met.

On appeal, the Board reviews the evidence of record from the Lower Appeals hearing. The Board reviews the record *de novo* and may affirm, modify, or reverse the hearing examiner's 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. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*. Only if there has been clear error, a defect in the record, or a failure of due process will the Board remand the matter for a new hearing or the taking of additional evidence. Under some limited circumstances, the Board may conduct its own hearing, take additional evidence or allow legal argument.

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)*.

In this case, the Board has thoroughly reviewed the record from the Lower Appeals hearing. The record is complete. Both parties appeared and testified. Both parties were given the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. Both parties were offered the opportunity to present closing statements. The necessary elements of due process were observed throughout the hearing. The Board finds no reason to order a new hearing, to take additional evidence, to conduct its own hearing, or allow additional argument. Sufficient evidence exists in the record from which the Board may make its decision.

The Board finds that while the hearing examiner's Findings of Fact are supported by substantial evidence in the record, those facts are incomplete and insufficient to support the hearing examiner's Decision. The Board makes the following additional findings of fact:

The employer had offered the claimant a similar teaching schedule for the 2014 Fall semester as she had worked during the preceding Spring semester. The claimant had agreed to this. Both parties understood that this offer was contingent upon sufficient enrollment in the claimant's assigned classes to warrant the employer actually having the claimant teach those classes. This was the same circumstances and understanding as between the parties in the prior year.

The Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

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 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 its appeal, the employer contends the hearing examiner erred in finding no reasonable assurance from the employer to the claimant for the second of two academic semesters. The employer cites to existing law in Maryland and guidance from the U. S. Department of Labor on this issue.

The Board agrees with the employer’s contentions. The claimant did have reasonable assurance of working in the same, or similar, capacity in the second of two academic semesters. The employer correctly notes that the concept of reasonable assurance does not require a guarantee of employment. It requires that the parties’ understanding be that the employment relationship will resume on essentially the same basis as before, after the end of a regular break between academic terms. Here, the claimant’s return was contingent on sufficient enrollment. That would nearly always be true of nearly every instructional position in nearly every educational institution. The concept is more apparent in the claimant’s position with a community college, it would be equally true in any other school which experienced a sudden or unexpected decline in enrollment. Under those conditions, an educator previously intending to return would find no class to which she could return despite the employer’s reasonable assurance or best intentions.

Reasonable assurance is not a contract and is not binding on either party. It is an agreement and understanding that the employer will have a position available of a similar nature to the claimant’s most

recent position, and that the claimant intends to return to that position. Neither party is bound by this and if something occurs which causes the claimant to not be able to return at the end of the break between terms, the reasonable assurance dissolves and the claimant could then be eligible for benefits for that period between terms.

In this case, the claimant had reasonable assurance as of the last date of the Spring semester that she could return to employment with this employer in a similar capacity. That reasonable assurance remained in effect until the first day of Fall semester at which time the claimant either would have returned to work or would have been advised she did not have classes available to teach.

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 did have 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 is not entitled to receive unemployment insurance benefits based upon employment with this employer from the week beginning May 11, 2014 through the week ending August 23, 2014.

The claimant may be eligible for unemployment insurance benefits based upon wage credits earned from other covered employment. However, the wages from the employer in this case will not be used to determine the claimant's weekly benefit amount.

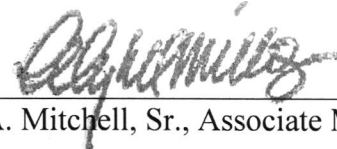
DECISION

The Board holds that the claimant did have reasonable assurance within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 8-909*. Benefits are denied as of the week beginning May 11, 2014 through the week ending August 23, 2014.

The Hearing Examiner's decision is Reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

EUNICE I. TAYLOR

BOARD OF TRUSTEES-PRINCE

SUSAN BASS DLLR

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

EUNICE I TAYLOR

SSN #

Claimant

vs.

BOARD OF TRUSTEES-PRINCE
GEORGES COMM COLLEGE

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: 1416819
Appellant: Claimant
Local Office : 65 / SALISBURY
CLAIM CENTER

August 12, 2014

For the Claimant: PRESENT

For the Employer: PRESENT , TENECIA ROSS

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 employer in this case, Prince Georges Community College, is an educational institution. The claimant, Eunice I. Taylor, began working for it on August 20, 2012. The claimant last worked for it on May 15, 2014, corresponding to the last day of the spring semester.

The claimant was employed as a part-time (contractual) adjunct professor, which is either an instructional, research or principal administrative position. (Claimant Exhibit #1)

The next successive semester begins on August 23, 2014 for the fall semester. The claimant's re-employment to return is dependent on student enrollment and finances. (Employer Exhibit #1)

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 service.

EVALUATION OF EVIDENCE

The Hearing Examiner considered all of the testimony and evidence of record 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.

It is clear and essentially undisputed that (a) the claimant was employed by an educational institution, (b) had unemployment that occurred between successive academic terms or years, and that (c) the employed was employed in a capacity covered by Section 8-909. The claimant's re-employment is dependent upon sufficient student enrollment and finances. The reason why the claimant felt that she did not have reasonable assurance of returning was credible. Since the claimant's re-employment depends on student enrollment (and finances) which is not predictable or controlled by the employer, the claimant's work history alone does not support a finding of reasonable assurance. (See Comminos v. Baltimore City Schools 264-BH-83)

Because it is found that the claimant did not have reasonable assurance of returning to work in the same capacity for the next academic term or year, benefits shall not be denied pursuant to the requirements set forth in Section 8-909.

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 May 11, 2014 through the week ending August 30, 2014,, 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.

P E. Butler

P E Butler, 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 27, 2014. 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 07, 2014
CH/Specialist ID: USB18
Seq No: 002
Copies mailed on August 12, 2014 to:

EUNICE I. TAYLOR
BOARD OF TRUSTEES-PRINCE
LOCAL OFFICE #65
SUSAN BASS DLLR