

-DECISION-

Claimant:

CYNTHIA L KENNEDY

Decision No.: 2985-BH-12

Date: June 06, 2012

Appeal No.: 1128239

Employer:

MORGAN STATE 361300

S.S. No.:

L.O. No.: 63

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.

See NOTES below for special issue.

- 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: July 06, 2012

- APPEARANCES -

FOR THE CLAIMANT:

CYNTHIA L. KENNEDY

FOR THE EMPLOYER:

CYNTHIA SPIRT, Asst. Attorney General
SUE BASS, Agency

EVALUATION OF THE EVIDENCE

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

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)*.

This case has a unique initial posture: the employer appealed to the Board on behalf of the claimant and the Agency concurs with the employer's legal argument in support of the claimant's case.

In the instant case, the Board is persuaded that the weight of the evidence supports a conclusion that the employer's Head Start program is not an educational institution and that the claimant was not performing services for an educational institution. Therefore, the claimant's disqualification from benefits pursuant to § 8-909 must be vacated.

As a result, the Board is persuaded that the claimant's unemployment was not subject to the § 8-909 "reasonable assurance" test. The Board is persuaded that the claimant was discharged for non-disqualifying reasons.

FINDINGS OF FACT

The claimant was employed as a full-time custodian from October 1992 through June 30, 2011. The claimant is unemployed as the result of a discharge.

The claimant was discharged when her employment contract ended. The claimant was not discharged because of any act of misconduct.

The claimant was employed by the employer's Head Start program. This program is not an educational program. The employer's Head Start program is primarily a social service for low income families and children. The claimant was not performing services for the educational institution.

CONCLUSIONS OF LAW

The findings of fact and evaluation of the evidence are adopted and incorporated herein by reference.

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.

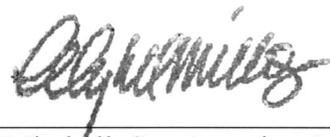
(f) Services provided on behalf of educational institutions. -- If any service described in subsection (a) of this section is provided by an individual to or on behalf of an educational institution, the individual is subject to subsections (b), (c), and (d) of this section and benefits may not be paid if not allowed under subsections (b), (c), and (d) of this section.

The Board finds that § 8-909 is inapplicable in the case at bar within the meaning of *Myers v. Community Action Council Howard County, 1104-BR-90* and *UIPL No. 411-97*. The *Myers* case and the *UIPL* find that Head Start programs are social service agencies and not educational institutions. The Board finds insufficient evidence in the record of this case to find otherwise. There is insufficient evidence that the claimant was performing services for an education institution. Therefore, the Board finds based on a preponderance of the credible evidence that § 8-909 does not bar the claimant from the receipt of benefits and that the hearing examiner's decision must be reversed.

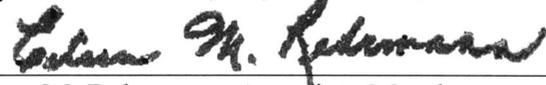
DECISION

THE BOARD HOLDS that the claimant is not disqualified from benefits within the meaning of *Md. Code Ann., Lab. & Empl. Art., § 8-909*. The claimant is eligible for benefits, provided she meets the other requirements of the law.

The hearing examiner's decision is reversed.



Clayton A. Mitchell, Sr., Associate Member



Eileen M. Rehrmann, Associate Member



Donna Watts-Lamont, Chairperson

RD

Date of hearing: March 20, 2012

Copies mailed to:

CYNTHIA L. KENNEDY

MORGAN STATE 361300

SUSAN BASS DLLR

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

CYNTHIA L KENNEDY

SSN #

Claimant

vs.

MORGAN STATE 361300

ATTN: H/R

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: 1128239

Appellant: Claimant

Local Office : 63 / CUMBERLAND

CLAIM CENTER

October 21, 2011

For the Claimant: PRESENT

For the Employer: PRESENT, JOHN PLAISIR

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. Whether the appeal should be reopened pursuant to COMAR 09.32.06.02 N.

REOPENING PREAMBLE

On the hearing notice, the "ISSUES" section indicates that an issue associated with the present matter is whether the case should be reopened pursuant to COMAR 09.32.06.02N. Because the reopening issue has previously been resolved in the appellant's favor, that issue shall not be re-adjudicated here.

FINDINGS OF FACT

The employer, Morgan State, in this case is an education institutional. The claimant, Cynthia L. Kennedy, worked for this employer from October, 1992 to June 30, 2011, which was the last day of her contract.

The claimant was employed as a custodian, which is not an instructional, research or principal administrative position.

The next successive semester began on August 23, 2011, and the claimant reasonable assurance of returning to work in the claimant's previous position at that time. On June 24, 2011, the employer sent the claimant a letter stating that she had reasonable assurance of returning to work at the beginning of the Fall Semester and she did return to work for this employer at the beginning of the Fall Semester.

CONCLUSIONS OF LAW

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 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.

Because it is found that the claimant had a reasonable expectation of being recalled to perform the same or similar services for the next academic term or year, benefits shall be denied pursuant to the requirements set forth in Section 8-909.

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 the above-identified employer from the week beginning June 26, 2011 and until the start of the successive academic year commencing with the week beginning August 21, 2011. 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 modified.

N. Grimes

N. Grimes, 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

Any party 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 November 07, 2011. 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: October 17, 2011
DAH/Specialist ID: WCU51
Seq No: 001
Copies mailed on October 21, 2011 to:
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LOCAL OFFICE #63
SUSAN BASS DLLR