SUITABLE WORK: 480
Vacant Due to a Labor Dispute.

VIRGINIA EMPLOYMENT COMMISSION

DECISION OF APPEALS EXAMINER

NOTICE: This decision becomes final unless appealed in writing by any party named setting forth the grounds upon which the appeal is sought either at the office where the claim was filed or by mail to the Appeals Section, Virginia Employment Commission, P. O. Box 1358 Richmond, Virginia 23211, not later than midnight of October 6, 1981

In the matter of:

Claimant

Thomas Rothe
330 E. Hawthorne St.
Covington, Va. 24426

Employer

Covington Virginian
P. O. Box 271
Covington, Va. 24426

Appellant:	☐ Employer ☒ Claimant
Claimant's S.S. No.:	[redacted]
Decision No.:	UI-81-9133
Date Deputy's Determination:	August 14, 1981
Date Referred or Appealed:	August 27, 1981
Date of Hearing:	September 10, 1981
Place of Hearing:	Covington, Va.
Date of Decision:	September 10, 1981
Date of Mailing:	September 15, 1981

APPEARANCES: Claimant; Employer Representative; Employment Service Representative

STATUTORY PROVISION(S) & POINT(S) AT ISSUE: Code of Virginia, Section 60.1-58 (c) Did the claimant fail without good cause to apply for or accept available, suitable work?

FINDINGS OF FACT: The claimant filed a timely appeal from a determination of the Deputy which disqualified him for unemployment compensation effective August 2, 1981, for having failed without good cause to apply for or accept available, suitable work.

The claimant was last employed as a security guard for the Covington Virginian in Covington, Virginia, from March 24, 1981, through July 18, 1981.

The claimant had been hired because the regular employees of the newspaper were going on strike and there was some thought that there might be problems since the paper was planning to continue operations using non-striking personnel. After four months, it was determined that the claimant's services were no longer needed and he was laid off due to lack of work. At the time of the hearing, however, the strike was still in progess and the employer does continue to operate in spite of it.

On August 3, 1981, the employer contacted the claimant and offered him the position of a reporter/trainee, covering courthouse news

and sports events at a local high school. He was offered $160.00 per week for a 35 hour week which actually worked out to more than the $4.00 per hour he had been receiving as a security guard. Because there was no overtime involved, the claimant would have suffered a net decrease in pay and he would have had babysitting problems since the hours would have conflicted with his wife's job. He therefore declined the offer.

The employment service representative testified that the job which the claimant was offered paid the prevailing wage rate for such work in the locality and involved terms and conditions prevailing for such work. He went on to indicate that the local job market was extremely tight.

When asked where the vacancy for a reporter/trainee came from, the claimant indicated that it was his assumption that he was to replace one of the reporters who had gone out on strike. The employer representative indicated that this was not actually so; rather the claimant was to replace a reporter who had been hired on a temporary basis only until such time as she returned to college.

OPINION: Section 60.1-58 (c) of the Virginia Unemployment Compensation Act provides:

> "If it is determined by the Commission that such individual has failed without good cause, either to apply for available, suitable work when so directed by the employment office or the Commission or to accept suitable work when offered him, and the disqualification shall commence with the week in which such failure occurred, and shall continue for the period of unemployment next ensuing until he has performed services for an employer during thirty days, whether or not such days are consecutive.
>
> In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience, his length of unemployment and the accessibility of the available work from his residence.
>
> Notwithstanding any other provisions of this title, no work shall be deemed suitable and benefits shall not be denied under this title to any otherwise eligible individual for refusing to accept new work under any of the following conditions:
>
> (1) If the position offered is vacant due directly to a strike, lockout, or other labor dispute;
>
> (2) if the wages, hours, or other conditions

of the work offered are substantially less favorable to the individual than those prevailing for similar work in the locality;

(3) if as a condition of being employed the individual would be required to join a company union or to resign from or refrain from joining any bona fide labor organization."

In the present case, the Appeals Examiner is presented with a situation of first impression. It appears from the evidence from the employment service representative that the claimant was offered a job which would be considered suitable under sub-section (2) of the aforementioned Section of the Act. Nevertheless, the fact that the employer is experiencing a labor dispute by workers in the same position as that which was offered to the claimant, brings up the question of suitability under the provisions of sub-section (1) of the aforementioned Section of the Act.

The language of the Act is clear in stating that no work is to be considered suitable under any of the sub-section conditions. Therefore, if it is to be found that the position offered the claimant was vacant due directly to a strike, then it would not be considered suitable work for him and a disqualification under this Section of the Act could not apply. This brings up the application of the word directly as it is used in the Statute. From the employer's statement, it is apparent that an argument might be made that since the claimant was not replacing one of the striking employers; rather he was merely replacing a college student hired for the summer, the vacancy was not directly due to the strike.

This Appeals Examiner feels that to place such an interpretation on the provision of the Act quoted above, would be to weaken the entire reason behind it. It is apparent that the General Assembly meant for the Commission to maintain a hands off policy with regards to labor disputes. This can be clearly seen with regards to the provision of Section 60.1-52 (b) of the Code of Virginia, which deny unemployment benefits to individuals who are participating in, financing, or directly interested in a labor dispute. In previous decisions decided under this Section of the law, the Commission has held that the term "directly interested in" does apply to individuals who are not union members, who never walk picket lines, and who may have even wanted to go to work but were prevented from doing so by a lockout. It is apparent, therefore, that the word "directly" has been interpreted in a very broad sense with regards to participation in a labor dispute. This Appeals Examiner feels that the same type of broad interpretation should be imposed with regard to an offer of work which might be vacant directly due to a labor dispute. Here, if there were no strike in effect against the employer, then, presumably, the employer would not have had to hire a reporter either on a temporary basis for the summer or on a permanent basis otherwise. Therefore, so long as a labor dispute

remains in active progress at the Covington Virginian, any vacancy to a position affected by that dispute must be deemed to be directly a result of it. (Underscoring Supplied)

The Commission has held in past decisions that the employer/employee relationship is merely suspended during a labor dispute and not severed. That is not to say, however, that an individual cannot be fired during a labor dispute or cannot quit during the same period of time. If the striking workers chose to call off their strike and report back to work, then the dispute would be unilaterally ended. Likewise, if the employer chose to inform the striking workers that they were fired, the dispute would also be over as far as this Commission is concerned. Until one or the other alternatives happen, however, the dispute must be deemed to be in active progress and, since the claimant was offered a position which was directly open because of it, it does not represent suitable work so as to subject him to a disqualification under this Section of the Act.

DECISION: The determination of the Deputy which disqualified the claimant for unemployment compensation effective August 2, 1981, for having failed without good cause to apply for or accept available, suitable work is hereby reversed.

The Deputy is instructed to carefully determine the claimant's eligibility for benefits during any weeks for which they may have been claimed.

Charles A. Young, III, S.R.

Charles A. Young, III
Appeals Examiner