BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

ENID G. BALLANTYNE
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-313

Office of Appeals No. NH-21879

Case No. 75-12017

The claimant appealed from that portion of the decision of the Administrative Law Judge which held her ineligible for unemployment benefits commencing September 21, 1975 under the provisions of section 1253(c) of the Unemployment Insurance Code on the ground that she was not available for work.

On February 4, 1976 we accepted as additional evidence the information contained in the claimant's appeal to this Board. We furnished a copy of this document to the Employment Development Department which was a party to the appeal and afforded the Department 10 days in which to submit rebuttal evidence or argument. To date no such evidence or argument has been received.

STATEMENT OF FACTS

The claimant has had experience working as a department store executive trainee for approximately two years. This employment ended in 1962. Thereafter, the claimant obtained full-time employment as a service representative with a telephone company and worked in this employment for two years. This employment ended in 1970.

Since 1970 the claimant has worked for a variety of employers primarily on a part-time basis. Between 1970 and 1973 she was employed on a part-time basis by a department store in Pasadena. After this work ended the claimant worked part-time, approximately 30 hours per week, as assistant manager and cashier in a theatre located in Pasadena. The theatre closed and thereafter the claimant obtained work with the Pasadena Unified School District administering, evaluating and analyzing special tests given

to elementary school children. She worked at this job approximately 20 hours per week and the work was terminated in June 1974.

She thereafter obtained employment as secretary with a Los Angeles newspaper working approximately 30 hours a week. This work ended in March 1975.

During the period from 1970 the claimant was the sole support of her three children and was attending college on a full-time basis.

In September 1975 the claimant entered the University of California, Los Angeles, Law School. She will not leave school to accept full-time work unless such work would offer a salary of at least $1,000 a month. She is searching for part-time work so as to continue her education and at the time of the hearing was employed as special tutor at a wage of $5 per hour. She also had been promised part-time work commencing in December 1975, as a credit checker at a wage of $25 per shift.

In her appeal to this Board, which we accepted as additional evidence, the claimant indicated that she was employed at the time of submitting her appeal. The claimant is willing to accept the prevailing wage for work which she can obtain and imposes no restriction as to the type of work she will accept. However, she will not accept work which will interfere with the completions of her law school studies.

In testifying as to the labor market available to the claimant, the Department representative stated in part:

> ". . . The labor market is extremely small regardless of what she does for a living. There are just too many people out of work and there is very little night work now."

REASONS FOR DECISION

Section 1253(c) of the Unemployment Insurance Code provides in pertinent part that an unemployed individual is eligible for benefits with respect to any week only if he is available for work during that week.

This Board and its predecessors have on numerous occasions been called upon to decide the availability of claimants who were attending school and claiming benefits at the same time.

In 1943 Benefit Decision No. 27 was issued. In that case, the claimant, who was well experienced as a waitress, was attending night school. However, she refused to consider accepting waitress work and would accept only "defense work." In that case, the Board held the claimant was not available for work.

In 1943 Benefit Decision No. 247 was issued. There, the claimant was attending school and refused to accept any work because he contended that all of his time was devoted to attending school and studying. There the Board held the claimant was not available for work.

In 1944 Benefit Decision No. 432 was issued. In that case, the claimant was attending school eight hours a day, six days a week, and refused to accept any type of work. This claimant too was held not available.

Benefit Decision No. 940 was issued in 1944 and considered a student not available for work because, although this claimant could work four hours a day, five days a week, she refused to work any more than three hours a day, three days a week.

In 1945 Benefit Decision No. 1380 was issued. There, the claimant had been attending school for a considerable period of time. All of the claimant's work history had been on a part-time basis and the benefits which she was claiming were based on wages earned in part-time work. The evidence in that case showed that a labor market existed for the claimant and at the time of the hearing she was working on a part-time basis. It was held that the claimant was available for work.

In Benefit Decision No. 4623, the Board again considered the eligibility for benefits of a student, and after reviewing prior decisions, concluded that "an inference of unavailable for work arises where a claimant is attending school during hours customarily worked in business and industry." The Board went on to point out that this interference of unavailable could be overcome by a showing that the claimant is willing and able to accept work for which there is a labor market. The Board also indicated that in evaluating the claimant’s availability for work, consideration must be given to the claimant’s past

employment pattern, the type of work acceptable to the claimant and whether or not an employment field exists in the locality for the work which the claimant will accept.

All of the prior cases concerning student claimants have been resolved on the bases of whether the claimants concerned imposed restrictions on acceptable work in addition to whatever restrictions resulted from school attendance. Where the claimant imposed additional restrictions, he was held ineligible for benefits.

Turning now to the instant matter, we find that the claimant's past employment history shows that she has attended school for a considerable period of time and at the same time worked on a part-time basis to support herself and her children. The benefits which she is claiming are based entirely upon wages earned in part-time employment. She imposes no undue restrictions on acceptable work except that such work will not interrupt her attendance at school. She has made diligent and successful efforts to obtain work. According to the testimony of the Department, a labor market, although small, does exist for the claimant. Under these conditions, we conclude that this claimant has overcome the inference of unavailability and has established that she is available for work.

It should be pointed out that the test of availability may not be predicated upon the lack of openings for a claimant, but rather must be based upon whether there is a potential employment field.

In Garcia v. California Employment Stabilization Commission, 71 C.A. 2d 107; 161 P. 2d 972, the court stated:

> "It is well established that the act under consideration is remedial and therefore must be liberally construed to effectuate the stated objects of the statute. . . . (citations deleted) 'Availability for work requires no more than availability for suitable work which the claimant has no good cause for refusing.'"

Restricting acceptable work to part-time hours does not necessarily result in a finding that the claimant has withdrawn from the labor market and thus is not available for work (Appeals Board Decision No. P-B-172).

In arriving at the decision in this matter, we are not unaware of the finding of the court in Perales v. California Department of Human Resources Development, et al., 32 C.A. 3d 332; 108 Cal. Rptr. 167, wherein the court stated: ". . . The unemployment insurance system cannot be used to subsidize an employee's education."

We do not believe that the Perales case is applicable here. In that case, the claimant voluntarily left employment to attend school. Here the claimant did not voluntarily leave employment to attend school. Nor does she depend upon unemployment insurance to subsidize education. She merely depends upon unemployment insurance to reduce the suffering caused by her involuntary unemployment (Section 100, Unemployment Insurance Code). Nor do we believe that by attending school this claimant will become "an unproductive member of society." (Sherbert v. Verner, 374 U.S. 398) Her primary interest is to obtain employment so that she can continue to complete her education.

The Administrative Law Judge cited Appeals Board Decision No. P-B-135 to support his conclusion that this claimant is not available for work. We do not believe that that decision is applicable to this matter. In the cited decision, the claimant was a student at the University of Washington in Seattle, Washington. During the Christmas holidays the claimant returned to Los Angeles, filed a claim for benefits and contended that he was available for work during the period of the school holiday. The claimant intended to return to the University of Washington after the Christmas holiday and did not intend to work either full time or part time while going to school. That is not the situation here.

In Appeals Board Decision No. P-B-135, we stated:

> "We believe that a claimant whose primary consideration is the continuation of his college education, while obtaining work during vacation intervals is only a secondary one, does not meet the availability for work requirement of section 1253(c). . . ."

We agree with the results reached in Appeals Board Decision No. P-B-135. However, that case contains the following language:

> ". . . On the other hand, a college student who expresses a willingness to forego school attendance if he is able to secure full-time employment is available for work."

We do not approve of this statement and hereby disaffirm it because we do not believe that this Board or any agency of the state government should make statements which could be interpreted as encouraging college students to become “drop outs” in order to become entitled to unemployment benefits.

Finally, we feel obligated to state that if school attendance is merely a “fill-in” activity between jobs and does not interfere with the claimant's efforts to secure work, such school attendance would not necessarily render the claimant not available.

DECISION

The decision of the Administrative Law Judge is reversed. The claimant is not ineligible for benefits under section 1253(c) of the code. Benefits are payable provided she is otherwise eligible.

Sacramento, California, May 11, 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 establishing the Unemployment Insurance Program, the legislature stated in Section 100 of the Unemployment Insurance Code:

> "Experience has shown that large numbers of the population of California do not enjoy permanent employment by reason of which their purchasing power is unstable. This is detrimental to the interests of the people of California as a whole.
>
> "The benefit to all persons resulting from public and private enterprise is realized in the final consumption of goods and services. It is contrary to public policy to permit the supply of consumption goods and services at prices which do not provide against that harm to the population consequest upon periods of unemployment of those who contribute to the production and distribution of such goods and services."
>
> * * *
>
> "The Legislature therefore declares that in its considered judgment the public good and the general welfare of the citizens of the State require the enactment of this measure under the police power of the State, for the compulsory setting aside of funds, to be used for a system of unemployment insurance providing benefits for persons unemployed through no fault of their own, and to reduce involuntary unemployment and the suffering caused thereby to a minimum.
>
> "It is the intent of the Legislature that unemployed persons claiming unemployment insurance benefits shall be required to make all reasonable effort to secure employment on their own behalf."

Thus, in enacting the unemployment insurance law, the legislature was interested in providing benefits to those individuals who were unemployed through no fault of their own and to encourage such individuals to return to gainful employment as rapidly as possible. The unemployment insurance law did not establish an eleemosynary program or a scholarship program but, rather, a program to assist in alleviating the hardships attendant upon involuntary unemployment.

We agree wholeheartedly with the court's statement in Perales v. Department of Human Resources Development, 32 Cal. App. 3d 332, 108 Cal. Rptr. 167 which reads as follows:

> ". . . However great may be society's interest in furthering a workingman's education, we find nothing in the unemployment insurance law to sanction this objective. Although we must afford a liberal construction to this statute so as to effect all the relief that the Legislature intended to grant we cannot exceed the limits of the statutory intent. The unemployment insurance system cannot be used to subsidize an employee's education." (Citations omitted)

In keeping with the purpose of unemployment insurance, the statement "On the other hand, a college student who expresses a willingness to forego school attendance if he is able to secure full-time employment is available for work," with which the majority disagrees, was included in Appeals Board Decision No. P-B-135 to express the Board's policy that unemployment insurance benefits are available only to those unemployed individuals whose primary objective is to return to the labor market ready and willing to accept gainful employment primarily of a full-time permanent nature.

We do not believe that Appeals Board Decision No. P-B-172, cited by the majority, is at all applicable here. In that case, because of orthopedic and general physical impairment of the claimant's health which was of a permanent nature, she was and had been for a considerable period of time unable to accept full-time employment. In the instant case, the claimant is unable to accept full-time employment only because of her desire to further her education.

We also do not believe that Sherbert v. Verner (374 U.S. 398) is applicable here. In that case, the claimant was a member of a religious organization which prohibited its members to work from sundown Friday through sundown Saturday and the evidence there showed that this was no impairment upon the claimant's availability for work.

While we agree that an individual should obtain as much education as he possibly can, we cannot authorize unemployment insurance benefits to further a claimant's education. There are other agencies of the state and federal governments as well as private organizations which are devoted to assisting students. The claimant should direct her efforts to secure financial aid while attending college to these organizations and not pursue unemployment insurance claims.

For these reasons, we would hold this claimant not eligible for unemployment insurance benefits so long as she is restricting her availability so that possible employment will not interfere with her reaching her educational goal.

CARL A. BRITSCHGI

HARRY K. GRAFE