



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: OCTOBER 27, 2009

IN THE MATTER OF: Appeal Board No. 547013

PRESENT: EILEEN M. LONG CHELALES, TANYA R. DANIEL MEMBERS

The Department of Labor issued the initial determination holding the claimant eligible to receive benefits. The employer requested a hearing and objected contending that the claimant should be disqualified from receiving benefits because the claimant refused an offer of suitable employment without good cause.

The Administrative Law Judge held a telephone conference hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance by the employer. By decision filed May 28, 2009 (), the Administrative Law Judge overruled the employer's objection and sustained the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant was employed for an employer in Allegany County as a production worker during periods of time from 2003 through 2008. The claimant last earned \$8.89 per hour. On November 14, 2008, the claimant was laid off without a definite date of return. In January 2009, the employer offered to rehire the claimant in a comparable position, at the rate of pay she had last earned, \$8.89. The claimant did not respond to the employer's offer of rehire.

The New York State Department of Labor's Prevailing Wage Program identifies prevailing wages for workers in various categories of jobs in the various regions of New York State. From among the categories of work that the Prevailing Wage Program recognizes, the job that the employer offered the claimant could fairly be characterized as Team Assembler, Helper-Production Worker, or Production Worker-All Others. In the Western New York Region, the prevailing wages for these respective categories are \$12.45,

\$10.70, and \$11.40 per hour. The Unemployment Insurance cutoff rates for these respective categories are \$11.20, \$9.63, and \$10.26 per hour.

OPINION: Labor Law § 593 (2) provides, in pertinent part: "No refusal to accept employment shall be deemed without good cause nor shall it disqualify any claimant otherwise eligible to receive benefits if... (d) the wages or compensation or hours or conditions offered are substantially less favorable to the claimant than those prevailing for similar work in the locality." Therefore the claimant cannot be disqualified for refusing a job that would pay substantially less than the prevailing wage. The employer offered the claimant \$8.89 per hour. The prevailing wage cut off rates for jobs comparable to what the claimant would be performing, for the Western New York area, where Allegany County is situated, are \$11.20, \$9.63 and \$10.26 per hour. The offered amount is below these figures and thus would be substantially less favorable to the claimant. It is not controlling that the claimant had accepted that same wage from the employer during a previous period of employment. She is not required to accept that wage when it was offered to her this time. We are also not persuaded by the employer's argument that the amount offered to claimant is within their own prevailing wage. The anecdotal testimony offered by the employer as to prevailing wage does not negate the Department's statistical evidence for Western New York. Under these circumstances we must conclude that the offer of employment was below prevailing wage and claimant had good cause to refuse the offer.

DECISION: The decision of the Administrative Law Judge is affirmed.

The employer's objection, that the claimant should be disqualified from receiving benefits because the claimant refused an offer of suitable employment without good cause, is overruled.

The initial determination, holding the claimant eligible to receive benefits, effective date, is sustained.

The claimant is allowed benefits with respect to the issues decided herein.

EILEEN M. LONG CHELALES, MEMBER

TANYA R. DANIEL, MEMBER