BEFORE THE

STATE OF WISCONSIN

LABOR AND INDUSTRY REVIEW COMMISSION

In the matter of the
unemployment benefit claim of

BRIAN K CAVANAUGH, Employe

Hearing No. 92600407MW

SEE ENCLOSURE AS TO TIME LIMIT ON FURTHER APPEAL.

Involving the account of

WILLOWGLEN ACADEMY INC, Employer

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The Department issued an Initial Determination which held that in week 30 of 1991, the employe terminated his work with the employing unit and that his quitting was not for any reason which would permit immediate benefit payment. As a result, benefits were suspended and there was a resultant overpayment of $846.00, which the employe was required to repay. The employe timely appealed and a hearing was held before an Administrative Law Judge who reversed the Initial Determination and found that he quit pursuant to sec. 108.04 (7)(e), Stats., and was therefore eligible for benefits. The employer filed a timely petition for Commission review asserting that the employe's reasons for quitting were that he did not like his job duties and not that the hours were not prevailing.

Based on the applicable law, records and evidence in this case, the Commission makes the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The employe worked for about one week as a counselor for the employer, a facility that houses developmentally disabled people. His last day of work was on July 26, 1991 and he terminated his employment effective August 12, 1991 (week 33).

On July 29, the employe informed the employer that he was giving two weeks notice because he did not like his job duties. The employer accepted his resignation but told him that he did not need to work during his notice period.

The employe was paid $6.00 per hour. He worked some first and some second shifts.

In the employe's labor market area, the first shift is an eight and one-half hour shift that starts between 4:00 a.m. and 12:00 p.m. The second shift is an eight and one-half hour shift that starts between 12:00 p.m. and 8:00 p.m. For all workers, 81 percent of the work is on the first shift and 13 percent of the work is on the second shift. For day care workers, 100 percent of the work is on the first shift. For nurses aides, 50 percent of the work is on the first shift and 21 percent of the work is on the second shift. Finally, 2 percent of all jobs and 11 percent of nurses aides jobs provide a rotating shift.

It is unclear how to classify the employe's employment. His work is similar to that of a nurses aide, a care provider, and a counselor. However, for each category, second shift or rotating shift is not prevailing for similar work in the employe's labor market area.

Sec. 108.04 (7)(a), Stats., disqualifies a claimant who voluntarily terminates his employment with an employing unit. Sec. 108.04 (7)(e) and sec. 108.04 (9)(a)2., Stats., provide as follows:

Section 108.04 (7)(e) of the Statutes provides:

> "(e) Paragraph (a) does not apply if the department determines that the employe accepted work which the employe could have refused with good cause under sub. (8) and terminated such employment

with the same good cause and within the first ten weeks after starting the work, or that the employe accepted work which the employe could have refused under sub. (9) and terminated such work within the first 10 weeks after starting the work."

Sec. 108.04 (9)(a)2., Stats., provides:

"(9) PROTECTION OF LABOR STANDARDS.

"(a) Benefits shall not be denied under this chapter to any otherwise eligible individual for refusing to accept new work under any of the following conditions:

"2. If the wages, hours (including arrangement and number) or other conditions of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;"

The Department's policy in situations where the hours or other conditions of employment are not prevailing is to determine whether the employe's quitting was related to either the hours or other conditions. Unemployment Compensation Benefits Manual, Volume 3, Part VII, Chapter 1, page 35, March 1988. If a worker quits a job with a nonprevailing wage, the job is substantially less favorable to the individual regardless of the reason the worker quits because in any given situation a higher or prevailing wage is always preferrable.

However, a determination with regard to whether hours or other conditions of employment are substantially less favorable must be made on an individual basis. Second shift can be preferred by the individual if he or she wishes to arrange child care with a partner who is employed on the first shift, or if the worker wishes to pursue educational or other activities which occur predominantly in the first shift.

Part-time work can be preferable for the same reasons. Because workers are individuals, nonprevailing conditions of employment can also be preferable. In this case, the employe's only reason for quitting was that he did not like his

job duties. Therefore, there is nothing in the record upon which to base a finding that the hours of work were substantially less favorable to him than those prevailing for similar work in the locality.

Although the employe did not work after July 29, he gave a two-week notice so his quitting was not effective until August 12, 1991. He is eligible for benefits until week 33 because the employer laid him off for two weeks in anticipation of his quitting.

The Commission therefore finds that in week 33 of 1991, the employe terminated his work with the employing unit, within the meaning of sec. 108.04 (7)(a), Stats., and that his quitting was not for any reason constituting an exception to that section.

The Commission further finds that the employe was paid benefits in the amount of $141.00 for each of weeks 33 through 35 of 1991, in the total amount of $423.00, for which he was not eligible and to which he was not entitled, within the meaning of sec. 108.03 (1), Stats., and that, pursuant to sec. 108.22 (8)(a), Stats., he is required to repay such sum to the Unemployment Reserve Fund.

DECISION

The Appeal Tribunal Decision is reversed. Accordingly, the employe is ineligible for benefits beginning in week 33 of 1991, and until four weeks have elapsed since the end of the week of quitting and he has earned wages in covered employment performed after the week of quitting equaling at least four

times his weekly benefit rate which would have been paid had the quitting not occurred. He is required to repay the sum of $423.00 to the Unemployment Reserve Fund.

Dated and mailed

September 1, 1992

145-CD1026

SW 844

/s/
Pamela I. Anderson, Chairman

/s/
Richard T. Kreul, Commissioner

/s/
James R. Meier, Commissioner

NOTE: The Commission did not consult the Administrative Law Judge regarding witness credibility and demeanor but reverses as a matter of law.

cc: CARL JASKLOSKI
C/O HUMAN RESOURCE DEPARTMENT