BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

VIRGINIA M. CARTER
(Claimant)

BEVERLY HILLS UNIFIED SCHOOL DISTRICT
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-461
Case Nos. 87-09357
87-09446

Office of Appeals No. VN-24857

In Case No. 87-09446, the claimant appealed from that portion of the decision of the administrative law judge which held that the claimant was ineligible to receive unemployment insurance benefits under section 1253.3 of the Unemployment Insurance Code beginning August 9, 1987. In Case No. 87-09357, the employer appealed from that portion of the decision of the administrative law judge which held that the claimant was not ineligible to receive benefits under section 1253.3 of the code between June 21, 1987 and August 8, 1987.

Pursuant to section 5107, Title 22, California Code of Regulations, these appeals are consolidated for consideration and decision as the facts and circumstances are the same or similar and no substantial right of any party will be prejudiced.

STATEMENT OF FACTS

The claimant was employed by the employer-school district as a full-time, permanent, tenured Spanish language teacher in grades six, seven, and eight for three years. She performed services for the school district up through the last day of her third school year, June 19, 1987, and then became unemployed under the following circumstances.

Because of budgetary cutbacks the employer notified the claimant on March 11, 1987 that it would be eliminating or reducing school district service, and that her position would therefore be abolished. After a formal hearing on the issue the claimant and other teachers were notified of their removal on May 12, 1987, to become effective on June 19. Pursuant to California Education Code Section 44956, the claimant was also informed of her reemployment rights within the school district anytime during the following thirty-nine months, including certain seniority provisions and her right to be placed on the substitute teacher list. The claimant filed her unemployment insurance claim effective June 21, 1987.

On August 5, 1987 the employer notified the claimant that she had been placed on the school district's substitute teacher list, but that she would only be paid her regular salary if she worked twenty-one days or more during any sixty-day period. Her pay would otherwise be $65 per day, a substantial reduction. She was given no specific date of return to work during the 1987-1988 school year. Because the claimant's teaching expertise extended to only one academic subject the chances of her being called to substitute on any regular basis, or at all, could not be determined. As a result of the employer's decision to eliminate or reduce certain services in March 1987 another six permanent, tenured teachers, along with twenty substitutes, had also been notified by the employer of its intent to remove them. These other teachers had the right to join the claimant in the substitute pool along with the teachers already there.

REASONS FOR DECISION

Section 1253.3(a) of the Unemployment Insurance Code provides in pertinent part as follows:

> "Notwithstanding any other provision of this division, unemployment compensation benefits, extended duration benefits, and federal-state extended benefits are payable on the basis of service to which Section 3309(a)(1) of the Internal Revenue Code of 1954 applies, in the same amount, on the same terms, and subject to the same conditions as benefits payable on the basis of other service subject to this division, except as provided by this section."

Section 1253.3(b) of the code provides in pertinent part as follows:

> "Benefits specified by subdivision (a) based on service performed in the employ of a nonprofit organization, or of any public entity as defined by Section 605, or of any federally operated school, with respect to service in an instructional, research, or principal administrative capacity for an educational institution are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms or, when an agreement provides instead for a similar period between two regular but not successive terms, during that period, or during a period of paid sabbatical leave provided for in the individual's contract, if the individual performs services in the first of the academic years or terms and if there is a contract or a reasonable assurance that the individual will perform services for any educational institution in the second of the academic years or terms."

Section 3304(a)(6)(A), Title 26, United States Code, provides that employees of private tax exempt or public schools are eligible to receive unemployment insurance benefits on the same basis as other claimants, except that they cannot use their school wages during a period between two successive academic years or terms under the following circumstances:

> "(1) with respect to those employed in an instructional, research, or principal administrative capacity, if the claimant worked in the first and was under contract or there is 'reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms.' (emphasis added)
>
> "(2) with respect to those in any other capacity, if the claimant worked in the first and there is 'reasonable assurance that such individual will perform such services in the second of such academic years or terms.' "

When the federal legislation was enacted in 1977, California's conformity legislation, section 1253.3(b) of the code, included additional language identical to that underscored above.

The inclusion of the underscored language works a profound change on the meaning of that section of the code. With the underscored language, benefits are payable if there is no contract nor reasonable assurance the affected school employee will perform services in the second academic year or term in the same capacity that that employee performed those services in the first year or term. Without the underscored language, an affected school employee can be paid benefits only if there is no contract nor reasonable assurance that the employee will perform any services in the second year or term.

In 1984, the Legislature amended a portion of section 1253.3(b) of the code unrelated to the issue in this case. In doing so, the Legislature also struck from this code section the words "in any such capacity," even though federal law was not similarly amended. When the amendment was made there was no explanation in the Legislative Counsel's Digest that the proposed amendment would change the law in this particular. Thus, California's statute has been apparently inconsistent with federal law, even though every other amendment in other years to the federal law has been dutifully followed by California. The state has always been able to provide coverage beyond the extent provided by federal law. However, it must provide coverage to those who would qualify for benefits under federal law, and specifically in this case under section 3304(a)(6) of Title 26.

On November 13, 1978, the Department of Labor stated that federal law required the between-terms denial for teachers, researchers, and principal administrators be applied if the individual had reasonable assurance of work in any of these capacities in the following term.

On December 24, 1986, the Department of Labor issued Program Letter No. 4-87, modifying its definition of "reasonable assurance" for the purposes of section 3304(a)(6)(A) of Title 26. It stated:

> " 'Reasonable assurance' is defined as a written, oral, or implied agreement that the employee will perform services in the same or similar capacity during the ensuing academic year, term, or remainder of a term." (emphasis added)

The Department of Labor now applies the following principles in this situation:

> "(1) There must be a bona fide offer of employment in the second academic period in order for a reasonable assurance to exist.
>
> "(2) An offer of employment is not bona fide if only a possibility of employment exists. This would occur if the circumstances under which the claimant would be employed are not within the control of the educational institution and the institution cannot provide evidence that such claimants normally perform services following the academic year.
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> "(3) Reasonable assurance exists only if the economic terms and conditions of the job offered in the second period are not substantially less (as determined under State Law) than the terms and conditions for the job in the first period. This position modifies that stated on page 23 of Supplement 5 of the Underlying Draft Legislation."

The position of the Department of Labor, and the position that section 1253.3(b) in California originally took in 1977, are adhered to by the overwhelming number of other state court jurisdictions that have considered the issue.

In Neshaminy School District v. Pennsylvania Commonwealth (1981), 57 Pa. Commw. 543, 426 A.2d 1245, the claimant had been employed for two and a half years as a long-term substitute. As such she filled in for various teachers who had taken long-term leaves of absence. The claimant was then informed that contract teachers who were suspended due to declining enrollment would be given preference as long-term substitutes and that the claimant would be only offered day-to-day substitute work. The court found that the claimant lacked reasonable assurance of work in the same capacity. The court stated:

> "Claimant's reemployment as a day-to-day substitute and not a long-term substitute is not relevant to a determination of the existence of or lack of reasonable assurance of reemployment." 426 A.2d at 1247.

In Sulat v. Board of Review (1980), 176 N.J. Super. 584, 424 A.2d 451, a teacher had been a substitute for seven years. During 1978/1979 she worked on a full-time basis. At the end of the school year she was informed she would not be reemployed on a full-time basis but would be kept on a substitute list. The court again found that the claimant did not have reasonable assurance of services in any such capacity. Since the claimant had worked in a full-time capacity previously she should be offered the same employment in the second term. The court stated:

> "We conclude that 'services in any such capacity,' in the circumstances, contemplates continuation of full-time services under an annual contract, not an offer of eligibility for day-to-day substitute services." 424 A.2d at 454.

In Leissring v. Department of ILHR (1983), 115 Wis.2d 475, 340 N.W.2d 533, a full-time public school teacher was laid off at the end of the school term and offered a place on the substitute teaching list with no guarantee of wages or hours or a contract to teach. The court found that the claimant lacked reasonable assurance of performing services in any such capacity.

In that case the agency claimed that the statutory language was unambiguous since if the teacher had reasonable assurance of performing any amount of services during the following year the claimant would be ineligible. The court disagreed and found that the language was in fact ambiguous. It stated that the purpose of the disqualification was to "prevent subsidized summer vacations for those teachers who are employed during one academic year and who are reasonably assured of resuming their employment the following year."

The court went on to state that a person would not have reasonable assurance unless "the terms and conditions of the employment for the following year are reasonably similar to those of the teacher's employment in the preceding year."

The court then explained the rationale behind its decision:

> "A teacher previously employed fulltime who becomes unemployed at the end of an academic year, and whose only employment prospect for the following year is a substitute teaching position involving no guaranteed hours or wages, or a position having a substantial decrease in hours and earning capacity, is immediately confronted with a potential need to find alternative means of economic support. In addition, that individual may need to seek another teaching position in a severely restricted job market. If the teacher wants to secure another fulltime position for the next academic year, he or she must utilize the summer months for this job search, and will need economic aid for this purpose as well. This teacher is confronting a far different situation than the teacher who can look forward to resuming his or her fulltime employment in the fall. If the latter individual seeks unemployment compensation benefits over the summer period, it is possible that he or she is merely seeking a subsidized summer vacation. . . ." 340 N.W.2d at 539-540.

The following other cases have reached comparable results on similar facts: Charatan v. Board of Review (1985), 200 N.J. Super. 74, 490 A.2d 352; Johnson v. Independent School District (Supreme Court of Minn., 1980), 291 N.W. 2d 699; Mallon v. Employment Division (1979), 41 Ore.App. 479, 599 P.2d 1164; Whitley v. Board of Review (1983), 116 Ill.App.3d 476, 451 N.E. 2d 942; Fort Wayne Community Schools v. Review Board (Indiana Court of Appeals, 1981), 428 N.E.2d 1379; Abulhosn v. Department of Employment Security (1986), 106 Wash.2d 486, 722 P.2d 1306; Ash v. Board of Review (1986), 26 Ohio St.3d 158, 497 N.E.2d 724; but see Williams v. City School District of Binghamton (1981), 81 A.D.2d 928, 439 N.Y.S. 503 (full-time New York tenured and probationary teachers who lost jobs due to layoffs and who were placed on the substitute list had reasonable assurance).

The claimant in the matter before us started the fall term in 1987 with no assurance when, or even if, she would be called for work. Arguably the size of the substitute list, her low amount of seniority, and her particular academic specialty militated against the school district's frequent use of her skills. More to the point, the claimant was at best assured of employment at a reduced pay rate and at a significantly reduced frequency of calls for work. Although we are aware that a given case might pose a close question of fact on the issue of whether, for example, a slight decrease in pay or a change from long-term to day-to-day substituting would be "in the same capacity," the case before us leaves no doubt that this claimant would not be performing services in the fall of 1987 in any capacity reasonably comparable to her earlier services.

We are not arriving at a result which is in any way inconsistent with the holding in Board of Education of Long Beach v. California Unemployment Insurance Appeals Board (1984), 160 CA3d 674, or in Russ v. California Unemployment Insurance Appeals Board (1981), 125 CA3d 834. In the former case a substitute teacher was found to be ineligible during the academic year break when he had reasonable assurance of employment as a substitute teacher during the subsequent academic year. In the latter case a teacher's aide was informed that she would be recalled as a teacher's aide if funds permitted. In neither case was the employee instructed that he or she would be recalled in a different capacity during the second year.

It is therefore found, and we hold, that where an affected school employee has only a contract or a reasonable assurance of performing services in the second academic year or term that are not reasonably in the same capacity as the services performed in the first academic year or term, that employee is not ineligible for benefits under section 1253.3(b) of the code.

DECISION

In case No. 87-09446, the appealed portion of the decision of the administrative law judge is reversed. The claimant is not ineligible for benefits under section 1253.3(b) of the code. In Case No. 87-09357, the appealed portion of the decision of the administrative law judge is affirmed. Benefits are payable as provided in the appealed decision.

Sacramento, California, April 12, 1988.

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