

02/28/2023

HOWARD COMMUNITY COLLEGE ROUSE COMPANY 201  
ROUSE COMPANY 201 C/O UNEMPLOYMENT INSURANCE SERVICE  
P O BOX 2033  
WESTMINSTER MD 21158-7033



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**Claimant:**  
CAROL J SCOTT

**Decision No:** 26226-BR-23  
**Appeal No:** 2130983  
**S.S. No:** XXX-XX

**Appellant:** Employer

**Employer:**  
HOWARD COMMUNITY COLLEGE ROUSE COMPANY 201  
P O BOX 2033  
WESTMINSTER MD 21158-7033

42822737

**BOARD OF APPEALS DECISION**  
**WARNING: IT IS IMPORTANT TO READ ALL PAGES OF THIS NOTICE**

ESTO ES UN DOCUMENTO LEGAL IMPORTANTE CON RESPECTO A SU DERECHO DE RECIBIR LOS BENEFICIOS DEL SEGURO DEL DESEMPLEO. CONTIENE FECHAS CON QUALES USTED TIENE QUE CUMPLIR PARA ASEGURAR SUS DERECHOS. SI USTED TIENE DIFICULTAD COMPRENDIENDO ESTE DOCUMENTO EN INGLES, POR FAVOR LLAME (301) 313-8000 INMEDIATAMENTE

**ISSUE(S)**

**ISSUE# 1:** Whether the claimant had reasonable assurance of returning to the same or similar employment with an educational institution in the next academic year, within the meaning of *Maryland Code Annotated, Labor and Employment Article, Title 8, Section 909.*

**REVIEW OF THE RECORD**

The employer, Howard Community College, Rouse Company 201, filed a timely appeal to the Board of Appeals from an Unemployment Insurance Lower Appeals Division Decision issued on December 7, 2022. That Decision held the claimant, Carol J. Scott, did not have reasonable assurance of returning to the same or similar work, in an academic institution, in the next academic year, within the meaning of *Md. Code Ann., Lab. & Empl. Art., §8-909.*

Benefits were allowed, based on this employment, from the week beginning May 23, 2021, through the week ending August 14, 2021.<sup>1</sup>

On appeal, the Board reviews the evidence of record from the Lower Appeals Division Telephone Hearing. The Board reviews the record *de novo* and may affirm, modify or reverse the hearing examiner's Findings of Fact and/or Conclusions of Law, on the basis of the evidence submitted to the hearing examiner or the evidence the Board may direct to be taken. *Md. Code Ann., Lab. & Empl. Art., §8-5A-10*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.02 (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, 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 thoroughly reviewed the record from the Lower Appeals Division Telephone Hearing. The record is complete. Both parties appeared and testified. The hearing examiner gave both parties the opportunity to cross-examine opposing witnesses and to offer and object to documentary evidence. The hearing examiner gave both parties an opportunity to make a closing statement. 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 to allow additional argument. Sufficient evidence exists in the record from which the Board may make its Decision.

#### FINDINGS OF FACT

The Board finds the hearing examiner's Findings of Fact are supported by substantial evidence in the record. The Board adopts the hearing examiner's Findings of Fact; however, for the reasons stated below, the Board Reverses the hearing examiner's Decision.

#### CONCLUSIONS OF LAW

*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:

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<sup>1</sup> The hearing examiner did not include an end date to the allowance of benefits; however, the claimant acknowledged she began new employment two (2) weeks prior to the anticipated start date of the 2021-2022 academic year, which began on Monday, August 29, 2021. Two (2) weeks prior to August 29, 2021, was August 15, 2021, which comports with the original Non-Monetary Determination's disqualification end date of Sunday, August 14, 2021. Accordingly, the Board finds the period in question, of potential benefit payment, ran from May 23, 2021, through August 14, 2021.

- (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:

42822737

- (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.

Unemployment Insurance Program Letter (UIPL) No.: 5-17 states, in pertinent part:

**Prerequisites for a "contract" or "reasonable assurance" determination.**

Before making a determination about whether there is a contract or reasonable assurance, the state must determine whether the employment offered in the following academic year or term, or remainder of the current academic year or term, meets three prerequisites. If any one of the three prerequisites is not met, the state UC agency may not deny the claimant UC based on the between and within terms denial provision.

However, if all three prerequisites are met, then the state UC agency must determine if the claimant has a contract or reasonable assurance.

- (1) The offer of employment may be written, oral, or implied, and must be a genuine offer, that is, an offer made by an individual with actual authority to offer employment.
- (2) The employment offered in the following academic year or term, or remainder of the current academic year or term, must be in the same capacity (i.e., a professional capacity or a non-professional capacity).
- (3) The economic conditions of the job offered may not be considerably less in the following academic year or term (or portion thereof) than in the first academic year or term (or portion thereof).

If the job offered meets each of the three prerequisites, the state agency must next determine whether the offer is a contract. Then, if no contract exists, the state agency must determine whether the claimant has a reasonable assurance to perform professional services in the following academic term or year.

Unemployment Insurance Program Letter (UIPL) No.: 5-17 further states, in pertinent part, in its analysis of "reasonable assurance:"

*Are Contingencies Within the Employer's Control?*

If any contingencies in the offer are within the employer's (i.e., the educational institution's) control, the state agency must determine the claimant does not have a reasonable assurance. Contingencies within the employer's control are those contingencies where the employer has the ability to satisfy the contingency. For example, the Department considers contingencies such as course programming, decisions on how to allocate available funding, final course offerings, program changes, and facility availability to be within the control of the employer. In each of these contingencies, whether the contingency will be satisfied is determined by an exercise of the employer's discretion in how best to allocate available resources. Similarly, offers that contain contingencies that allow employers to retract the offer at their discretion are considered to be within the employer's control. Generally, the Department considers contingencies based upon circumstances such as enrollment, funding, such as an appropriation for a specific course, and seniority to not be in the employer's control.

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*Totality of Circumstances*

The state agency must analyze the totality of circumstances to find whether it is highly probable that there is a job available for the claimant in the following academic year or term. This element requires considering factors such as funding, including appropriations, enrollment, the nature of the course (required or optional, taught regularly or only sporadically), the claimant's seniority, budgeting and assignment practices of the school, the number of offers made in relation to the number of potential teaching assignments, the period of student registration, and any other contingencies.

...

*Contingent Nature of the Offer*

If the offer contains a contingency, the state agency must give primary weight to the contingent nature of the offer. This requires the state agency to find whether it is highly probable that the contingency will be met. If it is not highly probable the contingency will be met, there is no reasonable assurance because the contingent nature of the offer outweighs any other facts indicating that the claimant has a "reasonable assurance." The term "highly probable" is intended to mean it is very likely that the contingency will be met.

In Attachment II, under the heading "Examples for Determining Reasonable Assurance," subheading "Contingent on Enrollment and/or Funding," sub-subheading "Enrollment," Unemployment Insurance Program Letter (UIPL) No.: 5-17 offers the following:

An adjunct instructor taught three classes of English 101, a required course, during the spring semester. Notwithstanding the fact that the offer of employment to teach this course has always been contingent on enrollment, the instructor has taught three classes of English 101 for ten consecutive semesters. There is no information indicating that enrollment will decline in the fall semester. At the conclusion of the spring semester, the instructor was given an offer to teach three classes of English 101 in the fall contingent on enrollment. Is UC payable between academic years based on her services as an adjunct instructor for the school district?

No. The State agency made the prerequisite determinations that the educational institution made an offer to the claimant, the employment offered is in the same capacity, and the economic terms and conditions of the job are not considerably less. Because the claimant does not have a contract, the State agency must determine if the claimant has a reasonable assurance. The State agency determined that the contingency (enrollment) is not within the control of the employer but reasonably concluded that it is highly probable there would be a job available to the claimant as enrollment (no indication it was declining), teaching history (ten consecutive semesters teaching the course), and nature of the course (intro-level required course taught every semester) indicate that the institution will offer the instructor the opportunity to teach the class the following term. Giving primary weight to the contingent nature of the offer, the State agency reasonably concluded that it was highly probable the enrollment contingency would be met and therefore, the between and within term denial applies and the claimant may not be paid UC based on the educational wages.

#### EVALUATION OF THE EVIDENCE

In its appeal to the Board, the employer offers the specific contention of error, as to the Findings of Fact and/or the Conclusions of Law in the hearing examiner's Decision, while the employer did not extend its offer to the claimant to teach two (2) classes in the fall semester of the 2021-2022 academic year in writing and did not execute a contract with the claimant for her services, the employer verbally informed the claimant it intended to use her services and had, at worst, an "implied" offer of future employment. The employer does not further cite to the evidence of record and makes no other contentions of error, other than to assert the claimant had reasonable assurance of teaching in the fall 2021 semester.

Although the Board adopts the hearing examiner's Findings of Fact, the Board finds the hearing examiner's synthesis of those Findings of Fact with the appropriate Conclusions of Law, which includes the U. S. Department of Labor's Unemployment Insurance Program Letter (UIPL) No.: 5-17, issued on December 22, 2016, and captioned "Interpretation of 'Contract' and 'Reasonable Assurance' in Section 3304 (a) (6) (A) of the Federal Unemployment Tax Act (FUTA),"<sup>2</sup> to be incorrect. Accordingly, the Board concludes the hearing examiner's Findings of Fact, Conclusions of Law and UIPL 5-17, warrant the Reversal of the hearing examiner's Decision.

In the December 7, 2022, Lower Appeals Division Decision, the hearing examiner cites to three (3) Board Precedent Decisions as the bases for finding the claimant did not have reasonable assurance of returning to work for the employer following the 2021 summer recess. Both *Taylor v. Board of Trustees Prince George's Community College*, 113-BR-15, and *Dearing v. Community College of Baltimore County*, 5705-BR-12, address whether the respective claimants had "contracts" providing for future employment. The parties in the matter on appeal to the Board agree there was no such contractual relationship between the parties during the two and a half (2½) months at issue, as the claimant's spring 2021 contract expired at the conclusion of the 2020-2021 academic year and the claimant resigned to accept other employment before the employer could offer her a contract to teach during the fall 2021 semester. Accordingly, the Board finds neither of these Precedent Decisions applicable to the matter before the Board.

The third (3<sup>rd</sup>) Precedent Decision cited, *Keicher v. Anne Arundel Community College*, 5193-BR-12, deals with reasonable assurance, which is at issue before the Board. However, in *Keicher* the facts reflect the employer did not inform the claimant, either in writing or verbally, nor was there an implied understanding the employer intended to use the claimant's services, from the end of the spring semester through the entirety of the summer sessions,

<sup>2</sup> For a review of the legal effect UIPLs have on the various States, the Board directs the reader to UIPL 01-96, issued on October 5, 1995, captioned "The Legal Authority of Unemployment Insurance Program Letters and Similar Directives."

and only came into reality when "On August 6, 2012, the claimant received a letter establishing reasonable assurance of returning for the next successive term."

In the matter on appeal to the Board, the parties again agree, both testifying the employer verbally informed the claimant at or around the end of the spring 2021 semester of its intention to use the claimant's services to teach two (2) classes in the fall 2021 semester. Accordingly, the Board finds this Precedent Decision is also inapplicable to the matter on appeal. Therefore, the Board will apply the directives from Unemployment Insurance Program Letter (UIPL) No.: 5-17 to analyze the matter before it.

Prerequisites for a "reasonable assurance" determination:

- (1) Was the offer of employment written, oral or implied, and was it a genuine offer, made by an individual with actual authority to offer employment? Yes. Both parties testified the employer verbally informed the claimant, by an employee with authority to offer employment, of the employer's intention for the claimant to teach two (2) classes in the fall 2021 semester.
- (2) Was the employment offered in the following academic year or term in the same capacity (i.e., a professional capacity) as the claimant's employment in the preceding academic year or term? Yes. The claimant taught as a part-time adjunct faculty member during the spring 2021 semester and would similarly teach as a part-time adjunct faculty member during the fall 2021 semester.
- (3) Were the economic conditions of the job offered considerably less in the following academic year or term than they were in the first academic year or term? No. The terms were identical: two (2) classes, the compensation for which was the same, per credit hour, in both semesters.

Because the job offered meets each of the three (3) prerequisites, the next question to be answered is whether the offer is a contract. As noted previously, the parties again agree there was no contract offered between May 23, 2021, and August 14, 2021. Therefore, because no contract exists, the Board must determine whether the claimant had "reasonable assurance" to perform professional services in the following academic term or year.

Again, the parties agree the oral offer of employment for the fall 2021 semester was contingent upon sufficient enrollment. In her Decision, the hearing examiner held, because "student enrollment determines whether or not a class will move forward, the claimant did not have reasonable assurance of returning in the fall." However, Unemployment Insurance Program Letter (UIPL) No.: 5-17 states:

If the offer contains a contingency, the state agency must give primary weight to the contingent nature of the offer. This requires the state agency to find whether it is highly probable that the contingency will be met. If it is not highly probable the contingency will be met, there is no reasonable assurance because the contingent nature of the offer outweighs any other facts indicating that the claimant has a "reasonable assurance." The term "highly probable" is intended to mean it is very likely that the contingency will be met.

Applying the facts in the matter on appeal to the principles set forth in the "Enrollment" example in Attachment II of Unemployment Insurance Program Letter (UIPL) No.: 5-17, under the heading "Examples for Determining Reasonable Assurance," the Board finds it was very likely the enrollment contingency would be met when the employer made its verbal offer in May of 2021.

The record reflects the claimant began working for the employer on September 15, 2018, and her last day worked was May 21, 2021, as a part-time adjunct faculty member, who taught psychology courses, and was paid per credit hour. The claimant worked every fall and spring semester, and one summer in 2019. The claimant taught the same two (2) classes each fall and spring semester and there is nothing in the record to support the finding enrollment was dropping and the claimant would not similarly teach her customary two (2) classes in the fall 2021 semester, due to a lack of enrollment.

Finding the prerequisite determinations that the educational institution made an offer to the claimant, the employment offered is in the same capacity, and the economic terms and conditions of the job are not considerably

42822737

less; and finding the claimant does not have a contract; and further finding the contingency (enrollment) is not within the control of the employer, but reasonably concluding it is highly probable there would be a job available to the claimant as enrollment (no indication it was declining), teaching history (the claimant taught 7 of the 9 semesters / session she could have taught), and nature of the course, it was highly probable the enrollment contingency would be met. Therefore, the between academic terms denial applies and the claimant may not be paid unemployment compensation benefits based upon the educational wages.

Accordingly, the Board finds, based on a preponderance of the credible evidence, the claimant had 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 23, 2021, through the week ending August 14, 2021.

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 (WBA).

**DECISION**

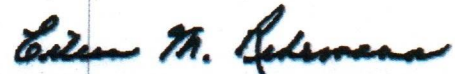
The Board holds the claimant had reasonable assurance of returning to the same or similar employment with an educational institution in the next academic year, within the meaning of *Md. Code Ann., Lab. and Empl. Art., Title 8, Section 8-909*. Benefits are denied from the week beginning May 23, 2021, through the week ending August 14, 2021.

The Hearing Examiner's Decision is Reversed.



CLAYTON A. MITCHELL, SR. CHARIMAN

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EILEEN M. REHRMANN, ASSOCIATE MEMBER



KIMBERLY M. BURNS, ASSOCIATE MEMBER

**Notice to Claimants of Right to Request Waiver of Overpayment**

The Department of Labor 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 410-949-0022 or 1-800-827-4839. 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.

**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: 03/30/2023

**Copies of this Decision was provided to:**

CAROL J SCOTT (Claimant)

HOWARD COMMUNITY COLLEGE ROUSE COMPANY 201

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