

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Dorothy L. Lowe,	:	
	:	
Petitioner	:	
	:	
v.	:	No. 2142 C.D. 2013
	:	
Unemployment Compensation	:	Submitted: May 9, 2014
Board of Review,	:	
	:	
Respondent	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER**

FILED: July 16, 2014

Dorothy L. Lowe (Claimant), pro se, petitions for review of an Order of the Unemployment Compensation (UC) Board of Review (Board) denying her claim for UC benefits pursuant to Section 402.1 of the UC Law (Law).¹ On appeal

¹ Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, added by Section 5 of the Act of July 6, 1977, P.L. 41, as amended, 43 P.S. §802.1. Section 402.1(1) provides, in relevant part, as follows:

With respect to service performed after December 31, 1977, in an instructional, research, or principal administrative capacity for an educational institution, benefits shall not be paid based on such services for any week of unemployment commencing during the period between two successive academic years, or during

(Continued...)

Claimant argues that the Board incorrectly interpreted and applied the regulatory definition of reasonable assurance set forth in 34 Pa. Code § 65.161 when it found that she had reasonable assurance of returning to work as a per diem substitute teacher for the 2013-2014 academic year. Discerning no error in the Board's determination of Claimant's ineligibility for UC benefits, we affirm.

Claimant was employed by the School District of Philadelphia (Employer) as a per diem substitute teacher beginning in September of 2005. (Board Decision, Findings of Fact (FOF) ¶ 1.) For the academic year 2012-2013, Claimant's last day of work was June 21, 2013, when the students' school year ended. (FOF ¶ 2.) Employer mailed Claimant a letter in June 2013² stating that Claimant had reasonable assurance of continued per diem employment as a substitute teacher in the 2013-2014 academic year. (FOF ¶ 4.) The letter was mailed to Claimant's last known address and was not returned as undeliverable. (FOF ¶ 5.) Claimant applied for UC benefits, alleging that she was never given reasonable assurance by Employer that continued employment would be available to her in the next academic year. (Claimant Questionnaire, R. Item 3.) However, the UC Service Center determined that Claimant was ineligible under Section 402.1(1) because

a similar period between two regular terms whether or not successive . . . to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract *or a 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.

43 P.S. § 802.1(1) (emphasis added).

² The letter is dated June 7, 2013. (Letter from Employer to All Substitutes (Per Diem Employees) (June 7, 2013), R. Item 2.)

Employer provided Claimant with a bona fide offer of work in the next academic year beginning September 3, 2013 and, by separate determination, calculated a non-fraud overpayment of \$582.00 under the Emergency Unemployment Compensation (EUC) Act.³ (Notices of Determination, R. Item 5.) Claimant appealed and, after a hearing, a UC Referee reversed the UC Service Center's determination of ineligibility and found that Claimant was not ineligible for UC benefits pursuant to Section 402.1(1). (Referee Decision at 2, R. Item 10.) The UC Referee concluded that Employer's invitation to Claimant to return as a substitute teacher did not carry with it a "guarantee of work for even one day." (Referee Decision at 2.) Because the UC Referee reversed the UC Service Center's determination of ineligibility, he did not address the non-fraud overpayment.⁴

Employer appealed and the Board reversed the UC Referee's Decision. The Board found that "[C]laimant planned to return to work as a per diem substitute teacher for the 2013-201[4] academic year." (FOF ¶ 6.) The Board compared Claimant's situation to Carlynton School District v. Unemployment Compensation Board of Review, 929 A.2d 680 (Pa. Cmwlth. 2007), in which a letter from a school district indicating that the district "anticipated continuing employment for

³ Section 4001(d)(2) of the EUC Act states that the terms and conditions of the UC Law that apply to claims for regular benefits shall also apply to claims for EUC benefits. Title IV of the Supplemental Appropriations Act of 2008, P.L. 110-252, 122 Stat. 2353, Section 4001(d)(2), 26 U.S.C. §3304 note.

⁴ See Notice of Determination of Overpayment of Benefits, R. Item 5 ("The overpayment must be repaid unless a waiver is requested and granted, or this determination is reversed on appeal.")

the claimant as a per diem substitute teacher for the new school year” was sufficient to find reasonable assurance. (Board Decision at 3.) Although Claimant testified that she never received such a letter from Employer, (Hr’g Tr. at 6, R. Item 9), Rhonda Boone, Employer’s unemployment specialist, testified that she mailed a letter to Claimant giving Claimant reasonable assurance that she could continue to work as a per diem substitute teacher for the 2013-2014 academic year, ((FOF ¶ 4); Hr’g Tr. at 5). The Board also found that the terms and conditions of the offer of employment for the 2013-2014 academic year were not substantially less than Claimant’s employment during the previous academic year because “[t]he employer offered the claimant the same per diem substitute position.” (Board Decision at 3.) Accordingly, the Board deemed Claimant ineligible for UC benefits pursuant to Section 402.1 of the UC Law. (Board Decision at 3.) Claimant now petitions this Court for review of the Board’s Order.⁵

Claimant’s main challenge⁶ on appeal is to the Board’s interpretation of the standard of “reasonable assurance” found in 34 Pa. Code § 65.161 as applied to Section 402.1, which prevents employees of academic institutions from receiving UC benefits during regularly scheduled academic breaks if the employee has

⁵ “The Court’s review is limited to determining whether constitutional rights were violated, whether an error of law was committed, whether a practice or procedure of the Board was not followed or whether the findings of fact are supported by substantial evidence in the record.” Western and Southern Life Insurance Co. v. Unemployment Compensation Board of Review, 913 A.2d 331, 334 n.2 (Pa. Cmwlth. 2006).

⁶ Claimant’s Statement of Questions Involved does not coincide with the Argument portion of her brief. Since Claimant’s arguments are not very well organized, the issues identified in this opinion have been discerned from the brief in its entirety and restated for clarity.

reasonable assurance of returning to work in the same capacity during the next academic session. Section 65.161 articulates the conditions that create “reasonable assurance” as used in Section 402.1 and provides as follows:

(a) For purposes of section 402.1 of the law (43 P.S. § 802.1), a contract or reasonable assurance that an individual will perform services in the second academic period exists only if both of the following conditions are met:

(1) the educational institution or educational service agency provides a bona fide offer of employment for the second academic period to the individual;

(2) the economic terms and conditions of the employment offered to the individual for the second academic period are not substantially less than the terms and conditions of the individual’s employment in the first academic period.

(b) For the purposes of subsection (a), an offer of employment is not bona fide if both of the following conditions exist:

(1) The educational institution or educational service agency does not control the circumstances under which the individual would be employed;

(2) The educational institution or educational service agency cannot provide evidence that the individual or similarly situated individuals normally perform services in the second academic period.

(c) For the purposes of subsection (a), economic terms and conditions of employment include wages, benefits and hours of work.

34 Pa. Code § 65.161.

Reasonable assurance in each case ““must be determined by the Board’s examination of all relevant facts.”” Glassmire v. Unemployment Compensation

Board of Review, 865 A.2d 269, 273 (Pa. Cmwlth. 2004) (quoting Neshaminy School District v. Unemployment Compensation Board of Review, 426 A.2d 1245, 1247 (Pa. Cmwlth. 1981)). The claimant’s employment history is among the relevant factors to consider. Bornstein v. Unemployment Compensation Board of Review, 451 A.2d 1053, 1055 (Pa. Cmwlth. 1982).

The crux of Claimant’s argument is that the requirements of Section 65.161 were not fulfilled in order to find reasonable assurance. Claimant first asserts that Employer’s offer of employment for the 2013-2014 academic year was not bona fide. Claimant states that, as a per diem substitute teacher, “[t]here remains only a possibility for assignments.” (Claimant’s Br. at 35.) Since substitutes cannot be *guaranteed* even a single day of work, Claimant believes that the offer to return as a substitute was not bona fide. Although Claimant does not specifically address Section 65.161(b), her argument is essentially that Section 65.161(b)(1) is not satisfied because Employer does not control the circumstances under which she will be employed as a substitute, i.e., exactly how many days she will work during an academic year.

In Glassmire, this Court stated that, in regard to Section 65.161(b), *both* subsections (b)(1) and (b)(2) must be met to find that an employer’s offer was *not* bona fide. Glassmire, 865 A.2d at 274. “Thus, an employer can meet its burden of demonstrating that it made a ‘bona fide offer’ of employment if it can refute the presence of one of the two conditions.” Id. Therefore, if an employer shows *either* that it controls the circumstances of employment *or* that similarly situated

individuals normally perform services in the second academic period, the offer *was* bona fide.

In the present case, Employer's offer was bona fide. While Employer cannot guarantee the number of days that a substitute teacher will work, which is a number based entirely on the unforeseen illnesses and emergencies of full-time teachers, Employer can control the *circumstances* under which Claimant would be employed; namely, as a per diem substitute. Claimant does not dispute that, as a "per diem" employee, she is called to work and is paid for her work on a day to day basis. All the Employer must definitively control are the circumstances of employment, and here Employer made it clear that Claimant was "welcome to return the next academic school year in the position for which you originally applied for and were hired (**Per Diem Substitute**).” (Letter from Employer to all Substitutes (Per Diem Employees) (June 7, 2013), R. Item 2 (emphasis in original).) In fact, as Claimant admits in her brief, she did return to work for Employer as a substitute on September 24, 2013. (Claimant's Br. at 14.)

Next, Claimant argues that the offer of employment did not meet the definition of reasonable assurance because the economic terms and conditions of the employment offer for the second academic period (2013-2014) were substantially less than those of the first academic period (2012-2013). Claimant states that “[w]e cannot predict what the economic terms and conditions of employment for ‘the second academic period’ will be” because the academic year is not over yet, and the number of days she will work (and, therefore, the amount of money she will make) is impossible to predict at the start of the academic term.

(Claimant's Br. at 14.) Claimant highlights "the tremendous, miserable drop of some twenty thousand dollars in [her] income from year 2011 to year 2012," which allegedly put her into bankruptcy, and explains that students transferring out of public schools and the frequency of public school closings creates less work for teachers and, thus, less work for substitutes. (Claimant's Br. at 14). Although Claimant's personal financial situation and the overall decrease in the job market for substitute teachers is lamentable, the phrase "economic terms and conditions" found in 34 Pa. Code § 65.161 as applied to Section 402.1 neither refers to exactly how much money a per diem employee will make per year, nor is it meant to protect per diem employees from the general flux of the state's economy.

"[E]conomic terms and conditions of employment," according to Section 65.161(c), includes "wages, benefits and hours of work." 34 Pa. Code § 65.161(c). Claimant accepted the job of a per diem substitute as well as "the uncertainty inherent in that position." Carlynton, 929 A.2d at 684. The claimant in Carlynton accepted a position as a per diem substitute teacher and was fortunate enough to secure two different long-term substitution positions during the 2005-2006 academic year. Id. At the end of the 2006 academic year, the employer sent the claimant a letter which "assured Claimant the same opportunity to secure limited long-term assignments and, failing that, daily work as the previous year." Id. This Court reasoned that as long as the employer provided the substitute with the same opportunity for daily work at the same per diem rate, even without being able to guarantee that he would be able to secure long term assignments, the economic terms and conditions of the offer were the same. Id.

Here, Claimant received the same offer from Employer that she had received in prior years.⁷ The Board found that Claimant was paid a daily rate of \$126.76 since she had started as a substitute teacher with Employer in 2005, (FOF ¶ 1), and at the UC Referee's hearing Claimant did not dispute that \$126.76 was still her daily rate as of June 2013, (Hr'g Tr. at 3-4). Claimant does not allege that Employer's offer changed for the 2013-2014 academic year with regard to her daily rate or benefit availability and, as already noted, a per diem arrangement naturally precludes a set number of hours. Therefore, Employer offered Claimant the same economic terms and conditions of employment as Claimant had received in the past, and there was no evidence to show that those terms and conditions were substantially less than what Claimant had worked for in the past.

This Court has determined that reasonable assurance does not equal a guarantee. Goralski v. Unemployment Compensation Board of Review, 408 A.2d 1178, 1180 (Pa. Cmwlth. 1979). Reasonable assurance of a *per diem position* does not include a guarantee to the employee of the number of days she will work or the amount of money she will make over the next academic year; it is simply a statement by the employer that the employee can return for the next academic year in the same per diem capacity as the employee had previously worked. Id.; see also, Glassmire, 426 A.2d at 274 (holding that the reasonable assurance of employment needs to be examined independently of the amount of days the substitute ultimately worked during the academic year); Richland School District v. Unemployment Compensation Board of Review, 459 A.2d 1358, 1360 (Pa.

⁷ (Letter from Employer to All Substitutes (Per Diem Employees) (June 7, 2013).)

Cmwlth. 1983) (stating that Section 402.1 does not require “the assurance of how many days employment would be offered”).

Accordingly, we conclude that the Board did not erroneously interpret 34 Pa. Code § 65.161 in finding Claimant ineligible for UC benefits pursuant to Section 402.1 of the UC Law. Claimant had reasonable assurance because Employer’s offer for her to return to her employment as a per diem substitute teacher for the 2013-2014 academic year was bona fide, and the economic terms and conditions were the same as those offered to Claimant during the 2012-2013 academic year.

Claimant also challenges the Board’s credibility determinations and questions why the Board did not correct Employer’s statement in its appeal to the Board from the UC Referee’s Decision that Employer had met its burden of proof. It is axiomatic that the Board, not the Referee, is the ultimate finder of fact in UC cases and questions regarding the weight of the evidence and witness credibility are solely within its province. First Federal Savings Bank v. Unemployment Compensation Board of Review, 957 A.2d 811, 815 (Pa. Cmwlth. 2008). As such, we cannot overturn the Board’s acceptance of Employer’s witness as credible. In addition, there was no requirement for the Board to correct any statement that Employer set forth in its appeal to the Board. Employer simply made the statement that it met its burden of proof as part of its argument regarding why the Board should reverse the UC Referee’s Decision. (Employer’s Petition for Appeal, R. Item 12.)

Finally, Claimant questions why the UC Referee held a hearing on a November 13, 2013 notice of determination of a non-fraud overpayment (Notice) pursuant to the EUC Act and the denial of her request for a waiver when these issues were stayed pending this appeal. However, any issue with respect to a non-fraud overpayment by Claimant is not before this Court and it appears that any challenge by Claimant in this appeal to the Notice is premature. Claimant has included in her brief a copy of a “Referee’s Decision and Order-Remand” mailed January 27, 2014 stating that: (1) on November 13, 2013, the UC Service Center issued a Notice under the EUC Act based on the Board’s Decision in this current matter; (2) Claimant filed a petition for review of the Board’s Decision with this Court on December 2, 2013; and (3) it would be moot to hold a hearing on the Notice until the current appeal to this Court on the merits of Claimant’s eligibility for UC benefits is finally determined. (Claimant’s Br. at 31.) Thus, the UC Referee’s January 27, 2014 decision and order remands the Notice to the UC Service Center to hold in abeyance until this Court disposes of Claimant’s current appeal. (Claimant’s Br. at 31.) Accordingly, any challenge to the Notice cannot be reviewed in the appeal currently before this Court. Once the issue of overpayment has been adjudicated by the Board, Claimant is free to file another petition for review with this Court specifically challenging the Board’s decision and order on that matter.

For the foregoing reasons, the Board’s Order is affirmed.

RENÉE COHN JUBELIRER, Judge

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Petitioner	:	
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v.	:	No. 2142 C.D. 2013
	:	
Unemployment Compensation	:	
Board of Review,	:	
	:	
Respondent	:	

ORDER

NOW, July 16, 2014, the Order of the Unemployment Compensation Board of Review entered in the above-captioned matter is **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge