BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

HAROLD L. COSTYK
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-333
Case No. 76-7 6 29

Office of Appeals No. SF-1250

The Department appealed from a decision of an Administrative Law Judge which held the claimant was eligible to establish a valid claim for benefits under section 1277 of the California Unemployment Insurance Code.

STATEMENT OF FACTS

The claimant served as a member of the military forces as a navigator with the rank of captain. He was released from the service in 1975 under circumstances not material to the instant case. In June 1975 the claimant established a valid claim for benefits for ex-servicemen, the so-called federal "UCX" program. The claim was given an effective date of June 1, with a base period comprising the four calendar quarters ending December 31, 1974.

The claimant had wage credits of $4,581 and $3,054 for the quarters ending March 31 and June 30, 1975, respectively. This represented the military earnings prior to his discharge but not included in the computation of his award. The claimant had no income subsequent to his release from active duty except pay received from his services rendered on temporary duty as a member of the Air Force Reserve.

The gross earnings of the claimant from the period June 1, 1975 through June 1, 1976 are not of record as to the actual amount received. It has been established that after his release from active duty the claimant as a reservist regularly attended his monthly drills and he satisfied his two-week annual duty. Further, the claimant was frequently called by the Air Force to serve in his capacity as a navigator on flights within the continental United States as well as overseas. Those flights varied from one to two days

to periods of ten to twelve days. None of the service performed by the claimant was attributable to extended active duty. All of these tours were for less than 90 days, and none met the requirements of "federal service" within the definition of the UCX regulations. The claimant receives an income of approximately $40 per day basic pay plus $5 per day as incentive pay. For extended flights the claimant also received subsistence on a pro rata basis. The basic pay plus the incentive pay are subject to withholding for both personal income taxes and FICA.

The claimant submitted nine pay vouchers reflecting earnings for his reserve service from August 1, 1975 through June 18, 1976 in the total amount of $2091.91.

The claimant contends that the income received while serving as a navigator in flight should be considered as earned income even if his pay for regularly scheduled reserve drills is excluded.

It is the Department's contention that inasmuch as the claimant has not served on active duty for at least 90 consecutive days he is ineligible to establish a federal claim for benefits. In the Department's view the income received as a reservist cannot be considered wages.

REASONS FOR DECISION

Section 1277 of the California Unemployment Insurance Code provides:

> "Notwithstanding the provisions of Section 1281, if the base period of a new claim includes wages which were paid prior to the effective date of and not used in the computation of the award for a previous valid claim, the new claim shall not be valid unless, during the 52-week period immediately following the effective date of the previous valid claim, the individual was paid sufficient wages to meet the eligibility requirement of subdivision (a) of Section 1281 and had some work. For the purpose of this section only the term 'wages' includes any and all compensation for personal services performed as an employee for the purpose of meeting the eligibility requirement under subdivision (a) of Section 1281. This section is not applicable to the computation of an award for disability benefits

> but the establishment of a valid claim for disability benefits shall not constitute a valid claim for unemployment compensation benefits unless the claimant was paid sufficient wages and performed some work to entitle the claimant to an award under this section."

Section 601 of the Unemployment Insurance Code defines employment as follows:

> " 'Employment' means service, including service in interstate commerce, performed by an employee for wages or under any contract of hire, written or oral, express or implied."

Section 632 provides in pertinent part that:

> " 'Employment' does not include service performed in the employ of the United States Government, or of any instrumentality of the United States, . . ."

Military duty as a reservist is clearly not covered employment. Therefore the pay earned when serving in such capacity, even if held to be wages received in employment, may not be utilized to establish a valid state unemployment claim. However, it is not material to the issue before us that the claimant's rendition of services be in covered employment (Appeals Board Decision No. P-B-267, see also section 629 et seq., California Unemployment Insurance Code). Consequently, the fact that the claimant's reserve service and pay was excluded from coverage under section 632 of the code is not determinative of his entitlement to establish a new claim under section 1277.

Wages are defined in section 926 in the following terms

> "Except as otherwise provided in this article 'wages' means all remuneration payable to an employee for personal services, whether by private agreement or consent or by force of statute, including commissions and bonuses, and the reasonable cash value of all remuneration payable to an employee in any medium other than cash."

The claimant herein had unused gross wages of approximately $7,600 with a high quarter of earnings of $4,581. The claimant could not use such military pay in connection with his claim filed June 1, 1975 as it was earned subsequent to the base period upon which his claim was computed. However, it would be available to him in the computation of a new claim if in fact he can satisfy the test set forth by the above section of the code. If it is concluded that the pay he received for his reserve duty was "wages" and if the services he performed constituted "some work" subsequent to June 1, 1975, the claimant will have met the requirements of section 1277. "Work" and "employment" are synonymous (Appeals Board Decision No. P-B-5).

In reaching a decision in this case it is appropriate and necessary that we review our pertinent previous holdings on the issue of whether military service and pay constitute employment and wages within the meaning of the Unemployment Insurance Code.

Prior to the issuance of Appeals Board Decision No. P-B-159 in 1974 there was never any question as to the status or nature of military pay received while on extended active duty or pay received as a result of participation in monthly reserve drills. The compensation received by a serviceman had at all times been considered wages in exchange for services irrespective of any confusion which may have existed with regard to whether or not services rendered to the military were in fact employment (see Benefit Decision No. 6793). We drew no distinctions between claimants whose wage credits were attributable to extended active duty and which provided the basis for unemployment compensation under the federal program for ex-servicemen (UCX), and those wage credits attributable to Reserve or National Guard service and unrelated to the UCX program.

In Appeals Board Decision No. P-B-159 this board discussed the differences between civilian and military responsibilities, duties, rights, benefits, and entitlements. We concluded,

> ". . . that the status of a military serviceman is quite different from that of an employee in the traditional or common-law employer-employee relationship. In a sense, military service might be referred to as a form of voluntary or involuntary servitude. In an employer-employee relationship an employee has a paramount right to terminate the relationship at will."

We found therefore that military service was not employment.

Subsequently, in Appeals Board Decision No. P-B-162, we held that since military duty was not employment then military pay was not wages within the meaning of the code. We concluded that it was not necessary for a claimant to report income derived from reserve component sources to the Department when filing for benefits. Consequently, National Guard and Reserve personnel were eligible to draw benefits even though their military pay was in excess of their weekly benefit amount.

In Appeals Board Decision No. P-B-165 we reexamined the nature of military duty in the light of the provisions of sections 8506(a) and 8521(a) of Title 5 of the United States Code, Chapter V, Title 20, sections 614.1, 614.11, and 614.13 which establish and implement the system of unemployment benefits for former military personnel - the UCX program. This board found that ". . . federal military service must be considered 'employment' and that . . . 'federal military wages' must be considered 'wages' under the unemployment compensation law of this state." We reached this finding recognizing that the federal law and regulations compelled a conclusion that former extended active duty servicemen were entitled to UCX benefits because their work in the military constituted "employment" and the pay they received was "wages."

The question now before us is whether duty and pay connected with service as a member of a reserve component of the Armed Forces, including the National Guard, constitute employment and wages, recognizing that they are not UCX qualifying.

We believe that it is no longer valid to perpetuate a distinction between extended active duty which under the UCX program considers military service as employment and military pay as wages, and temporary service as a member of the National Guard or as a reservist. The work performed on extended active duty is the same as that performed on temporary duty. The only significant difference lies in the length of time the tours of duty last. They all work in an employer-employee relationship, and they are paid accordingly. It is clear to us that these military personnel are in employment, and are receiving wages within the meaning of sections 601 and 926 of the code.

We therefore decide that all military duty performed by members of the National Guard and the various other Reserve components of the armed forces is employment, and the pay received for such service is wages.

We expressly overrule that portion of Appeals Board Decision No. P-B-159 which holds to the contrary, and overrule Appeals Board Decision No. P-B-162 in its entirety.

DECISION

The decision under appeal is modified as to reasoning but affirmed as to legal effect. The claimant has received wages in employment and is entitled to establish a new claim for benefits under section 1277 of the code.

Sacramento, California, February 3, 1977

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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