



CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD
P O Box 944275
SACRAMENTO CA 94244-2750

DION N FARQUHAR
Claimant-Appellant

UNIVERSITY OF CALIFORNIA
Account No.: 935-0506
Employer

Case No.: **AO-402566**

OA Decision No.: 5887682

EDD: 0060 BYB: 07/10/2016

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

ROBERT DRESSER

MARTY BLOCK

This is the final decision by the Appeals Board. The Appeals Board has no authority to reconsider this decision. If you disagree with the decision, please refer to the information attachment which outlines your rights.

DION N FARQUHAR
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Date Mailed: 7/24/2017

Case No.: AO-402566
Claimant: DION N FARQUHAR

The claimant appealed from the decision of the administrative law judge that held the claimant not eligible for unemployment insurance benefits under section 1253.3 of the Unemployment Insurance Code beginning December 11, 2016.

ISSUE STATEMENT

We adopt the administrative law judge's issue statement.

FINDINGS OF FACT

The claimant filed a claim for unemployment insurance benefits effective July 10, 2016.¹ The claimant has worked for the employer University of California, Santa Cruz (UCSC) as an untenured lecturer for several years.

¹ The Employment Development Department (EDD) claim notes indicate the claimant opened a claim for benefits on July 14, 2016 with a benefit year began date of July 10, 2016. On July 12, 2016, EDD sent a Notice of Unemployment Claim Filed (DE1101CZ) to the employer. There is no entry in the notes that the employer filed a timely protest to the claim. The claimant filed an additional claim effective December 11, 2016. On December 15, 2016, EDD sent a DE1101CZ to the employer. The notes indicate that on January 10, 2017, the ER filed an untimely response to the 1101CZ. There is no entry in the notes to indicate that EDD established the ER had good cause for failing to timely protest the initial claim in July 2016. To be entitled to a determination, the claimant's most recent employer must submit within ten days after mailing of notice of a new or additional claim any facts then known which may affect the claimant's eligibility for benefits, including the circumstances of the claimant's separation from employment. The ten-day period may be extended for good cause. (Unemployment Insurance Code, section 1327.) An employer who, without good cause, fails to respond properly to the first notice of claim it was mailed is not entitled to a ruling or determination notwithstanding a timely response to later notices. (Precedent Decisions P-R-363, P-R-371, P-R-372 and P-B-499.) Based on the information in the record, the employer is not entitled to a determination because it did not timely file a response to the initial 1101CZ. Moreover, the response to the subsequent 1101CZ does not entitle the employer to a determination, even if the employer has established good cause for the late filing of the response filed on January 10, 2017. Based on the evidence contained in the case for review before this Board, the employer does not have party status in the case.

The claimant is considered a pre-6 year Non-Senate Faculty (NSF) member. The claimant reopened her unemployment claim effective December 11, 2016 during the break between the fall and winter quarters.

The Employment Development Department (EDD) found the claimant eligible for benefits under code section 1253.5, determining she did not have reasonable assurance of returning to her position during the winter quarter.

The claimant received a letter of appointment from the employer dated August 29, 2016. The letter offered the claimant specific classes to teach in UCSC's Crown College for the fall and included, in part, the following provisions.

"I am pleased to offer you an appointment as Lecturer with Crown College, during the fall and winter quarter of the 2016/17 academic year (September 17, 2016 through December 9, 2016, and January 6, 2017 through—March 24, 2017). You will report to Crown College Provost Manel Camps."

"This Crown appointment is made at 61.88% percent time, at an annual salary rate of \$66,690 (9-month basis), for the period of October 1, 2016, through March 31, 2017, resulting in a total salary of \$27,509.63 for the entire term of this appointment, subject to any deductions that be required by applicable State and Federal laws and regulations, and those of the University. The pay period dates for this appointment are October 1, 2016 through March 31, 2017. Your first paycheck is scheduled to be issued on November 1, 2016."

The fall quarter began September 17, 2016 and ended December 9, 2016. The winter quarter schedule is from January 6, 2017 to March 24, 2017. The terms and conditions of the claimant's appointment are governed by the Memorandum of Understanding (MOU) between the employer and the union of which the claimant is a member.

The claimant accepted appointment and performed her lecturer duties for the fall quarter under the agreement.

Article 17 of the MOU contains general provisions regarding layoffs, reduction in time and employment and includes the following.

"Consistent with this MOU, the University has the sole discretion to determine when a layoff or reduction in time is necessary, and to determine the function(s) and the title code(s) on a particular campus within which the staffing level(s) are to be reduced."

...

"A layoff is an involuntary separation from employment in a layoff unit, due to a programmatic change, budgetary considerations, or a lack of work for the NSF."

...

"A reduction in time occurs when a NSF's appointment in a layoff unit is involuntarily reduced due to a programmatic change, budgetary considerations, or a lack of work for the NSF."

...

"[T]he University may lay off or reduce the appointment percentage of a Continuing Appointee as a result of assigning the course(s) taught by the Continuing Appointee to Senate Faculty or to graduate academic student employee. Nevertheless, the University may not lay off or reduce the appointment of a Continuing Appointee in order to assign the course(s) taught by the Continuing Appointee to a graduate academic student employee who is studying in a different department and unrelated discipline, unless such assignment is in accordance with the department's or division's academic plan for the pedagogical training of its graduate students."

The MOU defines a "layoff" as "an involuntary separation from employment in a layoff unit, due to a programmatic change, budgetary considerations, or a lack of work for the NSF."

REASONS FOR DECISION

We set forth the following reasons for decision in reversing the appealed decision.

Unemployment insurance benefits based on service performed in the employ of a non-profit or public educational institution in an instructional, research or principal administrative capacity are not payable to any individual with respect to any week which begins during the period between two successive academic years or terms if the individual performs services in the first of such academic years or terms and if there is a contract or reasonable assurance that such individual will perform services for any educational institution in the second of such academic years or terms. (Unemployment Insurance Code, section 1253.3(b).)

Unemployment insurance benefits based on services performed in the employ of a school district shall not be payable to any individual with respect to any week

which commences during an established and customary vacation period or holiday recess if the individual performs services in the period immediately before such vacation or holiday recess and there is a reasonable assurance that the individual will perform services in the period immediately following the vacation period or recess. (Unemployment Insurance Code, section 1253.3(d).)

"Reasonable assurance" includes, but is not limited to, an offer of employment or assignment made by an educational institution, provided that the offer or assignment is not contingent on enrollment, funding, or program changes. An individual who has been notified that he or she will be replaced and does not have an offer of employment or assignment to perform services for an educational institution is not considered to have reasonable assurance. (Unemployment Insurance Code, section 1253.3(g).)

In *Cervisi v. California Unemployment Insurance Appeals Board* (1989) 208 Cal.App.3rd 635, the faculty assignment form given hourly instructors in a community college stated that "employment is contingent upon adequate class enrollment." The court held that section 1253.3(g) applied and the claimants lacked reasonable assurance of employment.

U. S. Department of Labor Unemployment Insurance Program Letter No. 5-17 (UIPL 5-17) dated December 22, 2016 provides an interpretation of contract and reasonable assurance in Section 3304 (a)(6)(A) of the Federal Unemployment Tax Act (FUTA) and provides guidelines to analyze cases like this case before us.

"Section 3304(a)(6)(A)(i), FUTA, provides that states' laws must require that [benefits] be denied between and within terms to claimants who perform services in a professional capacity in an academic year or term if they have a "contract" or "reasonable assurance" to perform professional services in the following academic year or term. For the purposes of this provision, the term "contract" refers only to an enforceable, non-contingent agreement that provides for compensation: (1) for an entire academic year; or (2) on an annual basis, though the contract terms describing compensation do not have to be expressed specifically as an annual salary. For example, a contract may provide that the claimant works nine months of the year, has a summer break, and receives nine payments during the working months. If the offer is a contract, then [benefits] may not be paid based on the educational services subject to the between and within term denial provisions in section 3304(a)(6)(A), FUTA. However, any arrangement that does not provide the kind of non-contingent guarantee of employment on an annual basis intended to be covered by the "contract" exclusion, regardless of whether the arrangement would meet the relevant state's statutory or

common law requirements to be considered a contract, must, instead, be analyzed to determine whether it provide a "reasonable assurance" of continued employment."

The law provides that benefits will be denied between and within terms to a claimant who performs services in a professional capacity if there is a contract or reasonable assurance. The first inquiry is whether the claimant had a contract as defined above. The claimant's appointment letter is for two terms, fall and winter. It indicates it would provide for compensation on an annual basis. There was no other evidence submitted that would establish compensation for an entire academic year or on an annual basis. Because of the ambiguity in the appointment letter and the absence of any other evidence in the record, it cannot be concluded one way or the other whether the claimant had a contract. The next inquiry is whether the claimant had reasonable assurance. As set forth below, we conclude the claimant did not have reasonable assurance.

UIPL 5-17 defines reasonable assurance as follows.

"The legislative history demonstrates that the determining factor in whether a claimant has a "reasonable assurance" is "the availability of a job" to the claimant in the following academic term or year (or portion thereof). States must make the following finding in determining if the claimant has a reasonable assurance. Unless all of these findings can be made, the claimant does not have a reasonable assurance. (Emphasis added)"

The first finding is whether the "Contingencies [are] 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 employers' control."

"If the state agency determines that any of the contingencies are within the employer's control, then the claimant does not have a "reasonable

assurance" that a job is available and thus will be entitled to [benefits] if otherwise eligible."

The second finding that must be made is under the "Totality of the 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. When considering whether funding will be available, the state agency must consider the history of the educational institution's funding and the likelihood that the educational institution will receive the funding for a specific course and the individual claimant's likelihood of receiving an assignment. For a state agency to find that it is highly probable that a job is available does not require it to find that there is a certainty of a job."

The third and final finding is the "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. For example, if the claimant has an offer that is contingent on funding, the state agency's analysis must consider the likelihood that the institution will have funding available to teach the course. This analysis could include consideration of previous funding or appropriation levels, the likelihood of obtaining funding in the following term and any other information that indicates whether the educational institution will have funding for the course in the following term. ...".

If all three of the findings are not established, then the claimant does not have reasonable assurance and would be eligible for benefits.

The MOU establishes that the employer has contingencies that allow it control and therefore, the claimant does not have reasonable assurance and is eligible for benefits. The MOU states that the employer controls course programming, decisions on how to allocate available funding, final course offerings, program changes, and facility availability.

The MOU also states that the employer may lay off or reduce the appointment percentage of a Continuing Appointee as a result of assigning the course(s) taught by the Continuing Appointee to Senate Faculty or to graduate academic student employee.

The appointment letter which incorporates the MOU is an offer that contains the contingencies set out above. These contingencies allow the employer to retract the offer at their discretion (by layoff, reduction of appointment, reassignment to another employee), and is considered to be within the employer's control. As such, the claimant does not have reasonable assurance. The contingencies of employment are under the employer's control and therefore, the claimant has no reasonable assurance. Since the first finding – "Contingencies Within The Employer's Control" has not been established, it is not necessary to discuss the two additional factors, totality of circumstances and contingent nature of the offer.

Accordingly, the claimant is not ineligible for benefits under code section 1253.3. Benefits are payable, provided the claimant is otherwise eligible.

DECISION

The decision of the administrative law judge is reversed. The claimant is not ineligible for benefits under Unemployment Insurance Code section 1253.3 beginning December 11, 2016. Benefits are payable, provided the claimant is otherwise eligible.

FURTHER APPEAL INFORMATION

The Appeals Board's decision is final and can be changed only by action of a judicial court. (Unemp. Ins. Code § 410). The Appeals Board cannot reconsider or set aside the enclosed decision. (37 Ops.Cal.Atty.Gen. 133.)

If you wish to appeal the enclosed decision, you may seek review in Superior Court by filing a **Petition for Writ of Mandate** against the California Unemployment Insurance Appeals Board (Appeals Board) pursuant to section 1094.5 of the Code of Civil Procedure.

The Appeals Board does not process petitions for court review. **You must file such petitions directly with the Superior Court not later than six (6) months after the date of the decision of the Appeals Board. You must also serve a copy of the Petition for Writ of Mandate on the Appeals Board** at its headquarter, 2400 Venture Oaks Way, Suite 100, Sacramento, California 95833. Service of the Petition must comply with legal requirements set forth in the Code of Civil Procedure, sections 414 to 415.95.

The Appeals Board does not pay benefits, handle claims or claim forms, or collect overpayments. If you have questions about these matters, you must contact the Employment Development Department (EDD), not the Appeals Board. It is important that you notify the appropriate EDD office of any change in your address. You may contact EDD at (800) 300-5616 for further information.

If you are a claimant, you are reminded to continue to file weekly claim forms with the EDD while seeking a writ of mandate. If you prevail in court, you will only be paid for those weeks in which you file weekly claim forms and meet other eligibility requirements.

Case No. **AO-402566**

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DECISIONS SENT TO

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