Maryland
Department of Economic & Employment Development

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Board of Appeals
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Board of Appeals
Thomas W. Keech, Chairman
Hazel A. Warnick, Associate Member
Donna P. Watts, Associate Member

—DECISION—

Decision No.: 1458-BH-91

Date: November 18, 1991

Claimant: Paul Abbott, et. al.

Appeal No.: 91-BAJ-01

S. S. No.:

Employer: Westinghouse Electric Corp.

L. O. No.: 9

Appellant: EMPLOYER

Issue: Whether the claimants were employed as defined under Section 8-801 of the Labor and Employment-Article during the month of February, 1991; whether the claimant received dismissal pay or wages in lieu of notice within the meaning of Section 8-1009.

– 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 December 18, 1991

—APPEARANCES—

FOR THE CLAIMANT

FOR THE EMPLOYER:

Gerald Askin - Attorney
Alvira Milner - Human Resources Representative

DEPARTMENT OF ECONOMIC AND EMPLOYMENT DEVELOPMENT
John T. McGucken

PREAMBLE

This case concerns 1,764 unemployed former workers for the Westinghouse Electric Company who were laid off in the winter of 1991 and who filed claims for unemployment insurance benefits.

The issue is the date on which these claimants became unemployed. The employer contends that certain payments made to the claimants in February of 1991 were wages, and that the claimants were not unemployed while they received these payments. The Unemployment Insurance Administration, however, determined that these payments were not wages but dismissal pay. Consequently, the agency determined that the claimants were unemployed and eligible for unemployment benefits, despite the receipt of these payments.

The employer filed an appeal of the agency's determination, and the Board of Appeals took direct jurisdiction over the appeal at the request of the Executive Director of the Unemployment Insurance Administration.

In an attempt to simplify the factual issues involved, the Board requested, on July 12, 1991 that the employer state which of these claimants performed services for the employer during the period in question, and what these services consisted of. The employer responded by reiterating its contention that the payments were wages and that the claimants were not unemployed as long as they were receiving these payments. No information was given concerning the services performed by any particular claimant.

At the hearing on this case, the employer renewed this argument. In addition, the employer presented some generalized evidence concerning the claimants' activities during the period in question.

EVALUATION OF THE EVIDENCE

The employer presented evidence that the claimants were told to either report to work or report to the Career Counseling Center set up by the employer during the relevant period. But no evidence whatsoever was introduced showing what services, if any, were performed by a single individual claimant. In addition, the employer admitted that claimants who neither reported to work nor reported to the counseling center were still given these payments.

FINDINGS OF FACT

The claimants in this case were notified on February 1, 1991 by the employer that they were being laid off. Most of them, however, were kept on the payroll until February 28 or March 1, 1991. They received the same compensation which they were receiving while working. Most, if not all, of the claimants also received a lump sum "permanent separation amount" based on each employee's years of service.

During the month of February, the claimants were told that they should either report to work or visit the Career Counseling Center set up by the employer in a different location. The Career Counseling Center's only purpose was to help the employees find other jobs. All of the claimants were paid, whether they reported to work, reported to the Career Counseling Center, or did neither.

CONCLUSIONS OF LAW

The employer's legal argument is that the payments to the claimants during February constitute wages, and that the claimants were thus employed during that period of time. Since they were employed, they were not unemployed and should not collect unemployment benefits, the employer argues.

For purposes of the Unemployment Insurance Law, a person is unemployed in any week in which he "does not perform work for which wages are payable." Section 8-801(b)(1) of the Labor and Employment Article. "Wages" Are defined as "all compensation for personal services." Section 8-101(v)(1). The employers basic legal argument is that, since the claimants were kept on the regular payroll, the payments thus received must constitute "wages." This argument fails, however, because it does not take into account the statutory requirement that the employee "perform work" for these payments. The Board has consistently interpreted the statute as written. Payments made in weeks during which no services were performed, Dayton (199-BR-83), including payments made for services performed in the past, Markowski v: Baltimore County Personnel (749-BR-82), Lendo v. Garrett County Board of Education (299-BR-82) do not take the recipients out of the category of the "unemployed," for the purposes of the Unemployment Insurance Law.

The employer's second purely legal argument is that the lump sum "permanent separation amount" received by all of the claimants was the claimants' real severance pay, and that this shows that the payroll checks received were actually wages,

and not severance pay. There is a logical gap in this argument, since the receipt of one type of payment has little relevance to the legal characterization of the other payment received. It must be emphasized that the actual wording of the statute does not even include the term "severance pay." The operative words of the statute are "dismissal payment or wages in lieu of notice." Section 8-1009(b). The "permanent separation amount" paid by the employer in this case was obviously a "dismissal payment." This does not mean, however, that the paychecks received in February were not a "dismissal payment or wages in lieu of notice."

In order for the claimants to be disqualified during the month of February, on the basis of their not being unemployed, it must be shown that they were performing services for which these paychecks were paid as compensation. On appeal, the employer has the burden of showing that any of these claimants performed work for which these paychecks were wages payable. The employer presented some evidence that some claimants may have possibly performed some work, but the evidence lacked the specificity necessary for the employer to meet its burden and disqualify any particular claimant.

The claimants were theoretically required either to report to their job sites or to report to the Career Counseling Center. Reporting to the Career Counseling Center would not qualify as performing services for the employer. In the recent case of Fusco, et. al. v. Steamship Trade Association (1388-BH-91), the longshoremen claimants were required to report to a hiring hall maintained by a group of employers for one hour each day, in order to see if any actual work was available. In return, they received Guaranteed Annual Income payments. The claimants then argued that these payments constituted wages, and that these wages should be added to their base periods in order to make them eligible for unemployment benefits. The Board ruled, however, that reporting to the hiring hall to see if work was available was not "performing services," and that the payments did not constitue "wages."

This situation is analogous to the requirement in this case that the claimants visit the Career Counseling Center. While at the center, the claimants performed no services for the employer. They merely enhanced their own chances of getting work elsewhere. If anything, it was the employer who was performing services for the claimants at the Career Counseling Center. Since the claimants were not performing services or work for the employer at the center, they were not receiving disqualifying "wages," and they met the definition of being "unemployed."

On appeal, the employer made no identification of which employees went to the Career Counseling Center and which reported to work. In fact, the employer admitted that the claimants were kept on the payroll even if they did neither. There was no real requirement, then, that the claimants report anywhere or do anything in order to receive these payroll checks. And the employer has produced no evidence of who reported to the work site, who reported to the Career Counseling Center, and who stayed home. The employer has simply not mets its burden of showing that any particular claimant performed services for the paychecks received. The determination of the Executive Director that these payments were not wages for services performed will therefore be affirmed.

These payments were "dismissal payment or wages in lieu of notice" within the meaning of Section 8-1009. The Executive Director has determined, and the employer has not contested, that the claimants' jobs were abolished. Since the claimants' jobs were abolished, these payments are not disqualifying under Section 8-1009(a).

The Board recognizes the reasoning behind the employer's unwillingness to have its former employees collect paychecks and unemployment benefits for the same four weeks. Although this may seem like an unusual result, the legislature has clearly chosen to be generous to those whose jobs have been permanently lost.

DECISION

The agency's determination, that payroll checks received by the claimants after their last day of work were not disqualifying under Section 8-801 or Section 8-1009, is affirmed.

Thomas W. Keech
Chairman

Hazel A. Warnick
Associate Member

Donna P. Watts
Associate Member

K:H:D
kmb

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CLAIMANT

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