



March 30, 2001

Ms. Jeri Morris
BUCBA
Department of Labor & Industry
6th Floor, Labor & Industry Building
Seventh & Forster Streets
Harrisburg, PA 17121

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REVIEW COMMISSION

Dear Ms. Morris:

We are aware of the proposed regulation by the Bureau of Unemployment Compensation Benefits and Allowances (BUCBA) regarding “reasonable assurance” for employees of educational institutions and educational service agencies. On behalf of our educational clients (over 230) we wish to express our concerns regarding this proposed regulation.

The regulation is proposed to “bring the Pennsylvania Unemployment Compensation (UC) eligibility criteria into conformity with the United States Department of Labor’s (USDOL) requirements under section 3304(a)(6)(A) ...with regard to a principle know as ‘reasonable assurance.’”

In attempting to ascertain if the conformity issue was with Pennsylvania’s interpretation of reasonable assurance, we reviewed the USDOL Unemployment Insurance Program Letter No. 4-87. This program letter clarified USDOL’s interpretation of reasonable assurance. The program letter contained seven examples of different reasonable assurance situations along with USDOL’s suggested outcome. We believe in all seven examples Pennsylvania would have reached the same conclusion as USDOL suggested. If Pennsylvania is rendering decisions in line with USDOL’s interpretation, where is the conformity issue? As it appears Pennsylvania is issuing decisions in line with DOL’s own interpretation, a new regulation is unwarranted.

This situation appears to be the result of one case, *Musko vs. U.C.B.R.*, No. 2740 C.D. 1997 PA Commonwealth Court. We have reviewed this court case and have come to the conclusion that this case was an aberration. In our experience, cases with the same or similar factual matrix as was present in *Musko* have consistently awarded UC benefits to the claimant. If there is a pattern of cases being determined contrary to USDOL’s interpretation and in line with the *Musko* rationale, we are unaware of such a situation.

As a result of *Musko*, the USDOL informed the Department that it was out of conformity with the Federal Law. This determination by the USDOL raises several questions. They are as

follows: When did the USDOL inform the Department that they were out of conformity with Federal Law? Which USDOL made this conclusion - the previous administration or the present administration? Was the USDOL able to show that there was an extensive history of the Department rendering decisions in line with *Musko*? Has the USDOL reviewed all the States and their regulations to determine if they have the necessary regulations regarding reasonable assurance? In attempting to ascertain the answers to the above questions, we request a copy of any and all correspondence the Department received from the USDOL regarding this conformity issue.

Thus, we would appreciate the answers to the above questions before any unwarranted regulation is finalized. In particular, why does the USDOL believe one **unreported** court case renders Pennsylvania out of conformity with Federal Law.

As for the language of the proposed regulation, we believe this language would only increase the burden for an educational institution in any case dealing with reasonable assurance. Section (a)(1) of the proposed regulation uses the term "***bona fide offer of employment.***" This term is open to interpretation. Considering how the term "bona fide" is used in determining cases under Section 402(a) of the Pennsylvania UC Law, applying that same standard to reasonable assurance cases would weaken the current disqualification provisions of Section 402.1.

If you examine the case of a per diem substitute teacher, the term "bona fide offer of employment," could easily be misinterpreted. Under Section 402(a), an offer to place a claimant on the substitute list in the middle of the school year would not be considered an offer of actual suitable work. This is based on the rationale that the offer to be on the substitute list is not a "bona fide offer of employment," as an offer to be put on the substitute list is offering only a **possibility** of work. What would keep a referee or the courts from extending this interpretation of "bona fide offer of employment" to Section 402.1 cases. Any weakening of Section 402.1 would result in an increase in UC costs to the educational institution, which would be passed on to the local taxpayer or consumer.

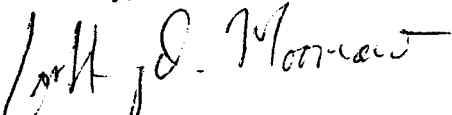
Section (a)(2) of the proposed regulation requires that the ***economic terms and conditions of the employment offered in the second academic period are not substantially less than ...employment in the first academic period.*** This language appears to contradict the language of Section 402.1(1) of the Pennsylvania UC Law. Section 402.1(1) states that the claimant must receive only a reasonable assurance to return to work in "***any such capacity.***" If the Law uses the term "any such capacity" how can the regulation dictate that the offer of employment must be under "economic terms and conditions which are not substantially less" than those from the previous term or period? These two terms contradict each other. Therefore, the educational institutions of Pennsylvania would be opened up to a entire new set of case law regarding Section 402.1(1). Once again this most likely would result in weakening the disqualification provisions of Section 402.1(1). The result would be an increase in UC costs to the educational institutions and eventually the citizens of Pennsylvania.

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In conclusion, we do not understand how Pennsylvania's UC Law is out of conformity with the Federal Law and therefore, fail to understand the need for a new regulation. As a leader in the representation of educational institutions in Pennsylvania for UC, we would welcome the opportunity to meet with BUCBA to review this situation further and to find an acceptable solution.

Sincerely,

A handwritten signature in black ink, appearing to read "Geoffrey D. Moomaw". The signature is written in a cursive style with a horizontal line at the end.

Geoffrey D. Moomaw
Partner

cc: Pennsylvania School Board Association
Pennsylvania Association of School Business Officials
Pennsylvania Association of School Personnel Administrators