STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

KAREN ZIELINSKI, Appeal Docket No. B79-00344-66220

Claimant Social Security No. [redacted]

BAY CITY PUBLIC SCHOOLS,

Employer

ORDER DENYING APPLICATION FOR REHEARING

This case is before the Board of Review upon application of the claimant for a rehearing by the Board in respect to its decision dated October 30, 1980. The majority of the Board of Review panel assigned to review this case, having read and considered said application, and having reviewed the record in the matter, is of the opinion that said application should be denied.

IT IS THEREFORE ORDERED that said application shall be and the same is hereby denied.

James Viventi, Member

Jeanne C. Harbour, Chairperson

THOMAS L. GRAVELLE (MEMBER) DISSENTING:

I disagree with the majority of the panel in this case. I would grant a rehearing for the reasons stated in my dissent of October 30, 1980.

Thomas L. Gravelle, Member

MAILED AT DETROIT, MICHIGAN December 23, 1980

This order will become final unless a written appeal to the appropriate circuit court is RECEIVED on or before

January 12, 1981

TO PROTECT YOUR RIGHTS YOU MUST BE ON TIME.

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

KAREN ZIELINSKI, Appeal Docket No. B79-00344-66220

Claimant Social Security No [redacted]

BAY CITY PUBLIC SCHOOLS,

Employer

DECISION OF BOARD OF REVIEW

This is an appeal from the referee's decision in this case, a copy of which is attached hereto and by this reference made a part hereof. We have reviewed the referee's decision in the light of the evidence appearing in the record. It is our opinion that said decision is in conformity with the law and facts.

The decision of the referee is hereby affirmed.

James Viventi, Member

Jeanne C. Harbour, Chairperson

THOMAS L. GRAVELLE (MEMBER), DISENTING:

I disagree with the majority of the panel in this case.

Under Section 29(1)(e) of the MES Act, a refusal of an offer of work is not disqualifying unless the work is suitable. The factors of suitability are set forth in Section 29(6) of the MES Act. It is noted that "the burden of proving suitability is on the employer." Lasher v Mueller Brass Co, 62 Mich App 171, 178 (1975).

Further, a refusal of an offer of suitable work is not disqualifying if the claimant had good cause for refusing it. Good cause is a substantial reason which "would be deemed by reasonable men and women valid and not indicative of an unwillingness to work." Keith v Chrysler Corp, 390 Mich 458, 483 (1973).

The employer's witness had no personal knowledge of the job offer or the claimant's previous rate of pay, hours of work, duties and conditions of employment (Transcript, pg 6). However, the employer witness acknowledged that the difference in the wages of a substitute and a regular teacher is substantial. (T, p. 10)

In these circumstances, the employer failed to carry its burden of proof that the offered work was suitable.

I would reverse the referee decision.

TL Gravelle

Thomas L. Gravelle, Member

MAILED AT DETROIT, MICHIGAN October 30, 1980

This decision will become final unless a written request for rehearing or appeal to the appropriate circuit court is RECEIVED on or before

November 19, 1980

TO PROTECT YOUR RIGHTS YOU MUST BE ON TIME.

MICHIGAN EMPLOYMENT SECURITY COMMISSION
REFEREE SECTION

IN THE MATTER OF THE CLAIM OF

Karen Zielinski
[redacted]

S.S. NO. [redacted]

EMPLOYER INVOLVED

Bay City Public Schools
1800 Columbus Ave.
Bay City, MI 48706

APPEAL NO. B79-00344 -66220

REFEREE: JAMES L. CARR

FINDINGS OF FACTS AND REASONS

The claimant filed an appeal from a redetermination issued by the Commission which held the claimant disqualified for benefits under Section 29(1)(e) of the Act, which provides:

> "(1) An individual shall be disqualified for benefits in all cases in which he:
>
> "(e) Has failed without good cause to accept suitable work when offered him, or to return to his customary self-employment, if any, when so directed by the employment office or the commission, ***"

Requalification and reduction in benefit entitlement were imposed in accordance with Sections 29(3) and 29(4) of the Act.

A hearing was held in Saginaw, Michigan on January 25, 1979 at which time the following persons appeared:

Karen Zielinski	Claimant
Edwin Shimabukuro	Claimant's Representative
Dorothy Kemmer	Employer Representative & Witness

The record establishes the following material facts:

The claimant was offered a job as a long-term substitute teacher, to last for at least six weeks, on November 10, 1978, and the claimant refused the offer. This job was offered under the same terms and conditions as the job the claimant had accepted and performed on February 6, 1978. The rate of pay was $42 per day and was for at least six weeks. If the job had lasted longer than fifty days, then the claimant would have received the same pay and benefits as a regular tenure teacher. These same conditions had applied to her long-term teaching on February 6, 1978 in which she then worked more than fifty days and drew the benefits of a regular teacher. The job offered was that of an elementary teacher and she was to teach two language arts classes and four physical education classes.

The claimant's certification by the State of Michigan qualified her to teach elementary school subjects, i.e. the job which the claimant was offered. The claimant bases her refusal on pay differential and the job offered was not full time. The claimant had been unemployed since June 16, 1978, and had no prospects for employment.

The issue here is whether the findings of the Commission that the claimant failed without good cause to accept suitable work and was accordingly disqualified pursuant to Section 29(1)(e) of the Act is supported by competent, material and substantial evidence on the whole record.

The two items or phrases for determining disqualification under Section 29(1)(e) are "(1) suitable work" and "(2) good cause" and in that order Chrysler Corporation v. Losada, 376 Mich 209 (1965).

Whether the job offer of work is suitable presents a question of fact which must be determined in the light of all the factors involved. Dynamic Manufacturers, Inc., v. Employment Security Commission, 369 Mich 556 (1963).

Section 29(6) of the Act sets forth the guidelines to be considered in determining suitability and provides as follows:

> "In determining whether or not work is suitable for an individual, the commission shall consider the degree of risk involved to his health, safety, and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation, and the distance of the available work from his residence."

The claimant argues that the work offered must be full time work and not part time work. This issue was addressed in the matter of In Re Mainprize (Kershaw Animal Hospital), B76-19231-54645, in which the Board of Review held:

> "If the legislature had intended that the offer of work must be full time, it could have so specified as was the case in subsection 28(1)(c) of the Act where it provided that an individual must be able and available to perform suitable full time work. The essential issue then is whether or not the claimant who has previously performed on a part time basis and is offered re-employment on the same basis has refused an offer of suitable work without good cause.

* * *

> "In the instant matter, the Board is of the opinion that since the claimant had performed part time work only, the employer's offer of the same part time job would be suitable so that the only question to be determined is whether or not the claimant refused an offer of suitable work with good cause."

In the Matter of the Claim of Linda Alexander, B75-6806-48559 and in the Matter of the Claim of William B. Kempp, B74-672-45313, both of these matters discussed the offer of part time work. The offer of work as a long-term substitute teacher can be considered as part time work. The above entitled matter also considered the issue of part time work offered and whether the job offered must be a full time job. In this matter, the claimant had performed the same type of work in February of 1978 that she refused in November of 1978. If the matter was to be part time work in February and she accepted, she cannot now be heard to argue that she should not have to accept the job because it is not full time work. Attention is also called to the statute, which the Board of Review pointed out, does not require that the offer of work be full time, only that it be suitable work. Therefore, it is the opinion of this Referee that the work offered need not be full time but may be part time work if the claimant had previously done that same type of work in a part time category. It matters not that later the part time work, that she accepted in February of 1978, then became full time work because of the length of time that the claimant had worked. It would be similarly so should she have accepted this position. It may have blossomed into full time tenured teacher work if she had performed her work for fifty or more days. The claimant was guaranteed at least six week's work at the time of the job offer.

The claimant argues, without merit, that her refusal of work because of pay is sufficient to remove the disqualification. The record discloses that she had previously accepted work under the same terms and conditions of the work that was offered on November 10, 1978. The rate of pay for the work offered on November 10, 1978 was $42 per day and that if she worked more than fifty days, then she would become a regular tenure teacher and receive all the benefits. On February 6, 1978 she accepted the same type of work under the same terms and conditions. Having once accepted the same type of work, the claimant may not now be heard to argue with merit that the refusal of work was with good cause and as such she should not be disqualified for benefits.

It is the opinion of this Referee that since the claimant had performed part time work previous to this job offer and the employer's offer was the same part time job, it would be suitable so that the only question to be determined is whether the claimant refused the offer of quitable work with good cause.

The statute has placed a section in the Act to be used as a guideline in determining the suitability of the work. This section is 29(6) of the Act and is referred to in the decision above. The claimant has not indicated that there would be any degree of risk involved to her health, safety, or morals. Therefore, insofar as this portion of Section 29(6) of the Act is concerned then the work offered was suitable. The claimant's physical fitness and prior training is next considered in Section 29(6) of the Act. The claimant does not indicate that she was under any physical disability and the employer testifies that the claimant had had prior training in this field. Therefore, it is the finding of this Referee that based upon that portion of Section 29(6) of the Act, the work was suitable.

The next portion of the guidelines to be considered is the work experience and prior earnings. It is the finding of this Referee that the prior earnings and the experience is the same in the offer of work as that which the claimant had previously performed. Therefore, this portion of Section 29(6) of the Act is not governing.

Section 29(6) of the Act states that the Referee should then consider the length of unemployment and prospects for securing local work in the customary occupation. The claimant had been unemployed since June 16, 1978 and had no possibilities of employment and none were in prospect. The claimant had been unemployed for a period of about five months and had not been able to find work in her customary occupation. In fact, the testimony of the claimant is that there were no job prospects which she was aware of at the time of the offer of work on November 10, 1978. It is the finding of this Referee that the length of unemployment was such that the claimant should have accepted the work offered and that the work under Section 29(6) of the Act was suitable.

The claimant had previously worked with the Bay City School District and there would be no change in the distance of available work from her residence. Therefore, based upon that portion of Section 29(6) of the Act, the job offered was suitable.

From an examination of the whole record, the evidence presented at the hearing before the Referee, the work offered the claimant was "suitable" and that the claimant did not have "good cause" for refusing the proffered work and was accordingly disqualified pursuant to Section 29(1)(e) of the Act.

MESC 1831 - S
(Revised 2-78)

DECISION

The Redetermination issued by the Commission on December 29, 1978 is affirmed.

JAMES L. CARR REFEREE

Mailed at SAGINAW, MICHIGAN JAN 29 1979

IMPORTANT

This decision will become final unless an interested party takes ONE of the following actions: (1) files a written appeal to the Board of Review, OR (2) files a written request for rehearing before the referee, OR (3) files a direct appeal to circuit court. (See MESC Form 1889, "Stipulation Permitting Appeal of Referee Decision or Order Directly to Circuit Court.") ONE of the above actions must be taken on or before

FEB 20 1979

To be filed on time, an appeal to the Board of Review must be RECEIVED by the Board of Review at 7310 Woodward Avenue, Detroit, Michigan 48202, or by any of the Commission's offices, on or before the above indicated date. A request for rehearing before the referee must be RECEIVED by the Referee Division at the same address or by any of the Commission's branch offices, on or before the above indicated date.

Where the appeal to the referee has been dismissed for lack of prosecution or an interested party is in possession of newly discovered material information not available when the case was heard by the referee, the dissatisfied party may request a rehearing before the referee.

If no appeal to the Board of Review or request for rehearing is received by the date set forth above, the law provides that this decision may be opened and reviewed by a Referee, only for "good cause," and only if such request for reopening is made within 1 year from the date of the mailing of this decision.

APPEAL TO THE CIRCUIT COURT

(Please read carefully)

Instead of an appeal to the Board of Review, this decision or order may be appealed directly to the circuit court having jurisdiction, pursuant to Section 38(2) of the MES Act [MCLA 421.38(2)]. For direct appeal to the circuit court, all parties must agree to do so by written stipulation filed with the Referee Division.

The appeal must be filed with the circuit court within 20 days of the mailing of this decision or order.

Therefore, if you wish to appeal directly to the circuit court, you must obtain the written consent of the other parties to this decision or order, which includes the Michigan Employment Security Commission, to do so. A Stipulation form (MESC 1889) is available at any office of the Commission. The other parties are not obligated to sign the Stipulation permitting you to file your appeal to the circuit court.

The stipulation must be filed with the Referee Division of the Michigan Employment Security Commission, 7310 Woodward Avenue, Detroit, Michigan 48202, or at any office of the Commission immediately after it has been signed by all the interested parties. Such filing does not affect the necessity of filing an appeal within 20 days to the circuit court.

Appeal Docket No. B79-00344-66220
Bay Circuit Court Docket No. 81-3010-T
S.S. No. [redacted]
B.O. No. 33

STATE OF MICHIGAN

COURT OF APPEALS

KAREN ZIELINSKI,

Plaintiff-Appellant,

v

BAY CITY PUBLIC SCHOOLS

and

MICHIGAN EMPLOYMENT SECURITY COMMISSION,

Defendants-Appellees.

_____/

DOCKET NO. 58867

Date Filed: October 12, 1982

OPINION

ELI GRIER (P 14374)
ERWIN B. ELLMANN (P 13168)
Attorneys for Appellant

PETER F. DAHM (P 25254)
Attorney for Appellee Bay City Public Schools

FRANK J. KELLEY, Attorney General of the State of Michigan

ROBERT A. DERENGOSKI
Solicitor General

By: DAVID A. VOGES (P 25143)
Assistant Attorney General
Attorneys for Appellee Michigan Employment Security Commission

Before: Danhof, C.J., and J.H. Gillis and M.R. Knoblock,* JJ.

PER CURIAM

Plaintiff appeals as of right from a circuit court order affirming the Michigan Employment Security Board of Review's determination that plaintiff was disqualified from receiving unemployment benefits pursuant to § 29 of the Michigan Employment Security Act (hereinafter the Act).

A hearing was held on January 25, 1979, before a referee of the Michigan Employment Security Commission (hereinafter MESC). According to the hearing testimony, plaintiff worked as a full-time first and second grade teacher at Forest Elementary School in the Bay City Public Schools from 1974 until the end of the 1977 school year when she was laid off. She remained unemployed until February 6, 1978, at which time she was rehired by defendant school district as a long-term substitute teacher at a salary of $42 per day. She remained in that position until June 16, 1978, when she was again laid off. Since plaintiff had worked for a period exceeding 50 days, she was entitled to and did receive full contract benefits of a regular teacher, retroactive to February 6, 1978.

On November 10, 1978, plaintiff was again offered a position as a long-term substitute teacher, which was to last at least six weeks, subject to the same terms and conditions as her previous job of February 6, 1978. Plaintiff refused this offer, claiming that it was not "suitable". The job was

* Circuit Judge, sitting on the Court of Appeals by assignment.

to be at Western Intermediate School, approximately five miles from Forest School, teaching two classes of language arts and four classes of physical education to sixth graders. Plaintiff was elementary certified, which meant she was qualified to teach all subjects, including language arts and physical education, in grades one through six.

On December 6, 1978, a referee of the MESC held that plaintiff was disqualified from receipt of unemployment benefits for the week ending November 18, 1978 and until completion of a six-week requalification period based on her refusal of an offer of suitable work. The referee's decision was affirmed on redetermination. Following the hearing on January 25, 1979, Referee James L. Carr affirmed the redetermination. On October 30, 1980, the MESC Board of Review affirmed Referee Carr's decision. Plaintiff appealed the denial of her application for rehearing of the Board's decision to the Bay County Circuit Court. The circuit court entered its order on June 25, 1981, affirming the MESC Board of Review's decision. Plaintiff appeals from that order.

The standard of review of a decision of the MESC Board of Review is set forth in MCL 421.38; MSA 17.540, which provides in pertinent part:

> "(1) The circuit court * * * may review questions of fact and law on the record made before the referee and the board of review involved in a final order or decision of the board, and may make further orders in respect thereto as justice may require, but the court may reverse an order or decision only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record."

The Michigan Supreme Court discussed this standard in Smith v Employment Security Comm, 410 Mich 231, 256; 301 NW2d

285 (1981):

"Our function as a reviewing court is limited to a determination of whether the findings of the MESC are supported by competent, material and substantial evidence on the whole record. MCL 421.38; MSA 17.540. This Court cannot substitute its own judgment for that of the administrative agency if there is substantial evidence which supports the agency." (Citations omitted.)

Accordingly, we must determine whether the MESC Board of Review's finding that plaintiff refused an offer of suitable work, without good cause, is supported by competent, material and substantial evidence on the whole record.

The MESC's determination was made pursuant to MCL 421.29(1)(e); MSA 17.531(1)(e), which provides:

"(1) Except as provided in section 69, an individual shall be disqualified for benefits in the following cases in which the individual:

* * *

"(e) Failed without good cause to accept suitable work when offered the individual, or to return to the individual's customary self-employment, if any, when directed by the employment office or the commission."

Section 29(6) of the Act sets forth the factors to be considered in passing on suitability:

"In determining whether or not work is suitable for an individual, the commission shall consider the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness and prior training, the individual's experience and prior earnings, the individual's length of unemployment and prospects for securing local work in the individual's customary occupation, and the distance of the available work from the individual's residence."

In determining suitability, each factor set forth in § 29(6) of the Act must be considered. Dueweke v Morang Drive Greenhouses, Inc, 411 Mich 670, 678; 311 NW2d 712 (1981). The factors should be considered together in relation to one another, and no one factor should be determinative. Gilliam v Chrysler

Corp, 72 Mich App 538, 545; 250 NW2d 123 (1976). The burden is on the employer to show that an offer of work was made and that the employee failed, without good cause, to accept it. Allied Building Service Co v MESC, 93 Mich App 500, 505; 286 NW2d 895 (1979).

Plaintiff argues that the offer of employment was unsuitable because she had no prior experience teaching physical education classes to sixth graders. However, an offer of employment need not be identical to the claimant's prior employment. Plaintiff was elementary certified to teach all subjects in grades one through six. Her apparent inexperience in teaching higher grade levels does not render the offered work unsuitable.

Plaintiff also contends that the 33% reduction in pay and loss of benefits were sufficient to render the offered employment unsuitable. The defendant could only guarantee the substitute teaching position for six weeks, although there was a possibility that it might extend for over 50 days in which case plaintiff would have been entitled to her regular teacher's salary in addition to all fringe benefits, retroactive to the first day of substitute teaching. We observe that this actually did occur with regard to the substitute position accepted by plaintiff on February 6, 1978.

Although we have been cited no Michigan authority precisely on point, the court in Grace v Maine Employment Security Comm, 398 A2d 1233 (1979), was faced with a similar

fact situation. In that case a claimant had been laid off for two months from a full-time job prior to refusing an offer for part-time employment from a different employer which meant a 56% reduction in total earnings. Under a statute similar to § 29(1)(e), the commission found the claimant disqualified from benefits for her refusal of the part-time position. The court upheld the commission's ruling, stating that work which is unsuitable at the beginning of unemployment may become suitable when consideration is given to the length of unemployment and the prospects of securing accustomed work. See also, Neff v Unemployment Compensation Board of Review, 195 Pa Super 4; 169 A2d 338 (1961).

In the instant case, plaintiff first applied for unemployment benefits on August 30, 1978. She had been collecting benefits for over two months when she was offered the substitute teaching position on November 10, 1978. Plaintiff had been unable to secure a full-time teaching position during this period and she testified that she was unaware of any prospects for such employment for the second semester of the 1978-79 school year or for the following fall.

Our review of the record demonstrates that the Board of Review considered all of the relevant statutory criteria in § 29(6) of the Act. We conclude that the Board's finding that plaintiff refused to accept a suitable offer of employment without good cause was not contrary to the law and was supported by competent, material and substantial evidence.

Affirmed.