BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

LUPE BEARD
(Claimant)

HOLLENBECK HOME FOR THE AGED
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-234
Case No. 75-8576

Referee's Decision No. LA-16705

The employer appealed from the referee's decision which held the claimant was not disqualified for unemployment insurance benefits within the meaning of section 1257(b) of the Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant had been formerly employed by the above employer and had been recently discharged for excessive absenteeism. The claimant's attendance problem had been brought about primarily due to her uncontrolled diabetic condition. Shortly after the claimant's termination, the employer offered the claimant part-time reemployment which the claimant refused. In response to the employer's timely protest, the Department issued a determination on June 11, 1975 which provided the claimant had not refused an offer of suitable employment without good cause and was therefore not disqualified for benefits under section 1257(b).

The employer, an electing entity which has selected reimbursable financing for unemployment compensation coverage and thus has no reserve account, filed a timely appeal to the Department's determination. A hearing was held before a Referee on August 26, 1975 at which the employer, the claimant and the Department testified. The referee issued a written decision on September 2, 1975 which affirmed the Department's determination.

It is from the referee's decision the employer has appealed to this Board.

REASONS FOR DECISION

Although the employer has not specifically so requested, it must be presumed by virtue of its appeal to this Board that it seeks some type of relief in connection with benefit payments that have been made to the claimant in the past and those which may be made in the future.

To assure compliance with various conformity requirements of federal law, section 803 of the Unemployment Insurance Code was enacted. Subsection (a) of this section allows "entities" such as nonprofit organizations, state hospitals and institutions of higher learning, the right to elect one of the reimbursement methods of financing unemployment compensation coverage described in subsection (b) thereof in lieu of making contributions under the regular tax provisions of the code.

Therefore, an authorized entity which has made an election under code section 803(b) does not have a reserve account and is not obligated as a reserve account employer is required, to make regular contributions to the Unemployment Fund pursuant to the tax schedules set out in sections 977 and 978 of the code or contributions to the balancing account required by section 976.5.

Section 803(c) specifically makes inapplicable to an authorized entity which has made an election under section 803(b), code sections 1030, 1030.5, 1031, 1032 and 1032.5, and any other provision of the code which provides for the noncharging of benefits to the reserve account of an employer.

Section 1335 of the code provides in pertinent part that if a referee affirms a determination which has allowed benefits, such benefits shall be promptly paid regardless of any appeal which may thereafter be taken, and regardless of any action taken under section 1336 or otherwise by the director, Appeals Board, or other administrative body or by any court.

This section also provides that if such determination is finally reversed, no employer's reserve account shall be charged with benefits paid because of that determination. This section does not, however, provide relief under such circumstances to employers who do not have a reserve account.

If the employer here had a reserve account, a reversal of the referee's decision by this Board would effectively relieve that reserve account from any benefit charges occasioned as a result of the determination in question. Benefits paid to the claimant would then be charged against the balancing account. Code section 1027(b) provides essentially that, except as provided by section 803, the balancing account shall be charged with benefit payments not charged to employer reserve accounts pursuant to section 1032 et al.

In this case, there is no fund against which the claimant's benefits can be charged if the employer is to be relieved of that responsibility. To charge the Unemployment Fund with such benefits would be violative of code section 803 because an electing entity undertakes to pay to the Unemployment Fund either the additional cost to the fund of benefits paid or the actual cost of such benefits. To relieve an electing entity of this responsibility under such circumstances would unfairly thrust that responsibility upon the reserve account employers of this state who have regularly contributed to the Unemployment Fund.

In view of these considerations, as well as the express language of section 1335, we are powerless to grant any relief to this employer in either the form of a discontinuance of benefits or the establishment of an overpayment. Therefore, any decision on the merits by us would serve no useful purpose. There may appear to be some element of unfairness in this result, but no other conclusion is possible under the legislative provisions by which we are bound. If the application of such provisions result in hardship or inequity, recourse should be had to the legislature and not to this Board.

DECISION

The appeal is dismissed.

Sacramento, California, February 11, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

CARL A. BRITSCHGI

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

HARRY K. GRAFE

DISSENTING OPINION

I dissent.

I cannot accompany my colleagues on their unsanctioned invasion of the legislative domain and in their unauthorized invention of a barrier to appeals by a certain class of employers. Plainly stated, I just do not believe we possess the power to take the action asserted by the majority in this case.

To all intents and purposes, the majority opinion effectively forecloses appeals to this Board by that class of employers who have made an election pursuant to subdivision (b) of section 803 of the Unemployment Insurance Code to forego the "reserve account" method of making contributions to the Unemployment Fund. There are at least three legal reasons contraindicating such foreclosure. Additionally, there well may exist a constitutionally-based question of equal protection of the law, but I leave argument on this issue to the fertile initiative of some interested employer.

The initial legal defect involves the vehicle of the precedent decision utilized by the majority. The impact of a precedent decision is limited by section 409 of the Unemployment Insurance Code:

> ". . . The Director of Employment Development, the Director of Benefit Payments, and the appeals board referees shall be controlled by such precedents except as modified by judicial review."

Thus, the binding effect of a precedent decision is visited upon the two named departments and the Board's referees (now referred to as Administrative Law Judges). However, the instant precedent, by its very terms, can have no binding effect upon either department or the Administrative Law Judges. The department must still carry out its statutory obligation to make and issue determinations and to perform all functions incident thereto. And, the Administrative Law Judges must hear and decide any appeal from any such determination of the department. It is only at the Board level that the thrust of this precedent decision is felt. Such, I submit, is a misuse of the precedent decision, and is something neither contemplated nor authorized by the controlling statute.

Second and more serious is the majority opinion's abnegation of the statutory right of appeal given to this class of employer. Section 1336 of the Unemployment Insurance Code statutorily guarantees that: "The Director or any party to a decision by a referee may appeal to the appeals board from the decision." Section 1337 requires the Board to render a decision, generally within 60 days, "on an appeal from the decision of a referee." Nowhere in the code is there a provision denying or abrogating the right of appeal by this class of employer. Nowhere in the code is there any authority for this Board to decline to decide appeals by this class of employer.

The source of this Board's power and authority lies in the statutes enacted by the Legislature. We are not a body which derives its existence from the fundamental law of the State as set forth in the California Constitution. Rather, we are a Board of limited jurisdiction, dependent upon the Legislature for such authority as may be granted to us.

If the Legislature in its wisdom finds that this class of employer should not be afforded the right to appeal to this Board and to have its appeals decided by this Board, the Legislature has the prerogative to so enact (again, for the purpose of this discussion, laying aside the consideration of questions of basic constitutional rights). But we, as members of this Board, are patently lacking in the power to make such a rule of law. Rather, it is our function to declare the law and not make it or rewrite it (People v. White, 122 Cal. App. 2d 551), or add what has been omitted or omit what has been added (Cornwell v. Bush and Stoddard Ins., 28 Cal. App. 2d 333). We may not deviate from the language used by the Legislature when that language involves no ambiguity (Sacramento County v. Hickman, 66 Cal. 2d 841) or necessary inconsistency with the general purpose of the statute (Bakersfield Home Building Company v. McAlpine Land Development Company, 26 Cal. App. 2d 444).

We must accept and apply the law as we find it, and if its operation results in inequity or hardship in some cases, the remedy lies with the Legislature (Jordan v. Retirement Board, 35 Cal. App. 2d 653). Thus, if the Legislature is of the collective opinion that the class of employer which elects an alternate means of financing unemployment compensation coverage as allowed by subdivision (b) of section 803 should thereby forego its right to have appeals decided by this Board in "double affirmation" cases like the instant matter, the Legislature may take appropriate action to so revise the statutes. But, unless and until the Legislature takes such action, we lack the authority to enlarge or constrict our jurisdiction and the rights granted to parties by the code.

A third legal ground for assault on the majority opinion arises from the express provisions of subdivision (b) of section 1335 of the Unemployment Insurance Code. Although my colleagues accurately paraphrase the provisions of said section, they fail to apply the statute properly, and by the over-reach of the majority opinion, an untold number of employers are secondary victims.

I have reviewed a number of cases in which the claimant had been employed only a relatively short time by the employer who elects an alternate means of financing unemployment compensation coverage as permitted by subdivision (b) of section 803. I submit that in such a case, the matter is far from moot, insofar as it applies to one or more base-period employers who do not come under the provisions of section 803. Our recent decision in Case No. 75-11730 is an example (and, in that case, two members of the majority herein joined me in carrying the matter through to decision). There, the claimant had been employed by the section 803-type employer for only seven months. Although we did not have the claimant's entire employment history before us as part of the record, it appeared that there could well have been one or more non-section 803 employers as claimant's base-period employers.

Even more pertinent is our recent decision in Case No. 75-11335, where the employer was a non-profit hospital, which elected coverage under section 803(b). There, the claimant had worked for the hospital for only three months and the record revealed that there were two non-section 803 employers during the claimant's base period, as the claimant had been employed by a research organization and in retail sales before his employment by the hospital. Moreover, one of the issues raised by the hospital on appeal to this Board was the assertion that the claimant had not established good cause for the reopening of the case, the claimant not having attended the first hearing and a decision adverse to him having been issued by the Administrative Law Judge. Although all issues were ultimately resolved in favor of the claimant, the fact cannot be overlooked that non-section 803 employers' reserve accounts were affected and, had the hospital prevailed on the question of good cause for reopening, the earlier decision of the Administrative Law Judge would have been reinstated and the hospital as well as the reserve accounts of the non-section 803 base-period employers would have been relieved of charges.

To such non-section 803 base-period employer, the Board's decision on the merits is crucial. Under subdivision (b) of section 1335 of the code, although benefits continue to be payable to the claimant in a "double affirmation"[1] situation:

> "If such determination is finally reversed, no employer's account shall be charged with benefits paid because of that determination."

To be sure, as the majority opinion explains, by reason of the express provisions of section 803, an employer who elects an alternative method of financing unemployment compensation coverage does not obtain relief if the Board reverses a "double affirmation," as such employer has no account which was charged and thus which could be relieved of charges. But, that result is only true as to section 803 employers. For a non-section 803 base-period employer, a Board reversal of a "double affirmation" will relieve such employer's account of charges, even though such employer is not the most recent employer. Such is the effect of that portion of section 1335(b), quoted above.

Thus, the non-section 803 employer who is a base-period employer can only have the effect on his reserve account judged derivatively through the section 803 employer's appeal to this Board. Consequently, when this Board cuts off the section 803 employer's right to have his appeal decided, as the majority members herein decree, the effect is to shut off any derivative means which a non-section 803 base-period employer otherwise would have to obtain relief for his reserve account. This denial of relief by the majority herein without any alternative means of redress for the non-section 803 base-period employer is unconscionable and utterly lacking in statutory authority.

Although the instant case involves a claimant who worked for the section 803 employer for four years (thus obviating the possibility of any other base-period employer, approximately one-half the cases that have come to my attention have involved a non-section 803 base-period employer.

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[1] "Double affirmation" describes a situation in which the Department's determination finds that benefits are payable to the claimant and, following the employer's appeal, the Administrative Law Judge affirms that determination. Even though the employer may take further appeal, once there has been a "double affirmation," benefits continue to be payable, regardless, so long as the claimant is otherwise eligible.

Yet, the majority have issued a blanket edict effectively barring the door in all cases of "double affirmation" where the most recent work was performed for a section 803 employer. That the majority have not chosen or cared to carve out an exception to their rule in cases where there exists a non-section 803 base-period employer is both regrettable and open to legal challenge.

When my colleagues boldly assert: "Therefore, any decision on the merits by us would serve no useful purpose," they have lost sight both of the law and of the facts

HARRY K. GRAFE