STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

CAROLE J. SHANE,

Claimant

Appeal Docket No. B81-16581-80508

[redacted]

CHARLEVOIX EMMET INTERMEDIATE SCHOOL DISTRICT,

Employer

DECISION ON REHEARING OF THE BOARD OF REVIEW

This matter is before the Board of Review on the claimant's petition for rehearing of a Board decision issued August 6, 1982. In that decision, a panel of the Board (Chairperson Hall dissenting) affirmed a Referee's decision dated October 7, 1981 and held the claimant subject to a "school denial period" under Section 27(i) of the MES Act for the period from July 20, 1981 through September 12, 1981.

On May 25, 1982, oral argument in this and three companion cases was presented at Gaylord, Michigan after which the above referenced decision was issued. The claimant's involved all petitioned for rehearing and, pursuant to Section 36(2) of the Act, this matter will be considered by the entire Board. We conclude that a rehearing should be granted and the decision of August 6, 1982 is hereby set aside.

After a review of the entire record, we adopt the findings of fact previously made by Chairperson Hall as follows:

> "The claimants involved in this case and its companions were instructors with the employer, an intermediate school district. On May 4, 1981 the claimant, among others, was laid off as of the end of the school year because of financial uncertainties regarding the coming year (T, p 8). On June 8, 1981 a millage election was held but the proposal was defeated. Subsequently, on July 9, 1981 the employer submitted a statement to the Commission in which it revealed the claimants did not have reasonable assurance of employment for the next school year. Nevertheless, five days later, on July 14, 1981, "recall" letters were sent to the claimants. Claimants' insurance coverage was reinstated. The letters of July 14, 1981 were triggered by the employer's decision to conduct another millage election on September 8, which the employer was confident would be successful (T, pp 10,11,14). The election was to ask for a millage increase, not merely a renewal of expired millage (T, p 17).
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> [T]he employer's confidence was based on several factors. One, that the increase, as submitted to the voters, would be a temporary measure for three years, rather than a permanent measure as was the June proposal. Secondly, that it would be the only issue on the ballot rather than sharing the ballot with other items as it did in June. Third, that the local newspapers had indicated they would support a short term

increase, and, finally, the fact the June proposal was defeated only by a margin of 53% - 47% (Ex. 5 in #80508). Despite the employer's optimism it is clear the claimant's reemployment in September hinged on the results of the September 8th election (T, pp 14,15,17). Claimants contend they did not have reasonable assurance."

Sections 27(i)(1)(a) and (b) of the Michigan Employment Security Act read as follows:

"Section 27(i).

Benefits based on service in employment described in section 42(8), (9) and (10) shall be payable in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to this act, except that:

(1) With respect to service performed in an instructional, research or principal administrative capacity for an institution of higher education as defined in section 53(2), or for an educational institution other than an institution of higher education as defined in section 53(3), benefits shall not be paid to an individual based on those services for any week of unemployment beginning after December 31, 1977, under either of the following situations:

(a) The week commences during the period between 2 successive academic years, or during a similar period between 2 regular terms, whether or not successive, or during a period of paid sabbatical leave provided for in the individual's contract, to an individual if the individual performs the service in the first of the academic years or terms and if there is a contract or a reasonable assurance that the individual will perform service in an instructional, research, or principal administrative capacity for an educational institution in the second of the academic years or terms, whether or not the terms are successive.

(b) The week commences during an established and customary vacation period or holiday recess if the individual performs the service in the period immediately before the vacation period or holiday recess, and there is reasonable assurance that the individual will perform the service in the period immediately following the vacation or holiday recess."

Recently, in another school denial situation, the Ottawa County Circuit Court made the following observations:

"The term 'reasonable assurance' of employment, in the absence of statutory definition or specific legal meaning, should be given its usual, common or ordinary meaning. Bingham v American Screw Products and MESC, 398 Mich 546,563.

The word 'assurance' has been defined in various sources as a pledge, guarantee or surety, a representation or declaration tending to inspire full confidence, a making secure. Black's Law Dictionary, revised 4th edition and Words and Phrases.

> Thus, claimants are not entitled to compensation if they were reasonably secure and confident in their expectation of employment for the next academic year." School District of the Village of Spring Lake v Charles A. Bassett, et al, Case No. 81-5806-AV Ottawa Cty Cir Ct (June 10, 1983).

The circuit judge then went on to detail several factors present in that case "which would lead reasonable persons to be insecure regarding their future employment". Among them was the defeat of a millage proposal.

Applying the law to the facts of this case, we find as follows:

The Referee's decision must be reversed as the claimants did not have reasonable assurance of employment prior to the millage election of September 8, 1981. In May, the claimants had been notified they were being laid off at the end of the year. In June a millage election failed. In early July the employer confirmed the bleak outlook of the situation by notifying the Commission that claimants did not have a reasonable assurance of work. Yet, the employer, only five days later, contended the situation had changed to the extent that claimants then had reasonable assurance. In fact, the only thing which had changed was that the employer school board had decided to have another election. The employer has raised the factors listed above which it contends supported its belief the September millage would succeed. We do not find them persuasive. The tentative character of the September proposal is evident from the testimony of Mr. Shepard, Superintendent of Schools, at the Referee hearing:

> "Following that time -- the defeat of that millage -- the board felt that by going back and changing the issue slightly and moving away from what seemed to be the -- the problem with the millage that we face (sic) in June, that means that it was a charter millage as opposed to a given period of time, the board chose to go back for a three year period the same amount of millage and felt quite certain that it would be -- the millage would be instated (sic) -- or instated (sic) I guess at that time I should say, because this was an additional millage, an additional amount of money." (T, p 10). (Emphasis added).

Further, there is simply no evidence in the record as to the mood of the voters toward the amended proposal nor was there evidence presented to support the contention that the editorial position of area newspapers was supportive of an increase limited to three years.

In any event, even if such evidence was in the record, we do not believe the Commission, a Referee or the Board itself could properly consider it when assessing whether or not "reasonable assurance" was present. It is no more our function to gauge electoral probabilities or the reasonableness of ballot proposals, to "go behind" the proposal as it were, than it is our function to decide the merits of a labor dispute. Linski v ESC, 358 Mich 239 (1959).

Viewing the situation as it existed on July 14, 1981, the claimants did not have reasonable assurance. After a millage has once been defeated, particularly when the proposal is for an increase, we would find the employer must have more to support its case than the employer did here.

The Board of Review decision of August 6, 1982 is hereby set aside.

The Referee decision of October 7, 1981 is hereby reversed.

Claimant is not subject to a "denial period" under Section 27(i) of the Act from July 20, 1981 through September 12, 1981 and is entitled to benefits if otherwise eligible and qualified.

This matter is referred to the Commission for further proceedings in accordance with this decision.

Beverly A. Hall, Chairperson

Michael L. Hogan, Member

Morris W.B. Cohl, Member

Frank Salomone, Member

Harry S. Benjamin, Jr., Member

Kenneth McPhail, Member

JAMES VIVENTI (MEMBER), DISSENTING:

I disagree with the majority in this matter and for the reasons stated in the August 6, 1982 opinion signed by myself and former Member Kelly, would affirm the Referee decision.

The circuit court affirmance of the Board decision in Spring Lake, supra, does not alter my decision. As was noted in the August 6, 1982 opinion:

> "This case is not controlled by Spring Lake, supra. At the outset, we note the statute only requires a "reasonable assurance" of employment, not a guarantee. We find there was a legitimate good faith basis for reasonable assurance here. Unlike the Spring Lake cases where the school district merely resubmitted the same proposal to the voters which had been defeated once before, the employer involved here made a significant modification to the ballot proposal. Specifically, the

millage increase was changed from a permanent increase to one that would expire in three years if not renewed. That change neutralized newspaper opposition which was evident at the time of the June proposal. The cumulative change of circumstances, when viewed in light of the narrow defeat of the June proposal justified the employer's confidence the September vote would be successful."

Those factors, which are adequately reflected in the record as it stands (Ex. 5 p 2; Appeal Docket #80508) support imposition of a denial period in this case.

I would affirm.

James Viventi, Member

MAILED AT DETROIT, MICHIGAN October 5, 1983

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

November 4, 1983

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME.