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.: 966 -BH-86

Date: December 3, 1986

Claimant: Betty J. Harrison

Appeal No.: 8601093

S. S. No.:

Employer: Washington County Department of Social Services

L.O. No.: 4

Appellant: EMPLOYER

Issue: Whether the claimant's unemployment was due to leaving work voluntarily, without good cause, within the meaning of Section 6(a) of the law; whether the claimant performed services in employment within the meaning of Section 20(g) of the law and whether the claimant was able, available and actively seeking work, within the meaning of Section 4(c) 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 January 2, 1987

— APPEARANCES —

FOR THE CLAIMANT:

Betty Harrison - Claimant
Kenneth Harrison

FOR THE EMPLOYER:

Sara Kaplan - Attorney General
John Kenney
Lynn Peirson
Margaret Oliver
Robert Hull

DEPARTMENT OF EMPLOYMENT AND TRAINING
John Roberts - Legal Counsel

EVIDENCE CONSIDERED

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

FINDINGS OF FACT

On November 25, 1985, the claimant entered into an agreement with the Washington County Department of Social Services to provide domestic care services to a client of the Washington County Social Services Department.

Funds were provided to pay the claimant from a state funded program, called Gateway II. This program was administered by a cooperative arrangement among three state agencies. The purpose of the entire program was to provide long term care to aid elderly people to remain in their homes and thus be free from the need to be institutionalized, whether in a nursing home or otherwise.

Although other services are provided by other agencies, the Washington County Department of Social Services does provide "chore services" to eligible elderly people in their homes. The Washington County Department of Social Services (hereinafter "WCDSS") provides, through its own employees, both chore services and personal care services. The WCDSS tends to provide chore services in the more difficult cases and the cases in which the clients need personal care and other services as well as chore services. For those cases which the WCDSS decides only simple chore services are necessary, that agency often provides those services from the list of "providers."

The WCDSS enters into a contract with these "providers" to perform specific services on a regular basis for a regular client. This contract purports to establish a contractual relationship but not an employer-employee relationship. The providers send a monthly statement of services provided to the agency. This invoice is then processed and paid. There is no restriction on providers having other employment. In fact, a provider who is working with only one client will be idle much of the week. On some occasions, the provider will be a professional cleaning company, but in this case the procedure used is different. In the case of a professional cleaning company, the WCDSS will have gotten an estimate from the company and make an agreement based on the estimate. In the case of other

"providers" like Ms. Harrison, the pay rate is set at $3.70 per hour of services. The WCDSS expects providers to perform the services personally instead of subcontracting them to a third party, but such subcontracting would not be in violation of the contract and would not be a ground for termination of the contract by the WCDSS.

Providers go to homes where generalized instructions are given as to which areas of the house are expected to be cleaned, usually once a week. There is a "Case Manager" (who, incidentally, is also termed a "provider") who visits the client with the provider and executes the first contract. This case manager then visits the premises once every six months to see if the services are being provided as requested. Neither the case manager nor the WCDSS supervises the providers in the daily performance of their tasks. The providers are not told how to accomplish these cleaning and other chores; they are simply told which chores to do.

The providers, at least at this period, which is apparently near the inception of the program, are screened by the WCDSS. The WCDSS requires only a written application. The applicants generally come from persons who have sought employment at the WCDSS. The WCDSS has also run newspaper ads and has obtained providers from people who have heard of the program through word of mouth. The program is explained to all who are interested, not as a program of state employment, but as a program of approved providers. Those interested are given a brief interview and fill out a short written application. For a person to be on the provider list, it is not necessary that the person be eligible to be hired by the WCDSS or the state of Maryland.

In Betty Harrison's case, she learned of the employment through the local office of the Department of Employment and Training. She was referred to the WCDSS, who interested her in the provider program. A provider is then apparently introduced to a case manager, who introduces a provider to a client in the client's home and explains what has to be done. The provider estimates the amount of time per week that the job will take, and the provider is then paid $3.70 per each hour, according to a monthly bill submitted by the provider. A provider may refuse to work for any particular client, and a client may refuse any particular provider. The claimant, Betty Harrison, applied for regular employment at the Department of Social Services but was instead referred to this program. She was aware of the general nature of this program, including the fact that the WCDSS did not consider her to be its employee.

There was some confusion regarding her actual duties, however, and the claimant was under the understanding that part of her assignment was to assist the client in her personal care. After performing these duties for a while, the client became more disabled and required someone to lift her in and out of the bathtub. Because the claimant had a medical problem which ruled out this type of heavy lifting, she quit the employment.

The claimant is otherwise capable of performing the duties as a chore aide or in the type of light housekeeping work she has done in the past.

The claimant had previously worked doing light housekeeping for an elderly woman. This was clearly intended to be, and was reported to the Department of Employment and Training as, an employee-employer relationship. Prior to this experience, the claimant had worked for a country club in a janitorial capacity as an employee. Prior to this, the claimant had cleaned houses for doctors and lawyers and "richies" (wealthy persons) in the Hagerstown area.

The claimant had obtained each of these jobs by answering ads in the newspaper. She had never placed an ad in the newspaper holding herself out as an independent cleaning operation. She has not established herself as a corporation or any other business entity. She has never employed any subordinates to work for her in this cleaning.

Although she is unable to perform heavy lifting, the claimant remains able to perform ordinary housekeeping chores.

CONCLUSIONS OF LAW

Whether the claimant was an employee of the WCDSS or not, the claimant's reason for leaving that employment must be adjudicated since a claimant may be disqualified for leaving non-covered employment. Yasin v. Grempler Realty (273-BR-82) and even for leaving self-employment. Weller v. Highway Petroleum Sales (781-BR-83).

The Board concludes that the claimant did have good cause for leaving her employment. There is no question but that there was a total misunderstanding as to the duties which the claimant was expected to perform. Although the written contract did not spell out the duties in the manner described by the claimant, the claimant had difficulty reading, and the Board is convinced that she did not fully understand the

contract. The WCDSS has gone to great lengths to explain how little contact and supervision it has with the providers, and the testimony of its own witness with respect to the exact instructions given to the claimant was extremely vague. The Board has given much more credibility to the claimant's statement that she was given to understand that she had to do everything necessary for the client. Although the claimant was physically capable of doing everything that appeared necessary, it so happened that the client's needs changed drastically, and the claimant was no longer able to perform those duties. The claimant had explained her pre-existing physical condition to the WCDSS at the time that she made her application. Since the work which the WCDSS expected the claimant to perform changed drastically and in such a way that she could no longer physically perform, the claimant clearly had good cause for leaving this situation, whether it is termed employment or self-employment. No disqualification will therefore be issued under Section 6(a) of the law regarding this claimant.

In the case of Pennsylvania Manufacturer's Association Insurance Company (3-EA-86), the Board ruled that an insurance company which, as the result of its Workmen's Compensation Coverage of the employer of an injured person, was required to pay for 24-hour nursing care for a permanently disabled worker, did not become the "employer" of the nurses hired for the injured worker simply because the insurance company paid its checks directly to the nurses rather than to the injured worker. In that case, the Board pointed out that the Pennsylvania Manufacturer's Association Insurance Company (hereinafter PMA) did not hire, supervise or fire the nurses. There was no privity of contract between the nurses and PMA. The services were not performed for PMA. Considering all of these factors, the Board ruled that these services were not performed for PMA within the meaning of Section 20(g)(1). Since the services were not performed for PMA at all, the checks issued by PMA to the nurses were held not to be wages for employment within the meaning of Section 20(g) of the law.

In this case, there are several crucial distinctions which result in a different conclusion under Section 20(g)(1). First, there clearly was privity of contract between the WCDSS and the claimant. In addition, the services are clearly performed for the WCDSS. These are services which the WCDSS has a duty to perform and does perform in other similar cases. The WCDSS does not hire the providers (as they are hired by the client's themselves) but it screens the providers, and it can fire the providers. See, Employer's Exhibit 1. For all of the above reasons, the Board concludes that the service performed by the providers is service for the WCDSS. The WCDSS is not simply discharging an insurance obligation by paying money, as was the case in PMA, but is actually contracting with the providers to perform services which are central to the business of the WCDSS.

Since the services were performed for the WCDSS, it becomes necessary to reach the question of whether they are services in employment within the meaning of Section 20(g). The only question in this regard is whether the services meet the standards of the exception in Section 20(g)(6) of that law.

That subsection of the law provides that any services performed "shall be deemed to be employment subject to this article," unless it is shown that three specific criteria are met. The first criteria is that the individual be free from control or direction over the performance of their services, both in the contract of service and in fact. The Board concludes that the employer has met this test. The case manager's semi-annual visit to the premises, to make sure that the chores are being done, certainly does not qualify as supervision. There appears to be no specific direction given by the WCDSS as to how the chores are to be done at all. In fact, in this case, it appears that the WCDSS had so little contact with Betty Harrison that it never even communicated to her exactly what it wanted her to do.

With respect to the second criteria, the service must be either outside the usual course of business for which that service is performed or performed outside all of the places of business of the enterprise for which the service is performed. Clearly, this service is not outside the usual course of business of the WCDSS. The WCDSS has other workers who perform the exact same chores that the providers are contracted to perform. This is clearly the usual course of business of the WCDSS. This service, nevertheless meets the requirements of this section, however, because the service is clearly performed outside of all of the places of business of the WCDSS.

The third requirement must be that the "individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service in question." This is clearly the most difficult question for the WCDSS to meet in this case. The Board rejects the notion that the claimant, by performing services throughout her working career as a housekeeper as an employee of other people, has established herself in an "independently established" trade or occupation within the meaning of this exception. With regard to the interpretation of this particular requirement, the Board is not unaware of the purpose of Section 20(g)(6) of the law. The purpose of this section is to avoid abuse or evasion by employers of the unemployment insurance law (and taxes) by the designation of

employees as subcontractors. For this reason, the statute gives little or no weight to those items commonly cited by employers as evidence of an independent contractor arrangement. Such evidence would include the signing of a statement stating that the person was performing services as an independent contractor and the fact that the employer does not take any type of taxes or other deductions out of their remuneration paid to someone performing services. The statute gives absolutely no weight to these factors, and the reason for this is clear. These factors are totally within the control of the employer and would allow any employer to simply opt out of the unemployment insurance system by exercising its greater economic power over prospective employees in order to require them to agree to sign these papers as a condition of hire.

Instead of relying on these indicia, the statute sets out the three requirements of Section 20(g)(6). The Board notes that, of these three requirements, the first two are largely within the control of the employer. The third criteria is the only criteria which looks wholly beyond the actions of the employer and requires independent evidence that the person performing services has, himself or herself, customarily held herself or himself out as an independent business person. For this reason, the Board has concluded that it is totally inappropriate to interpret a claimant's previous work in covered employment for an employer as the establishment of a "independently established" trade, business or occupation. This section is intended to safeguard the unemployment insurance system by excluding only those persons who truly hold themselves out to be independent contractors.

The question which arises in this case is whether a person, who signs to become an independent contractor just prior to performing services, and who had applied to the employer for ordinary employment just prior to that, can nevertheless be held to be engaged in an "independently established" business.

The Board concludes that the very wording of the statute clearly rules out any such interpretation. The statute clearly requires that the person be "customarily" engaged in an "independently established" trade, occupation, profession or business.

The words "independently established" are crucial. Clearly, the claimant has worked in the "occupation" of housekeeper before. If the statute means that anyone who has performed the duties of any established occupation meets the exception found in Section 20(g)(6)(iii), then this subparagraph would have no

meaning, for virtually all employees have been engaged in some occupation,and at any given time they are all usually performing the same type of duties for some employer. A secretary, for example, performs the duties of an established occupation of a secretary, but to make this an indication that the secretary should not be considered an employee of the present employer would be ridiculous. On the other hand, where a secretary had established himself or herself as an independent secretarial service, that fact would reasonably be considered an indication of self-employment status. For this reason, the Board concludes that the words "independently established" mean operated as a business, as a contractor or, at least, as a professional performing independent services for the public at large.

Betty Harrison clearly did not meet this standard, as she had never performed housekeeping services in any capacity other than that of employee, at least prior to her signing on as a "provider" for WCDSS.

The question which then arises is whether the claimant's simple act of registering as a "provider" could place her within the exception of Section 20(g)(6)(iii). Clearly, the providers are set up, to a great degree, as contractors. Since the claimant signed up to perform services in this way, she thus to some extent did become engaged in an independently established occupation.

Even though the claimant signed on to enter this program, she still does not meet the standards of Section 20(g)(6)(iii), however, because she was not "customarily" engaged in it, as required by the exception. Ms. Harrison had clearly never even heard of the "provider" concept prior to applying for work at WCDSS. She had never held herself out to the public as a cleaning business and had worked only as an employee.

The statute uses the word "customarily" in order to prevent just the sort of evasion of the system that the employer urges here. The statute clearly contemplates that the exception will come into play only where the person was functioning in an independently established manner <u>prior</u> to performing the particular services in question. Without such an interpretation, the word "customarily" would have no meaning.

The Board concludes that, in the context of this case, the word "customarily" means prior in time to the commencement of the services under scrutiny. The word also connotes that the person has been engaged in an independently established occupation with respect to some services for someone else other than the putative employer. In this case, there is no evidence that Betty Harrison either was independently established prior to signing on as a WCDSS provider <u>or</u> that she performed independently established services in any other context.

At some point, of course, anyone who was "customarily" not previously independently established can become "customarily" independently established. The Board is ruling simply that this transformation does not occur when the person, in search of a job, is offered a contractual arrangement by the prospective employer to perform services which the person has previously performed only as an employee.

Except perhaps in cases where the profession itself is one in which practitioners are so traditionally independent that the very possession of the practitioner's skills and license is sufficient for the practitioner to be considered customarily engaged in an independent profession (and, whatever these professions may be, housecleaning is not one of them), a person must have performed either prior services or outside services as an independently established business, trade or occupation before it can be said that the person was "customarily" so engaged.

For the above reasons, the services performed by Ms. Harrison are performed under a contract of hire for the WCDSS within the meaning of Section 20(g)(1), and they do not meet all of the requirements of the exception listed in Section 20(g)(6)(i), (ii) and (iii).

Since the Board has ruled that Ms. Harrison's services were performed in covered employment, all issues with respect to Ms. Harrison's monetary eligibility have been resolved. The exact identity of her employer, whether the WCDSS or the State Department of Human Resources is immaterial to that determination and need not be decided. To the extent that the WCDSS is merely an arm of the Department of Human Resources, however, all references in this decision to the WCDSS as an employer should apply to the State Department of Human Resources.

DECISION

The claimant voluntarily left her job, performed under the auspices of the Washington County Department of Social Services, for good cause, within the meaning of Section 6(a) of the Maryland Unemployment Insurance Law. No disqualification is imposed based upon her reason for leaving that employment.

The services performed by the claimant as a "provider" under the auspices of the Washington County Department of Social Services was service in covered employment under Section 20(g)(1) and it does not meet the exceptions to covered employment set out in Section 20(g)(6) of the Maryland Unemployment Insurance Law.

The claimant was able, available and actively seeking work, without unreasonable restrictions within the meaning of Section 4(c) of the law.

The decision of the Hearing Examiner is affirmed with respect to Sections 6(a) and 20(g)(1) and (6) of the law and reversed with respect to Section 4(c).

Thomas W. Keech
Chairman

Associate Member

K:W
kmb
DATE OF HEARING: September 16, 1986
COPIES MAILED TO:

CLAIMANT

EMPLOYER

Sarah Kaplan, Esquire
Assistant Attorney General
1100 N. Eutaw St., Rm. 606
Baltimore, MD 21201

John Roberts - Legal Counsel

UNEMPLOYMENT INSURANCE - HAGERSTOWN

DEPARTMENT OF EMPLOYMENT AND TRAINING

STATE OF MARYLAND
1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

(301) 383-5040

STATE OF MARYLAND
HARRY HUGHES
Governor

— DECISION —

Date: Mailed: March 24, 1986

Claimant: Betty J. Harrison

Appeal No.: 8601093

S. S. No.:

Employer: Washington County Department of Social Services

L.O. No.: 04

Appellant: Employer

Issue: Whether the claimant voluntarily quit his employment, without good cause, within the meaning of Section 6(a) 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 April 8, 1986

— APPEARANCES —

FOR THE CLAIMANT:

Present

FOR THE EMPLOYER:

John Kenney, Supervisor, Adult and Family Services

FINDINGS OF FACT

On November 25, 1985, the claimant entered into an agreement with the Washington County Department of Social Services to provide domestic care service to a client of the Washington County Social Services Department, Marjorie Pugh (see Employer's Exhibit 1). The claimant was to be compensated at a rate of $3.70 per hour for a five-hour day on a monthly basis, the claimant submitting a monthly bill for services rendered

during each preceding month. The contractual agreement provided that "The provider understands he/she is not an employee of the Washington County Department of Social Services, but rather, is self employed."

The claimant last performed such services on 12/18/85. It was her understanding at the time of the making of the contract that she was to do light housekeeping and cooking, but it later developed that she would be required to lift a nursing patient in the course of her domestic care duties, and the claimant was restricted by her physician from heavy lifting of over 50 pounds. Therefore, effective 12/18/85, the claimant withdrew from the agreement to provide services.

CONCLUSIONS OF LAW

Before a separation issue may be considered under the facts presented, it must be determined whether in fact a bona fide employment relationship existed between the claimant and the Washington County Department of Social Services, or whether the relationship was between two independent contracting parties to provide contractual services of a non-employment nature. This issue is best addressed by reference to Article 95(a), Section 20(g) 6(i, ii, and iii), in which it is provided that "Services performed by an individual for wages or under any contract of hire, shall be deemed to be employment subject to this Article, irrespective of whether the common law relationship of master and servant exists, unless it is shown to the satisfaction of the executive director that: (i) That individual has been and will continue to be free from control or direction of the performance of those services, both under his contract of service and in fact; and (ii) The services are either outside the usual course of the business for which that service is performed, or that the service is performed outside of all the places of business or the enterprise for which the service is performed; and (iii) The individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service in question."

The exceptions provided for in the statute are not met in this case. While the contract is silent on the degree of "control and direction over the performance of those services," it is clear and inherent that the claimant would be subject to essentially the same standard of care that would have been provided directly to the beneficiary, Marjorie Pugh, by the Washington County Department of Social Services, had an employee of the Department been providing those services. There is no evidence (nor is it reasonable to expect) that the Washington County Department of Social Services attempted to provide to a client in-home care services over which it maintained absolutely no control or direction. Secondly, the nature of the service is entirely within the "usual course of the business for which that service is performed." Thirdly, there is

no showing that the claimant was customarily engaged in an independently established business, or that she provided such services for other contractees.

Accordingly, following this interpretation of Section 20(g) 6(i, ii and iii) and the general trend Board of Appeals cases, which presume in behalf of employment as opposed to independent contractorship, it shall be held that the claimant was "employed" within the meaning of the Maryland Unemployment Insurance Law.

The question then presented is whether the claimant resigned such employment and, if so, if for good cause or under valid circumstances; and, further, if the claimant is in compliance with the requirements of Section 4(c) of the Law.

The claimant left the duties when she found that she would be required to lift a nursing patient. Such care was clearly beyond the purview of the agreement (See Employer's Exhibit No. 1), which stated that the "services to be provided are cleaning, cooking and laundry, five hours per day." Patient care and, specifically, lifting the patient are not contemplated duties, and such later requirement is a material variation of the contract of employment. Further, the evidence shows that the claimant was physically unable to lift over 50 pounds (See Agency's Exhibit Nos. 1 and 2). The lifting of the patient by an employee prohibited from lifting over 50 pounds constitute a sufficiently significant change in the working conditions and job duties as to constitute a good cause for voluntary resignation. (See, Jones v. Nu Dy Per Baby Services, 138-BR-84; and Williams v. Greenwood Towing, Incorporated, 441-BR-84.)

A claimant for unemployment insurance benefits be able, available and actively seeking work. In this case, Agency's Exhibits 1 and 2 demonstrate that the claimant was "unable to work due to illness" on 17th of December, 1985, but was released for return to work, with a 50-pound lifting restriction, on December 18th. The claimant did not meet the requirement of Section 4(c) for the 17th of December, and thus was disqualified by the Claims Examiner for that date and for that claim week. The claimant's job classification is "companion" (apparently with light housekeeping duties attached), and a 50-pound lifting prohibition does not constitute a material restriction within that job category, and the determination of the Claims Examiner so rendered under Section 4(c) shall be affirmed.

DECISION

It is held that the claimant was employed within the meaning of Article 95(a) Section 20(g) 6(i, ii and iii).

It is held that the claimant left her employment voluntarily, but for good cause, within the meaning of Section 6(a) of the Maryland Unemployment Insurance Law. No disqualification is imposed based upon the claimant's separation from employment with Washington County Department of Social Services. The claimant may contact her local office concerning other eligibility requirements of the Law.

It is held that the claimant was not fully able, available and actively seeking work within the meaning of Section 4(c) for the claim week ending 12/21/85. The determination of the Claims Examiner made under Section 4(c) for the period 12/15 through 12/21/85 is affirmed.

Louis W. Steinwedel.

Louis W. Steinwedel
Senior Hearings Examiner

Date of hearing: 2/13/86
adp
(0910)

Copies mailed on March 24, 1986 to:
Claimant
Employer
Local Office