BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ROBERT BERNARD JOHNSON, JR.
(Claimant))

PRECEDENT
BENEFIT DECISION
No. P-B-241
Case No. 75-8983

Referee's Decision No. LA-17445

The claimant appealed from the referee's decision which held that the claimant was disqualified for benefits under section 1256 of the Unemployment Insurance Code on the ground that he had been discharged for misconduct connected with his most recent work.

STATEMENT OF FACTS

The claimant was last employed as a serviceman by a security systems company for a period of four days. This employment ended with the claimant's discharge on July 23, 1975.

We find that there is sufficient evidence to sustain a finding that at the time the claimant applied for the job he completed an initial employment application which asked if he was ever arrested. The claimant answered no. The application provided that any false statements would be grounds for immediate dismissal. After the claimant completed his initial employment application, the employer did not inquire further into the claimant's arrest record.

The claimant was hired and commenced his training as an inspector of burglar alarm systems. When applying for a clearance to obtain a bond, the claimant was confronted with an arrest record. In the process, he was instructed to inform his employer of a prior arrest. On informing his employer, the claimant was discharged for making a false statement on his employment application. Approximately six years ago, at the age of 18, the claimant was arrested for tampering. The charges were subsequently dismissed after the claimant successfully completed a probationary period.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits if he has been discharged for misconduct connected with his most recent work.

In Appeals Board Decision No. P-B-3, we found that the four elements necessary to establish misconduct are:

1. A material duty owed by the claimant to the employer under the contract of employment;

2. A substantial breach of that duty;

3. A breach which is a wilful or wanton disregard of that duty; and

4. A disregard of the employer's interests, which tends to injure the employer.

In Appeals Board Decision No. P-B-77, we held that in facts similar to the present case the employer had the right to inquire of a prospective employee as to matters of his arrest record and a claimant who, without justification, failed to reveal his arrest record substantially breached a duty owed the employer. In holding that the claimant was discharged for misconduct, we stated:

> "Counsel for the claimant has cited no statutory authority prohibiting employers from questioning prospective employees concerning arrests or convictions, and we are not aware of any such prohibition. The California Labor Code does limit the areas of inquiry an employer may make in connection with prospective employment but the disclosure of an arrest record is not one of them. (See, for example, section 1420 of the Labor Code). The act of making application for employment carries with it of necessity the requirement that matters of proper concern to a prospective employer are open to its inquiry. This inquiry may be very broad. Considering the nature of the job for which the claimant made application, security guard, and the nature of the employer's business, we can only conclude that the inquiry was proper and a necessary safeguard to the employer in the selection and retention of its employees."

Subsequent to our decision in Appeals Board Decision No. P-B-77, the Legislature passed into law section 432.7 of the Labor Code. It provides:

> "No employer, public or private, shall require on an initial employment application form a record of arrests or any questions regarding arrest records. Questions regarding convictions are permitted. Questions regarding arrest records are permitted in the employment process following receipt of the initial application form. Nothing in this section shall prevent a public agency authorized by law from requesting arrest records from the Division of Law Enforcement. A violation of this section is a misdemeanor punishable by a fine not to exceed five hundred dollars ($500).
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> "This section does not apply to persons seeking employment as peace officers."

It is apparent that our decision in Appeals Board Decision No. P-B-77 is too broad and sweeping under the present law. We must limit the application of Appeals Board Decision No. P-B-77 to those cases where the employer has a legitimate basis for inquiring into the arrest records of potential employees.

The facts in the present case show that the claimant was asked on his initial employment application whether he was ever arrested. The claimant answered no. When the claimant made application to be bonded in his employment, he revealed to his employer a prior arrest without conviction which resulted in his discharge. Under section 432.7 of the Labor Code, the employer had no right to inquire into the claimant's arrest record on the initial employment application. It follows that the claimant had no duty to reveal his arrest record at that time. After the initial application was filed by the claimant, the employer had an opportunity to inquire as to the claimant's arrest record, because the law does not prohibit questions regarding arrest records in the employment process following receipt of the initial application form.

The claimant did not withhold information from the employer or falsify answers concerning his arrest record after the initial application was filed. Under such circumstances, we cannot find the employer's request of the claimant to answer a question in an initial employment application to be the basis for establishing misconduct when such action is in violation of state law.

If we were to find misconduct on such facts, we would be condoning such actions and seemingly approving violations of the law. We can only conclude that there was no substantial breach of a duty to the employer and any injury to the employer that might have arisen from the employer's reliance on the claimant's answer in the initial employment application is caused not by the claimant's answer, but by the employer's act in requesting such information on an initial employment application which is contrary to law.

DECISION

The decision of the referee is reversed. The claimant is not disqualified for benefits under section 1256 of the code.

Sacramento, California, February 17, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

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