

NO. 69252-6

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

JOHN H. THOMAS,

Petitioner,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

RESPONDENT'S BRIEF

ROBERT M. MCKENNA
Attorney General

APRIL BENSON BISHOP
WSBA # 40766
Assistant Attorney General
Attorney for Respondent
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
Phone: (206) 464-7676
Fax: (206) 389-2800
E-mail: LALSeaEF@atg.wa.gov

RECEIVED
COURT OF APPEALS
DIVISION I
MAY 2 2012

ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

III. STATEMENT OF THE CASE.....2

IV. STANDARD OF REVIEW.....4

V. ARGUMENT6

 A. Under the plain language of RCW 50.44.050, Mr. Thomas, as an employee of an educational institution, was not entitled to unemployment benefits for a period that fell between successive academic years.7

 B. The Commissioner’s decision is consistent with the legislature’s intent in enacting the reasonable assurance statute, and Mr. Thomas’s previous summer employment with the school district does not qualify him for benefits during the summer of 2011.....14

 C. Granting benefits to Mr. Thomas during his temporary summer break would undermine the Employment Security Act’s requirement that claimants be available for work.17

 D. The Commissioner’s decision in Mr. Thomas’s case is consistent with case law from other jurisdictions.....19

 E. An award of attorney fees is only allowable if the Court reverses or modifies the decision of the Commissioner.21

VI. CONCLUSION.....21

TABLE OF AUTHORITIES

Cases

<i>Anderson v. Emp't Sec. Dep't</i> , 135 Wn. App. 887, 146 P.3d 475 (2006).....	5
<i>Arima v. Emp't Sec. Dep't</i> , 29 Wn. App. 344, 628 P.2d 500 (1981).....	18
<i>Berland v. Emp't Sec. Dep't</i> , 52 Wn. App. 401, 760 P.2d 959 (1988).....	15, 16
<i>Dep't of Ecology v. Campbell & Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	11
<i>Evans v. Dep't of Emp't Sec.</i> , 72 Wn. App. 862, 866 P.2d 687 (1994).....	11, 12
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 8, 93 P.3d 147 (2004).....	5
<i>In re Griswold</i> , 102 Wn. App. 29, 15 P.3d 153 (2000).....	18
<i>Jacobs v. Office of Unemployment Comp. & Placement</i> , 27 Wn.2d 641, 179 P.2d 707 (1947).....	18
<i>Safeco Ins. Co. v. Meyering</i> , 102 Wn.2d 385, 687 P.2d 195 (1984).....	5
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	5, 6, 7
<i>Verizon Nw., Inc. v. Emp't Sec. Dep't</i> , 164 Wn.2d 909, 194 P.3d 255 (2008).....	4
<i>W. Ports Transp., Inc. v. Emp't Sec. Dep't</i> , 110 Wn. App. 440, 41 P.3d 510 (2002).....	5

<i>Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 914 P.2d 750 (1996).....	5, 10
---	-------

Statutes

26 U.S.C. § 3304.....	15
26 U.S.C. § 3304(a)(6)(A).....	15, 16
RCW 34.05.510.....	4
RCW 34.05.558.....	5
RCW 34.05.570(1)(a).....	5
RCW 50.20.010.....	18
RCW 50.20.010(1)(c).....	17
RCW 50.20.010(1)(c)(ii).....	17
RCW 50.32.070.....	4
RCW 50.32.120.....	4
RCW 50.32.160.....	21
RCW 50.44.050.....	1, 6, 7, 15, 16
RCW 50.44.050 (1990).....	13
RCW 50.44.050(1).....	7, 8, 11, 12
RCW 50.44.050(2).....	3, 7, 8, 9, 10, 12, 22
RCW 50.44.050(5).....	8, 10, 13

Other Authorities

Final Bill Report on E.S.H.B. 1821,
54th Leg., Reg. Sess. (Wash. 1995)..... 13

Final Bill Report on E.S.H.B. 2947,
55th Leg., Reg. Sess. (Wash. 1998)..... 13

Laws of 1995,
ch. 296, § 2..... 13

Laws of 1998,
ch. 233, § 2..... 13

Regulations

WAC 192-04-020(5)..... 4

WAC 192-170-010(c)..... 17

Out of State Cases

Thomas v. Dep't of Labor,
170 Md. App. 650, 908 A.2d 99 (2006) 15

Halvorson v. Cnty. of Anoka,
780 N.W.2d 385 (Minn. Ct. App. 2010)..... 20

Swanson v. Indep. Sch. Dist. No. 625,
484 N.W.2d 432 (Minn. Ct. App. 1992)..... 19, 20

I. INTRODUCTION

For employees of educational institutions, time off between successive school years is not a severance of the employment relationship warranting unemployment benefits. Petitioner John Thomas has an academic-year position as a lunchroom manager with the Seattle School District. In July 2011, Mr. Thomas, like employees of many educational institutions, was on a summer break between academic years with a reasonable assurance that he could return to the same position with the school district in the fall. RCW 50.44.050 excludes the payment of unemployment benefits to school employees during periods that fall “between two successive academic years.” The record in this case shows that July 2011 was part of the Seattle School District’s summer break and therefore fell “between two successive academic years.” Though Mr. Thomas had previously chosen to obtain summer work from the school district in addition to his academic-year position, his work history has no bearing on his eligibility for unemployment benefits during the summer of 2011. The Commissioner therefore correctly determined that Mr. Thomas was not eligible for unemployment benefits for the summer of 2011. This Court should affirm the Commissioner’s decision.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Commissioner properly conclude that Mr. Thomas was ineligible for unemployment benefits in the summer of 2011 because he was a school employee with a reasonable assurance of returning to work in the fall and sought benefits for a period that fell between two successive academic years?

III. STATEMENT OF THE CASE

The facts in this case are not in dispute. Mr. Thomas began working as a lunchroom manager for an elementary school in the Seattle School District in January 2008. Administrative Record (AR) at 11-12, 44, 50. His job duties include managing the kitchen, setting out dishes, cooking, cleaning, and handling paperwork. AR at 12, 50. Mr. Thomas worked as a lunchroom manager during the school year term, which ran from September to June. AR at 12-14, 44, 47-49.

During each spring season of 2008, 2009, 2010, and 2011, the school district sent out letters to lunchroom staff, asking them to submit their names if they were interested in grounds-keeping or custodial work during the summer break. AR at 17, 18, 21, 50. Each year, Mr. Thomas submitted his name for this work. AR at 17, 50. He accepted work as a custodian or groundskeeper during the summers of 2008, 2009, and 2010. AR at 12-13, 50. Shortly before the summer break of 2011, Mr. Thomas learned that the school district did not have a summer

custodial/groundskeeper position available for him due to budget constraints. AR at 13, 18-19, 21, 51.

Though the school district did not have additional custodial or grounds-keeping work for Mr. Thomas in the summer of 2011, Mr. Thomas knew before the end of the 2010-2011 school year that he would be returning to work as a lunchroom manager for the 2011-2012 school year. AR at 13-14, 21-22, 51. He did in fact return to work as a lunchroom manager on September 7, 2011. AR at 12, 22, 42, 49, 51.

Not having summer work with the school district, Mr. Thomas applied for unemployment benefits in July 2011. AR at 14, 33-34. The Department denied Mr. Thomas's application under RCW 50.44.050(2), the "reasonable assurance" statute. AR at 33-34. Specifically, the Department denied the application because Mr. Thomas was a classified school employee who sought benefits during a school break period, though he had a reasonable assurance of returning to work at the beginning of the next academic year. AR at 33-34.

Mr. Thomas appealed the Department's decision, and a hearing was held before an administrative law judge (ALJ). AR at 1-49. The ALJ affirmed the Department's denial of benefits. AR at 50-52. Mr. Thomas petitioned the Commissioner of the Department for review. AR at 54-62.

The Commissioner¹ adopted the ALJ's findings of fact and conclusions of law, concluding that the summer weeks during which Mr. Thomas claimed benefits fell between two academic years, and affirmed the Department's denial of benefits. AR at 64-67.

Mr. Thomas filed a Petition for Judicial Review in King County Superior Court. Clerk's Papers (CP) at 1-7. The superior court affirmed the Commissioner's decision. CP at 41-43.

Mr. Thomas now appeals to this Court.

IV. STANDARD OF REVIEW

The Washington Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department's Commissioner. RCW 50.32.120; RCW 34.05.510; *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). The decision on review is that of the Commissioner, not the underlying decision of the administrative law judge. *Verizon*, 164 Wn.2d at 915. The standard of review is of particular relevance here because Mr. Thomas argues that the Commissioner misapplied the law in his case.

The Commissioner's decision is considered *prima facie* correct and the burden of demonstrating the invalidity of an agency action is on the party

¹ Decisions on petitions for Commissioner review are made by review judges in the Commissioner's Review Office, but are treated as decisions of the Commissioner due to statutory delegation. See RCW 50.32.070; WAC 192-04-020(5).

asserting invalidity—here, Mr. Thomas. RCW 34.05.570(1)(a); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006).

Judicial review of disputed issues of fact must be limited to the agency record. RCW 34.05.558. An agency's findings of fact must be upheld if supported by substantial evidence. *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Substantial evidence is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The reviewing court should "view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed" at the administrative proceeding below. *Wm. Dickson Co.*, 81 Wn. App. at 411. Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

Questions of law are reviewed under the error of law standard and are subject to de novo review. *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002). While review is de novo, courts have consistently accorded a "heightened degree of deference" to the Commissioner's interpretation of employment security law in view of the Department's expertise in administering the law. *Id. at 449-50*; *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

When there are mixed questions of law and fact, the court must make a three-step analysis: (1) the court determines which factual findings are supported by substantial evidence; (2) the court makes a *de novo* determination of the correct law; and (3) the court applies the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

V. ARGUMENT

Mr. Thomas sought unemployment benefits during the summer break of 2011. Unemployment benefits are not available to school employees for periods that fall between two successive academic years or terms. Under the plain language of the applicable statute, RCW 50.44.050, and consistent with the policy underlying the statute and with other jurisdictions, the Commissioner properly concluded that Mr. Thomas was ineligible for unemployment benefits during summer 2011.

The evidence before the Department's Commissioner showed that summer was not an academic term or part of the academic year at the school where Mr. Thomas worked as a lunchroom manager. In determining whether a period of time is part of an academic year or academic term, the Department must look at the schedule and circumstances of the particular school, not the circumstances or work history of the individual employee, which is what Mr. Thomas asks this

Court to do. For these reasons, the Commissioner correctly determined that Mr. Thomas was not entitled to unemployment benefits for the summer of 2011. Mr. Thomas has not challenged any of the Commissioner's findings of fact, so this Court should treat them as verities on appeal. *Tapper*, 122 Wn.2d at 407. This Court should affirm the Commissioner's decision.

A. Under the plain language of RCW 50.44.050, Mr. Thomas, as an employee of an educational institution, was not entitled to unemployment benefits for a period that fell between successive academic years.

Under the "reasonable assurance" statute in Washington's Employment Security Act, employees of educational institutions do not qualify for benefits during any periods between successive academic years or terms. RCW 50.44.050. Specifically, "[b]enefits shall not be paid" based on an individual's non-instructional services for an educational institution

for any week of unemployment which commences during the period between two successive academic years or between two successive academic terms within an academic year, 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

RCW 50.44.050(2); *cf.* RCW 50.44.050(1) (parallel provision for an individual's service "in an instructional, research, or principal

administrative capacity”). Stated another way, the reasonable assurance statute applies to claimants who meet three conditions. First, the individual’s claim for benefits must be based on non-instructional services provided to an educational institution. See RCW 50.44.050(1), (2). Second, the claimant must be seeking benefits for a week that falls between two successive academic years or terms. RCW 50.44.050(2). Third, the claimant must have reasonable assurance that he or she is going to perform the non-instructional services again in the second of the successive academic years or terms. *Id.* If all three provisions are met, the claimant is ineligible for benefits. *Id.*

The statutory definition of “academic year” looks to the particular educational institution at issue. RCW 50.44.050(5) provides that “academic year” means “[f]all, winter, spring, and summer quarters or comparable semesters unless, based upon objective criteria including enrollment and staffing, the quarter or comparable semester is not in fact a part of the academic year *for the particular institution.*” (Emphasis added.)

Mr. Thomas meets each of the conditions in the reasonable assurance statute. His claim for benefits was based on his non-instructional service as a lunchroom manager for an educational institution, the Seattle School District. AR at 11-12, 50-51. He sought

benefits for a period beginning in July 2011, which was between the two successive academic years of 2010-2011 and 2011-2012. AR at 14, 51. Finally, he had a reasonable assurance that he could return to work in the fall—he testified at the administrative hearing that he “knew” before the end of the 2010-2011 school year that he would be returning to work as a lunchroom manager for the 2011-2012 school year. AR at 13-14, 51.

Mr. Thomas’s appeal focuses on the second requirement of RCW 50.44.050(2): whether he sought benefits for a week that fell between two successive academic years or terms. In his opening brief, he does not challenge that his claim for benefits was based on non-instructional services provided to an educational institution, nor does he challenge whether he had a reasonable assurance that he could return to work for the 2011-2012 academic year.

The following evidence supports the Commissioner’s factual finding that Mr. Thomas sought benefits during July 2011, which was not part of the academic year for the particular educational institution for which Mr. Thomas worked. AR at 50-51, 64. Mr. Thomas opened his claim for unemployment benefits on July 14, 2011. AR at 14, 33-35. At the administrative hearing, Mr. Thomas testified that his position as a lunchroom manager was “during the school year term” and that the school year ended in June and began again in September. AR at 12-14. The

exhibits admitted at the hearing included information that the Seattle School District's 2011 summer break ran from June 23, 2011, to September 6, 2011. AR at 41, 48-49. On a July 2011 "School Employee Questionnaire" that asked Mr. Thomas to "list the school(s) where you worked during the last three years," he listed "Lunchroom Mgr." at "Emerson Ele." for September 2008 to June 2009, September 2009 to June 2010, and September 2010 to June 2011. AR at 44.

Based on this evidence, the Court should uphold the Commissioner's finding that Mr. Thomas sought benefits for a period that was a summer break, not a part of the academic year. AR at 50-51; *see Wm. Dickson Co.*, 81 Wn. App. at 411 (reviewing court should view evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed at the administrative proceeding).

This finding supports the legal conclusion that Mr. Thomas sought benefits during a "period between two successive academic years." AR at 50-52, 64-66; RCW 50.44.050(2). The record shows that the Seattle School District's academic year ran from September to June, and that summer was "not in fact part of the academic year for the particular institution." RCW 50.44.050(5). Thus, under the plain language of RCW 50.44.050(2), the Commissioner correctly concluded that Mr. Thomas was ineligible for unemployment benefits.

Mr. Thomas argues that the reasonable assurance statute does not apply to him because he was a “year-round” employee and had no break or vacation between academic terms. This argument is unpersuasive under the plain language of the statute. If a statute’s meaning “is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Dep’t of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). The plain meaning of the reasonable assurance statute is that school employees are not eligible for unemployment benefits for periods between academic years. The Court should give effect to the plain meaning of the reasonable assurance statute and affirm the Commissioner’s decision in this case.

Further, *Evans v. Department of Employment Security*, 72 Wn. App. 862, 866 P.2d 687 (1994), on which Mr. Thomas relies, does not support his claim for benefits. There, a Green River Community College instructor had requested a summer teaching position at the college, but was not selected for the position. *Id.* at 864. She applied for unemployment benefits for the summer quarter, but the Department denied her claim under the reasonable assurance statute. *Id.* On appeal, the court framed the question presented as: “[W]hether, under RCW 50.44.050(1), summer is an academic ‘term’ at a community college such as Green River Community College.” *Id.* at 865. It concluded that summer was an

academic term at the college because the college offered summer classes, and the parties did not show that the summer term was in any way “qualitatively different from the other [academic] terms.” *Id.* at 866. Therefore, the weeks for which the claimant sought benefits did not fall *between* two successive academic terms—they occurred *during* an academic term. *Id.* at 866-67. Accordingly, RCW 50.44.050(1) did not prevent the claimant from receiving unemployment benefits. *Id.* at 867.

Unlike in *Evans*, the evidence here supports the conclusion that July 2011 was part of the school’s summer break and was therefore a “period *between* two successive academic years.” RCW 50.44.050(2) (emphasis added); *see* AR at 12-14, 42, 44-45, 47-49. Mr. Thomas argues that he was in the same position as the claimant in *Evans* because he worked year-round and there was no break in his work year. But in determining whether a summer was part of the academic year in *Evans*, the court focused on the school, not the work history of the individual claimant. *See Evans*, 72 Wn. App. at 865-67. There, the court concluded that summer itself at Green River Community College was an “academic term” because classes were offered, grades were awarded, and credits were granted during that time. *Id.* at 866-67. Additionally, the court in *Evans* relied on an earlier version of the reasonable assurance statute that

did not yet include a specific definition of “academic year.” *See* former RCW 50.44.050 (1990).

The Legislature responded quickly to clarify the *Evans* decision. *See* Final Bill Report on E.S.H.B. 1821, 54th Leg., Reg. Sess. (Wash. 1995). Recognizing that *Evans* raised a potential issue regarding the state’s conformity with federal requirements, the Legislature added a new definition of “academic year” to the reasonable assurance statute, specifically “with respect to services . . . performed by part-time faculty at community colleges and technical colleges.” Laws of 1995, ch. 296, § 2; *see also* Final Bill Report on E.S.H.B. 1821, 54th Leg., Reg. Sess. (Wash. 1995). In 1998, the Legislature amended the statute again to make the definition of “academic year” applicable to all benefits based on services to educational institutions. Laws of 1998, ch. 233, § 2; *see also* Final Bill Report on E.S.H.B. 2947, 55th Leg., Reg. Sess. (Wash. 1998).

The current reasonable assurance statute directs the Department, in determining whether a period is part of an academic year, to look to “objective criteria . . . *for the particular institution.*” RCW 50.44.050(5) (emphasis added). In Mr. Thomas’s case, the objective criteria included a statement from a school district representative indicating that Mr. Thomas “is currently on a school break” and had received a reasonable assurance “to return to work in the same or similar capacity after the Summer break

from 6/23/11 through 9/6/11, returning 9/7/11.” AR at 42. The administrative record also includes a calendar for the Seattle Public Schools, showing “Last Student Day[s]” on June 21 and 23, 2011, and the “First Day of School: 2011-12” on September 7, 2011. AR at 47-49. Nothing in the record supports an inference that summer was part of the school district’s academic year. On the contrary, the evidence supports the finding that the summer weeks Mr. Thomas sought benefits fell between two successive academic years. Simply because the school district offered, and Mr. Thomas accepted, summer work as a custodian or groundskeeper at the end of the previous academic years does not convert the summer to an “academic term” for the Seattle School District. The Commissioner correctly concluded that Mr. Thomas was ineligible for unemployment benefits, as he sought benefits for a period that fell between two successive academic years.

B. The Commissioner’s decision is consistent with the legislature’s intent in enacting the reasonable assurance statute, and Mr. Thomas’s previous summer employment with the school district does not qualify him for benefits during the summer of 2011.

The purposes behind the reasonable assurance statute support the Commissioner’s decision in Mr. Thomas’s case. That Mr. Thomas had previously chosen to obtain additional summer work with the school district does not mean that he meets the requirements for unemployment

benefits for the summer of 2011. As discussed above, the plain language of the reasonable assurance statute supports the Commissioner's conclusion that Mr. Thomas did not qualify for benefits. While Mr. Thomas may have anticipated additional summer work in the summer of 2011, the Commissioner's denial of benefits is consistent with the purposes behind the reasonable assurance statute.

States receive federal funds for unemployment compensation if they pass legislation conforming to federal requirements. 26 U.S.C. § 3304. The reasonable assurance statute is one such "conforming" statute. *Compare* RCW 50.44.050 *with* 26 U.S.C. § 3304(a)(6)(A); *Berland v. Emp't Sec. Dep't*, 52 Wn. App. 401, 407, 760 P.2d 959 (1988). The federal funds are intended to provide benefits for workers during aggravated periods of unemployment. *Berland*, 52 Wn. App. at 407-08. This Court has have recognized that "unemployment during a school vacation is not the type of unpredictable layoff that unemployment benefits are designed to redress." *Id.* at 408-09; *see also Thomas v. Dep't of Labor*, 170 Md. App. 650, 660, 908 A.2d 99 (2006) (federal ineligibility provision sought to exclude those employees who can plan for temporary unemployment and thus do not truly suffer from economic insecurity).

Here, Mr. Thomas argues that he should have qualified for benefits because he was not offered work as a groundskeeper in the summer of

2011 as he had been in three prior years. Br. of Appellant at 9, 12. But while the school district had previously hired Mr. Thomas to work in another capacity during the summer, his claim for benefits was based upon his services to an educational institution with a conventional summer break period. AR at 44-45, 50-51. Though Mr. Thomas may have anticipated the availability of additional summer work in 2011, that work was not guaranteed, and the school district had previously offered the work on a summer-by-summer basis. AR at 12, 44, 50-51, 64. The work simply happened to have been available the three previous summers Mr. Thomas worked for the school district. Like other employees of educational institutions, Mr. Thomas was dealing with a predictable, temporary break from work. This is exactly the type of situation contemplated by the reasonable assurance statute and the associated federal legislation. RCW 50.44.050; 26 U.S.C. § 3304(a)(6)(A).

To take Mr. Thomas's argument to its logical conclusions, because the school district previously gave him an unrelated summer job, it must continue to offer him summer work each year or he will qualify for unemployment benefits every summer for the indefinite future. This result is inconsistent with the recognized reasons behind the reasonable assurance statute. *See, e.g., Berland*, 52 Wn. App. at 408-09 (substitute

teachers' "unemployment during a school vacation is not the type of unpredictable layoff that unemployment benefits are designed to redress").

C. Granting benefits to Mr. Thomas during his temporary summer break would undermine the Employment Security Act's requirement that claimants be available for work.

Mr. Thomas's position also raises serious questions relating to other aspects of Washington's employment security law. To be eligible for unemployment benefits, an individual must be "able to work" and "available for work." RCW 50.20.010(1)(c). To be available for work, an individual must be ready, able, and willing immediately to accept any suitable work which may be offered to him or her and must be actively seeking work pursuant to customary trade practices. RCW 50.20.010(1)(c)(ii). Because of the availability requirement, a claimant may not "impose conditions that substantially reduce or limit [his or her] opportunity to return to work at the earliest possible time." WAC 192-170-010(c).

Relying on this principle, the Court has held that a community college secretary who sought benefits for the summer months was ineligible because of her self-imposed limitation that she would only accept temporary, summer employment and not year-round employment.

Arima v. Emp't Sec. Dep't, 29 Wn. App. 344, 628 P.2d 500 (1981) (does not address the reasonable assurance statute). Thus, the secretary was not truly “available” for work. *Id.* at 350-51.

In this case, granting benefits to Mr. Thomas—a school employee on summer break—would undermine the availability requirement and this Court’s previous decisions. *See, e.g., Arima*, 29 Wn. App. at 350-51; *In re Griswold*, 102 Wn. App. 29, 15 P.3d 153 (2000) (claimant was “available for work” under RCW 50.20.010 where she did not place geographic or time constraints on her job search, never refused offers of employment, and did not refuse job referrals); *Jacobs v. Office of Unemployment Comp. & Placement*, 27 Wn.2d 641, 660, 179 P.2d 707 (1947) (claimant failed to prove that she was “available for work” where evidence showed that she restricted her work search to daytime employment and failed to show that she had proper transportation if work were offered to her). Because Mr. Thomas has a full-time, permanent position during the school year, he is not truly “available” to accept permanent work during the summer break. To rule otherwise, defies the availability requirement in RCW 50.20.010, and years of precedential case law.

D. The Commissioner's decision in Mr. Thomas's case is consistent with case law from other jurisdictions.

Finally, because Washington's reasonable assurance statute originates from federal legislation, the Court will find persuasive authority in other jurisdictions with similar conforming legislation. For example, the Minnesota Court of Appeals has consistently refused to accept the argument that previous summer employment is relevant to the question of a school employee's claim for benefits during the summer break. First, in *Swanson v. Independent School District No. 625*, 484 N.W.2d 432 (Minn. Ct. App. 1992), the court considered a claim for benefits made by a year-round employee of a school district who was initially laid off in June 1991, but then informed on June 14 that she would be rehired effective July 1, 1991. *Id.* at 433. Looking at the plain language of Minnesota's reasonable assurance statute, the court concluded that Ms. Swanson was not eligible for benefits between June 14 and July 1, 1991, because those two weeks of unemployment occurred between two school years and she had received an assurance of reemployment in the upcoming school year. *Id.* at 433-34. Though Ms. Swanson had previously been a year-round employee, the court refused to "disregard the letter of the law under the pretext of pursuing its spirit." *Id.* at 434. Further, the court noted that its decision was consistent with decisions from other jurisdictions reviewing

similar statutory language. *Id.* (citing cases where school employees' summer hours were cut despite full-time employment in previous summer terms).

Similarly, in *Halvorson v. County of Anoka*, 780 N.W.2d 385 (Minn. Ct. App. 2010), the court considered a teacher's claim for unemployment benefits due to a reduction in summer work hours. *Id.* at 387. The teacher had worked full time during the summer for several years, but as enrollment declined, the school only offered him reduced hours as a tutor in the summer of 2008. *Id.* His work as a teacher was set to resume at full-time levels in the fall. *Id.* The court, examining the circumstances of the particular school at which the claimant taught, concluded that the summer term fell "between successive academic years." *Id.* at 391. Additionally, "[t]hat [the claimant] had received near full-time hours during the summer of 2006 or earlier years does not mean that he meets the requirement for unemployment benefits for the summer of 2008." *Id.*

Here, as in *Swanson* and *Halvorson*, the Court should conclude that Mr. Thomas's previous summer work for the school district is not relevant to the question of whether he met the requirements for unemployment benefits for the summer of 2011.

E. An award of attorney fees is only allowable if the Court reverses or modifies the decision of the Commissioner.

The Act provides for an award of attorney fees and court costs to a claimant only if the decision of the Commissioner is reversed or modified. RCW 50.32.160. Only a reasonable attorney fee may be charged under the statute. *Id.* Here, the Court should refuse Mr. Thomas’s request for attorney fees if it affirms the decision of the Commissioner. *See id.* If the Court reverses or modifies the Commissioner’s decision, the Department reserves the right to present argument regarding the reasonableness of attorney fees granted.

VI. CONCLUSION

Mr. Thomas is an employee of an educational institution. He sought unemployment benefits for the summer of 2011—a period that fell between two successive academic years—though he knew he would be returning to work in the fall. The fact that the school district offered him summer custodial or grounds-keeping work at the end of the three previous academic years does not mean that the summer was an “academic term” or part of the “academic year” under the Employment

Security Act. This Court should affirm the Commissioner's decision denying Mr. Thomas benefits under RCW 50.44.050(2).

RESPECTFULLY SUBMITTED this 7th day of December, 2012.

ROBERT M. MCKENNA
Attorney General

April Benson Bishop
APRIL BENSON BISHOP,
WSBA # 40766
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Dan Marvin, certify that I served a copy of this **Respondent's**
Brief on all parties or their counsel of record on the date below as follows:

ABC/Legal Messenger

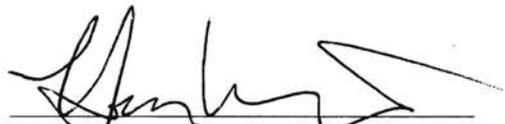
Marcus Lampson
Unemployment Law Project
1904 Third Ave., Suite 604
Seattle, WA 98101

Original filed with

Washington State Court of Appeals, Division I
One Union Square
600 University St
Seattle, WA 98101-1176

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 7th day of December, 2012, at Seattle, WA.



Dan Marvin, Legal Assistant