BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

THURMAN CARROLL
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-292
Case No. 75-9522

Office of Appeals No. S-SUA-26923-A

The claimant appealed from the decision of the Administrative Law Judge which held that the claimant was not available for work and denied benefits under section 1253(c) of the Unemployment Insurance Code. The decision also held that the claimant's eligibility for benefits under section 1253(e) of the code need not be considered.

STATEMENT OF FACTS

For the last several years the claimant, age 64, has been employed as a home caretaker and gardener. He was last employed as a gardener for four years ending in February 1975.

While claiming benefits in the Marysville office of the Employment Development Department the claimant was interviewed on June 2, 1975 and was instructed that he was to register and look for farm labor work. The claimant contacted the Department's farm labor office in Marysville on the same day and was advised that there would be no farm labor work until the tomato harvest. The claimant did not personally contact farmers in the area because of the expense involved for such extensive travelling. The farmers he knew personally were not hiring.

During the two-week period ending June 14, 1975 the claimant regularly checked the newspaper ads for work as this was the method he generally followed in obtaining his prior employments. He responded to all of the ads which specified gardener or caretaker work as he was principally interested

in obtaining these kinds of work. He contacted a private employment agency and on June 13, 1975, he checked with the employment office in Quincy, California. He applied for work at a cannery and at a mill where he was told that a younger man was wanted to perform the work for which he made application.

On August 19, 1975 the claimant obtained work as a gardener in the Lodi, California area as a result of responding to an ad in a Sacramento newspaper.

In addition to the denial of benefits under section 1253(c) of the code the Department determined that the claimant was ineligible for benefits under section 1253(e) for the two-week period ending June 14, 1975 on the ground that he failed to make the required search for work.

REASONS FOR DECISION

Section 1253 of the Unemployment Insurance Code provides in part that an unemployed individual is eligible to receive benefits with respect to any week only if:

> "(c) He was able to work and available for work for that week."
>
> * * *
>
> "(e) He conducted a search for suitable work in accordance with specific and reasonable instructions of a public employment office."

Both the Department and the Administrative Law Judge denied benefits to the claimant under section 1253(c) of the code on the ground that his failure to seek farm work as instructed rendered him unavailable for work. We do not agree with this interpretation of the statutory provisions.

As set forth above, subsections (c) and (e) of section 1253 are separately stated eligibility requirements. This was not always so.

In 1953 the Unemployment Insurance Code was amended to incorporate the seek-work requirement in section 1253 as follows:

> "(c) He was able to work and available for work for that week, and had made such effort to seek work on his own behalf as may be required in accordance with such regulations as the director shall prescribe."

The director adopted a regulation (initially section 209, now section 1253(c)-1, Title 22, California Administrative Code) which prescribes in detail those efforts which would be considered by the Department as constituting a reasonable effort to seek work.

Under the statute as it existed in 1953, it was proper to deny benefits under section 1253, subsection (c) on any one of three grounds; namely, (1) inability to work, (2) unavailability for work, or (3) failure to make the prescribed search for work.

In 1961 section 1253 was again amended to remove the seek-work requirement from section 1253(c). It again became section 1253(e) and read as it does today.

Fundamental principles of statutory construction dictate that we consider subsections (c) and (e) as separate eligibility requirements. We took this position in Appeals Board Decision No. P-B-62, where the claimant was affiliated with a carpenter's union local. During a period of unemployment, he filed a claim for benefits and was given a seek-work plan which required that he register each week with his local and that he meet all union requirements relative to being dispatched to a job. In order to meet local rules, the claimant was required, in order to maintain his place on the unemployed list, to report to the local for roll call at 7:30 a.m. each Monday. On Monday, December 4, the claimant was unable to report because of transportation difficulties. As a result his name was dropped on the list from number 80 to 95. The claimant was denied benefits for the week under section 1253(c) of the code on the ground that he was not available for work for that week. We stated as follows:

"Turning our attention now to the immediate problem of the claimant's eligibility for benefits. Both the Department and the referee considered the claimant's eligibility under section 1253(c) of the Unemployment Insurance Code. This section provides that an unemployed individual is eligible for benefits with respect to any week only if he is available for work during that week. We believe that the Department and the referee were in error in considering this case under section 1253(c). While the claimant's failure to comply with the reporting requirements of the union did result in a loss of his position on the out-of-work list, it did not, on the facts of this case, affect his availability for work for that week.

"We believe that the claimant's eligibility for benefits in this case should have been considered under code section 1253(e). For such reason we remanded the matter for an additional hearing after advising the parties that we intended to consider this issue."

It is our conclusion that while the failure to seek work may be a factor to be considered together with restrictions and limitations placed by a claimant on acceptable work in arriving at the conclusion that a claimant is not available for work, such failure in and of itself cannot form the basis for a determination of unavailability (see also Appeals Board Decision No. P-B-196).

The claimant in this case imposed no unreasonable restrictions on acceptable work and there was a labor market for his services. Therefore, we hold that the claimant was available for work as required by section 1253(c) of the code.

As to section 1253(e) of the code, the claimant was instructed to register for work and look for farm labor work. When he registered with the Department he was told there would be no farm labor work until the tomato harvest. It was reasonable for the claimant to rely upon this information. Thus, to require that the claimant make a farm-to-farm search for work would be fruitless to the claimant and burdensome to employers. Any such requirement would be unreasonable and the claimant's failure to follow such instructions would not render him ineligible for benefits under section 1253(e). It is our opinion that the claimant did make other reasonable efforts to find employment during the two-week period ending June 14, 1975 and, therefore, benefits may not be denied under this section.

DECISION

The decision of the Administrative Law Judge is reversed. The claimant is not ineligible for benefits under the provisions of section 1253, subdivisions (c) and (e), of the Unemployment Insurance Code. Benefits are payable provided the claimant is otherwise eligible.

Sacramento, California, April 6, 1976.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DON BLEWETT, Chairperson

MARILYN H. GRACE

RICHARD H. MARRIOTT

DISSENTING - Written Opinion Attached

CARL A. BRITSCHGI

HARRY K. GRAFE

DISSENTING OPINION

We dissent.

In the instant case both the Department and the Administrative Law Judge found the claimant is ineligible for unemployment insurance benefits under section 1253(c) of the Unemployment Insurance Code on the basis that he failed to seek farm work as instructed by the Department, and is thus not available for work. We submit that both the record and the applicable law solidly support that finding. The Department also determined that the claimant was ineligible under section 1253(e) of the code by reason of his failure to conduct a search for work. The Administrative Law Judge left this issue undecided in view of his decision regarding section 1253(c).

The majority of this Board, on the other hand, by reliance on evidence utterly lacking in probative value, now establish a precedent which holds, in effect, that one may ignore the Department's seek-work instructions with impunity and yet be eligible for benefits under both subdivision (c) and (e) of section 1253. Taken literally, the majority opinion requires nothing more than that a claimant read the "help wanted" ads in a newspaper to be eligible under both of said subdivisions. Such a rule is in discord with both the plain meaning of section 1253 and the decisional law of this state.

Section 1253, insofar as it is in issue in this case, provides that one who claims benefits for any week is eligible therefor only if:

> "(c) He was able to work and available for work for that week."
>
> * * *
>
> "(e) He conducted a search for suitable work in accordance with specific and reasonable instructions of a public employment office."

The California courts have held uniformly that the burden is upon the claimant to prove eligibility under section 1253 (Spangler v. California Unemployment Insurance Appeals Board (1971), 14 Cal. App. 3d 284; Ashdown v. Department of Employment (1955), 135 Cal. App. 2d 291; Loew's, Inc. v. California Employment Stabilization Commission (1946), 76 Cal. App. 2d 231). In Benefit Decisions Nos. 6078, 5836 and 5400 this Board has construed subdivision (c) of section 1253 to require that a claimant for benefits be in a labor market where there is a reasonable demand for his services, offering himself for suitable work without restrictions or limitations on acceptable employment as will materially reduce the likelihood that he may become employed. Appeals Board Decisions Nos. P-B-1, P-B-17 and P-B-61 are in accord. Moreover, in Benefit Decisions Nos. 5989, 5733 and 5718, it was held that a mere expression of willingness to work in a labor market, unaccompanied by active efforts by the claimant to obtain employment, is insufficient to establish that the claimant is available for work.

To repudiate the above rule, the majority place all their tomatoes in one basket, as it were. They find that the Department farm labor office told the claimant on June 2, 1975 there would be no farm labor work in the Yuba-Sutter County area until the tomato harvest. Such a finding, which forms the keynote for the majority decision, gains scant support from the record, and none from the Law of Evidence. The record discloses the following answers by the claimant to questions asked by the Administrative Law Judge.

"Q All right, you registered at the state employment office, is that right?

"A Didn't register out there. I went out there and talked to them about a job and --

"Q You talked to them about a job?

"A Yeah.

"Q What kind of a job was that?

"A This was ranch work. It's a state farm.

"Q All right.

"A But I didn't sign up out there. They just said they wouldn't have anything until the tomatoes started and so then --

"Q Where was this? In Marysville?

"A Yeah, it's in Marysville. It's -- I don't know. I don't know just what street it's on out there.

"Q Well, that's all right. Okay.

"A And then --

"Q Now, this is during the week, the period beginning June 1 through June 14 that we're talking about?

"A Yeah.

"Q You have shown me your handbook which indicates that you appeared in Marysville on June 2, 1975 at the employment office. Is that the date that you're talking about?

"A Well, that's -- no, I didn't sign up on that at that same time. I signed -- I think I got two checks before I signed up on that job.

"Q Yeah, but that's the -- I'm talking about the dates that you looked or -- looked for farm work.

"A Yeah."

As is apparent, the claimant's recollection is something short of positive, either as to the date or the place he was given the information. But, more importantly, the majority rely on this testimony as establishing the fact that the Department's farm labor office asserted on June 2, 1975 that in the Yuba and Sutter County area "there would be no farm labor work until the tomato harvest" (Majority Op., pp. 1 and 5). On the basis of the experience of Mr. Grafe, who resided in that region for many years and who, in more youthful years, was an agricultural worker in that area, and the experience of Mr. Britschgi who was a dairyman for many years, we can only shake our heads in utter disbelief. The tomato harvest is a <u>late</u> summer crop, preceding the early autumn harvest of melons and pumpkins. Between early June and the start of the tomato harvest are the picking, transportation, canning, drying and marketing of two crops: apricots and peaches, which are planted in larger acreage in that area than are tomatoes. In fact, the local Chambers of Commerce proclaim that region as "The Peach Bowl of the World" which may lean somewhat to the hyperbole, but is indicative of the crop emphasis in the area.

The plainly weak testimony of the claimant that there would be no farm labor work between June 2 and the tomato harvest (which does not commence until well into August) was disregarded by the Administrative Law Judge and must be disregarded by this Board. Under subdivision (g) of section 452 of the Evidence Code, we may, without the request of any party, take judicial notice of "facts and propositions that are of such common knowledge within the territorial jurisdiction of the tribunal taking judicial notice that they cannot reasonably be the subject of dispute." We submit that it is a territorily-known fact beyond dispute that there is a plentitude of farm labor connected with apricots and peaches (as well as other crops) in the Yuba-Sutter region between June 2 and the start of the tomato harvest. Further, even the uncontradicted testimony of a witness is to be disregarded if it is inherently improbable (Davis v. Judson (1910), 159 Cal. 121; People v. Headlee (1941), 18 Cal. 2d 266; Sanan v. Schoenborn (1941), 47 Cal. App. 2d 366). The testimony of the claimant on the availability of farm work comes within this rule.

The majority opinion in this case states that the claimant did not contact farmers in the area personally because of the expense involved, and the farmers with whom the claimant had a personal acquaintance were not hiring. The majority conclude that it would thus be "fruitless to the claimant and burdensome to employers" to require the claimant to make a personal-contact search for work and the Department's instructions that the claimant do so are "unreasonable." Once again, the record is not all that strongly supportive of the majority's findings, as is seen from this exchange between the Administrative Law Judge and the claimant.

"Q Okay. Is there anything further then that you'd like to add in this that we haven't covered perhaps?

"A No, there's nothing else. Only that I just can't understand why they -- in there they're claiming that I didn't look for work and --

"Q I think they based that on the fact that you didn't actually contact any ranchers or farmers in response to their request that you look for farm work.

"A Well, I don't know.

"Q Is there any reason for that?

"A No reason. That's the only reason, the only reason had was the farmers that I knew wasn't hiring nobody and then on top of that I didn't have gas enough to go out and run around. I told them that, but and I was living in a camper and -- I told them that I didn't have -- it takes quite a bit of gas to go out to, around from ranch to ranch and ask the people, you know."

The record is silent as to how many farmers with whom the claimant had personal acquaintance and what percentage of the local labor market they represented. Under Spangler, Ashdown and Loew's, supra, the burden was upon the claimant to establish that the number of farmers represented by his statement was a sufficiently sizeable majority of the labor market so as to make further search "fruitless." As the claimant has failed to sustain that judicially-mandated burden, the majority err in their conclusion, unsupported by any evidence other than the claimant's self-serving declaration, that that there was no purpose to be served by requiring the claimant to make an active search for work.

Although the instant case involves farm work in a rural, agrarian area, the rule confected by the majority is equally applicable to manufacturing work in an urban, industrialized setting. Following this case, an unemployed assembly-line worker need only testify that the manufacturing plants he "knows" are not hiring and he cannot afford the gas to go from plant to plant making an active search for work, and he is nevertheless eligible under subdivisions (c) and (e) of section 1253.

To us, it is not unreasonable for the Department to require a claimant to make personal contact with potential employers in his or her territorial labor market. Such has been the rule of law as long as there have been "availability" and "seek work" requirements as conditions of eligibility for unemployment insurance benefits, not only in this state, but in other jurisdictions as well. By their decision in this case today and by their recent decision in Appeals Board Decision No. P-B-260, it appears that the majority are, by piecemeal chipping away, slowly but methodically repealing the "availability" requirement of section 1253(c) and the "work search" mandate of section 1253 (e). This is amendment of a statute by administrative fiat.

The power to make, amend and repeal laws is vested solely in the legislative department of the government of this state. The California Constitution expressly sets forth this doctrine. "The powers of State government are legislative, executive and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution." (Article 3, section 3, California Constitution; see also Parker v. Riley (1941), 18 Cal. 2d 83; Bixby v. Pierno (1971), 4 Cal. 3d 130) Should the State Legislature perceive a need to amend section 1253 that body, and that body alone, has the power to do so. Unless and until such action is taken, the majority, like all other California citizens, should be content to follow the law and not attempt to rewrite it.

CARL A. BRITSCHGI

HARRY K. GRAFE