



DECISION OF COMMISSION

In the Matter of:

Alfred D. Brown
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Richmond Symphony
Richmond, Virginia

Date of Appeal
to Commission: November 13, 1985

Date of Hearing: January 23, 1986

Place: RICHMOND, VIRGINIA

Decision No.: 26044-C

Date of Mailing: March 7, 1986

Final Date to File Appeal
with Circuit Court: March 27, 1986

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This is a matter before the Commission on appeal by the employer from the Decision of Appeals Examiner (UI-85-7908), mailed October 24, 1985.

APPEARANCES

Attorney for Employer

ISSUES

Was the claimant discharged for misconduct in connection with his work as provided in Section 60.1-58 (b) of the Code of Virginia (1950), as amended?

Is the employer an educational institution and should the claimant be denied benefits because his employment began during the period between two successive academic years or terms as provided in Section 60.1-52.3 B or E of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

The employer appealed from the Appeals Examiner's decision which held that:

"[N]o disqualification should be imposed in connection with the claimant's separation and his claim for benefits, as his separation was not for misconduct in connection with work. Additionally, the provisions of Section 60.1-52.3 (A) (B) (D) and (E) do not apply, and the employer is not considered to be an educational institution."

The Richmond Symphony, Inc., was the claimant's last employer where he worked as an assistant concert master from September 2, 1984, through May 25, 1985. The claimant had signed a thirty-eight-week employment contract which ended on May 25, 1985. The employer's employment season usually begins no earlier than September 1 and ends no later than June 15 of each succeeding year. The claimant had signed a notice of intent to accept employment for the 1985-1986 season.

The Richmond Symphony, Inc., is a non-profit organization exempt from taxation under the provisions of Section 501 (C) (3) of the Internal Revenue Code. The bylaws of the corporation provide that:

"The Richmond Symphony is organized solely and entirely for charitable and educational purposes as an organization exempt from taxes under Section 501 (C) (3) of the United States Internal Revenue Code. The purposes of The Richmond Symphony (within such limitations) shall be the promotion of musical performances, the organization and sponsorship of musical organizations and the encouragement of the development of the arts."

The employer argues that The Richmond Symphony is an educational institution as contemplated by Section 60.1-52.3 B of the Code and, therefore, benefits should not be paid to the claimant between two successive academic terms. The employer alternately argues that if it is held The Richmond Symphony is not an educational institution Section 60.1-52.3 E applies since the Symphony provides services to or on behalf of educational institutions.

In addition to conducting concerts for adult audiences, the Symphony has a program for presenting in-school concerts to elementary and secondary schools in Virginia. This program is under the supervision of the Director of Marketing and Education who described the program as follows:

"In-School programs, which are 30 minutes in length, are designed to appeal to age and grade levels from elementary through high school with each concert specifically designed for the group in attendance. Elementary school children will get a closer, more intimate experience with some of the instruments which make up an orchestra through instrument demonstrations, solos, a variety of music, a lively conversation about music and musicians. Junior and senior high students will receive a more advanced presentation with works from Back (sic) to Bernstein, Mozart to Mancini. WORKSHOPS AND CLINICS ARE AVAILABLE FOR THE SECONDARY SCHOOL LEVEL."

The 1984-85 in-school concerts in the Richmond Metropolitan Area totalled 131 with an estimated attendance of 56,079. The program also included the formation of three orchestras composed of 135 students from various schools. At the end of the school year, these performing students are presented a certificate of achievement which is signed by the director and the school principal.

In The Richmond Symphony Orchestra's long-range plan, education is commented upon as follows:

"Education: The Richmond Symphony recognizes its role in the community not only as an instrument for enhancing the quality of life through concerts attended largely by adults, but also as a means to nurture an appreciation of music through service to the young people of the area. Musical education of young people is an obligation rather than an enterprise. Youth programs of The Richmond Symphony include in-school appearances by the smaller orchestra and classroom demonstration lectures by individual musicians as well as concerts in the concert hall. However, the majority of the orchestra's educational effort is now focused on the grade school level. While this focus is perhaps the most important in formulating among our young people the interest in, and appreciation of, music, there is an on-going task for the orchestra in sustaining this involvement with classical music into the high school and college years. High schools and colleges, speaking in general terms, provide a curriculum for teaching music and its appreciation through regular classes.

There has been a tendency to assume that musical education at the high school and college level is thereby served. However, The Richmond Symphony represents a rich, untapped resource to broaden the dimensions of all musical education in the area and should be alert to the possibility of augmenting musical programs diminished by local school administration budget cuts. The schools, in turn, can provide valuable service to the orchestra by encouraging attendance at regular concerts and instilling in their students the idea and perhaps even the habit of attending concerts. The building of our future audience is no less important than holding the allegiance of our present one.

OBJECTIVE: It is an objective of The Richmond Symphony to continue the musical education programs now in place to the extent that finances permit, to seek opportunities for expansion of musical programs when finances permit, and to pursue aggressively the development of a closer liaison with area high schools and colleges to augment their own programs and to foster a reciprocal support from them."

OPINION

Inasmuch as the claimant's unemployment prior to the initiation of his claim for benefits ended because of the completion of his contract for the 1984-85 employment season, it is concluded a disqualification under the provisions of Section 60.1-58 (b) of the Unemployment Compensation Act does not apply.

Section 60.1-52.3 B of the Virginia Unemployment Compensation Act provides:

"B. Benefits based on service in any capacity other than an instructional, research, or principal administrative capacity, for an educational institution shall not be paid to any individual for any week which commences during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms."

The Act does not define an educational institution other than an institution of higher education which is defined in Section 60.1-14.1. In a September 1, 1977, memorandum from the U. S. Department of Labor addressed to all state agencies, subject: "Supplement #4 -- Questions and Answers Supplementing Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 - P.L. 94-566", the answer to one of the questions concerning educational institutions appears to be instructive. The question and answer read as follows:

"2. Question:

Are Head Start programs 'educational institutions' or 'schools' within the meaning of the Federal law?

Answer:

No. Title 45, part 1304 of the Code of Federal Regulations, promulgated by the Department of Health, Education and Welfare, sets out the program performance standards for the Head Start program. In these regulations, the program is defined as a comprehensive developmental program designed to meet children's needs in the health (medical, dental, mental, nutritional) social, and educational areas. The goal is child adjustment and development at the emotional and social level, rather than school-type training. There are educational objectives, but these are designed to

'Provide children with a learning environment and the varied experiences which will help them develop socially, intellectually, physically, and emotionally in a manner appropriate to their age and stage of development toward the overall goal of social competence.'

It appears to us that the educational aspect is incidental to the primary purpose of bringing the participating children to a level of development where they can better cope with the environment of a kindergarten or primary school. In addition, it is our understanding that, in general, the Head Start staff members are not licensed as teachers and the Head Start programs are not licensed as schools in the States.

We provided a definition of 'educational institution' on page 39 of Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 -- P.L. 94-566. We believe an organization is an

educational institution within the meaning of the Federal law in question if: (a) participants, trainees, or students are offered an organized course of study or training designed to transfer to them knowledge, skills, information, doctrines, attitudes or abilities from, by or under the guidance of an instructor or teacher; (b) it is approved, licensed or issued a permit to operate as a school by the State Department of Education or other government agency that is authorized within the State to approve, license or issue a permit for the operation of a school; and (c) the courses of study or training which it offers may be academic, technical, trade or preparation for gainful employment in a recognized occupation. (Underscoring supplied)

For all of these reasons, Head Start programs do not, in our opinion, come within the definition of educational institution as used in the FUTA."

While The Richmond Symphony's program is not comparable to Head Start programs, the definition of "educational institutions" given above is applicable. Because The Richmond Symphony's program staff members are not licensed teachers and the program is not licensed as a school, The Richmond Symphony is not an educational institution as contemplated by the Unemployment Compensation Act. (Underscoring supplied)

Section 60.1-52.3 E of the Code of Virginia provides that:

"E. Benefits based on services provided to or on behalf of an educational institution while in the employ of a governmental entity or nonprofit organization shall not be payable to any individual who provided such services under the same circumstances and subject to the same terms and conditions as described in subsections A. B. D and F of this section."

The employer argues that this section applies to the Symphony because fifty-eight percent of all concerts performed are for youth. While the in-school program certainly is instructive and provides some musical education for the students, these educational aspects are somewhat incidental to the overall purposes of The Richmond Symphony which are the promotion of musical performances, the organization and sponsorship of musical organizations, and the encouragement of the development of the arts. Furthermore, the schools in which concerts are performed are expected to "provide valuable service to the orchestra by encouraging attendance at regular concerts and

instilling in their students the idea and perhaps even the habit of attending concerts."

This objective of formulating among young persons an interest in and appreciation of music is very laudible, but the services performed by the claimant in this case were not exclusively for the schools and were incidental to his overall work for the Symphony. It is concluded the claimant is not subject to the "between-terms ineligibility" provided by Section 60.1-52.3 E of the Code.

Inasmuch as there is nothing in the record to show what weeks, if any, benefits were claimed by the claimant, the case should be remanded to the Deputy for determination of the claimant's eligibility for benefits.

DECISION

The Decision of Appeals Examiner is hereby affirmed. It is held that the claimant is qualified for benefits effective August 4, 1985, based on the reason for his separation from work.

It is also held that The Richmond Symphony, Inc., does not come within the definition of an educational institution as used in the Unemployment Compensation Act.

It is further held that the services performed by the claimant for The Richmond Symphony, Inc., a non-profit organization, were not services provided to or on behalf of an educational institution so as to deny him benefits between two successive academic years or terms.

The case is remanded to the Deputy for determination as to whether or not the claimant has met the other eligibility requirements of the Act during any weeks for which benefits have been claimed.


Gene Pitts
Special Examiner