BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

BERNARD A. LONDON
(Claimant)

SPROUSE REITZ COMPANY
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-421
Case No. 79-8456

Office of Appeals No. VN-32765-A

The claimant appealed from the decision of an administrative law judge disqualifying him for benefits under section 1256 of the Unemployment Insurance Code and relieving the employer's reserve account of benefit charges under section 1032. The claimant's appeal also questions the legal validity of certain procedural actions in the case.

STATEMENT OF FACTS

We set forth those facts necessary for the disposition of this appeal.

On March 25, 1979 the claimant filed a new claim for unemployment insurance benefits. The claimant gave full and accurate information concerning his last employment, together with the reasons for separation, on the appropriate form provided by the Department. The claimant's most recent employer has an unemployment insurance reserve account in California.

On April 11, 1979, in accordance with Department procedures, a copy of the claim form was mailed to the employer. (This form originally showed an erroneous mailing date of March 28, 1979, which was corrected.)

On April 23, 1979 the separation information was mailed by the employer's authorized agent to the appropriate Employment Development Office. (The tenth day of the period within which a response would be timely fell on a Saturday, thereby extending the time to Monday, April 23, 1979.)

The response confirmed the date of separation and set forth the employer's reasons for terminating the claimant.

On May 11, 1979 the Department issued a determination only to the claimant disqualifying him for benefits under section 1256 of the Unemployment Insurance Code upon a finding that he had been discharged from his last employment for work-connected misconduct. No copy was sent to the employer or his agent.

The claimant filed a timely appeal from the determination, and on June 28, 1979 a notice of hearing before an administrative law judge was mailed to the claimant. No notice was sent to the employer or its authorized agent.

On July 12, 1979 a hearing was conducted at which the claimant was the sole witness.

On July 19, 1979 the administrative law judge issued a decision reversing the Department and holding the claimant not disqualified under section 1256.

On August 2, 1979 the employer's agent wrote to the Department inquiring as to what action, if any, had been taken with respect to the claim.

On August 17, 1979 a Department representative telephoned the Office of Appeals seeking advice regarding the issuance of a ruling. On the same day, and as a result of this conversation, the Department issued a determination and ruling disqualifying the claimant under section 1256 of the code, and relieving the employer's account under section 1032.

On August 24, 1979 the administrative law judge who participated in the August 17 telephone conversation issued an order setting aside the final decision of the administrative law judge of July 19, 1979, and scheduled a new hearing on the ground that the employer, as an interested party, had not been given notice of the hearing.

On October 2, 1979 a notice of a new hearing was sent to the claimant and the employer. The issues noticed were whether the claimant was entitled to receive unemployment insurance benefits within the meaning of section 1256, and whether the employer's account was subject to charges under sections 1030-1032.

On October 12, 1979, a hearing was held before another administrative law judge who had not participated in any of the earlier phases of the case. The employer appeared and was represented by its authorized agent. The claimant appeared, but only to register his objections to the validity of the hearing. He vigorously articulated his position, stating among other things that the second hearing constituted "double jeopardy" and "harassment."

The hearing judge noted all of the claimant's objections but declined to cancel the proceeding. The claimant refused to participate further, and departed.

On October 15, 1979 the administrative law judge issued his decision which was favorable to the employer and adverse to the claimant. The claimant immediately wrote a letter protesting the procedures involved. That correspondence constitutes the appeal to this Board.

REASONS FOR DECISION

The four principal issues posed by this appeal are:

1 Was the August 24, 1979 order of the administrative law judge, purporting to set aside the decision of another administrative law judge in favor of the claimant under section 1256 of the code, properly issued?

2. Was the "determination" portion of the determination and ruling dated August 17, 1979 validly issued?

3. If so, was the hearing held on October 12, 1979 valid?

4. If not, was the decision of October 15, 1979 resulting from such hearing properly issued?

Section 1327 of the Unemployment Insurance Code states in pertinent part:

"The department shall give a notice of the filing of a new or additional claim to the employing unit by which the claimant was last employed immediately preceding the filing of such claim. The employing unit so notified shall submit within 10 days after the mailing of such notice any facts then known which may affect the claimant's eligibility for benefits. The 10-day period may be extended for good cause. . . ."

Section 1030(a) of the Unemployment Insurance Code states, in pertinent part:

"Any employer who is entitled under section 1327 to receive notice of the filing of a new or additional claim may, within 10 days after mailing of such notice, submit to the department any facts within its possession disclosing whether the claimant left such employer's employ voluntarily and without good cause or was discharged from such employment for misconduct connected with his or her work . . . ."

The record shows that the employer complied with the statutory requirement quoted above.

Section 1328 of the Unemployment Insurance Code states in pertinent part:

"The department shall consider the facts submitted by an employer pursuant to Section 1327 and make a determination as to the claimant's eligibility for benefits. The department shall promptly notify the claimant and any employer who prior to the determination has submitted any facts or given any notice pursuant to Section 1327 or this section and authorized regulations of the determination or reconsidered determination and the reasons therefor. . . . The claimant and any such employer may appeal from a determination or reconsidered determination to a referee within 20 days from mailing or personal service of notice of the determination or reconsidered determination. The 20-day period may be extended for good cause, which shall include, but not be limited to, mistake, inadvertence, surprise, or excusable neglect. The director shall be an interested party to any appeal."

Section 1032 of the Unemployment Insurance Code provides, in pertinent part:

> "If it is ruled under Section 1030 or 1328 that the claimant left the employer's employ voluntarily and without good cause or was discharged by reason of misconduct connected with his or her work, . . . benefits paid to the claimant . . . shall not be charged to the account of such employer unless he or she failed to furnish the information specified in Section 1030 within the time limit prescribed in that section or unless such ruling is reversed by a reconsidered ruling."

Section 1256 of the Unemployment Insurance Code states, in pertinent part:

> "An individual is disqualified for unemployment compensation benefits if the director finds that he left his most recent work voluntarily without good cause or that he has been discharged for misconduct connected with his most recent work."

We address first the August 24, 1979 order of an administrative law judge which sets aside the July 19, 1979 decision of another administrative law judge. In that respect we must consider the basic statutes relating to the finality of decisions.

Decisions of administrative law judges involving benefit issues are governed by section 1334 of the Unemployment Insurance Code which states in pertinent part:

> "A referee after affording a reasonable opportunity for fair hearing, shall, unless such appeal is withdrawn, affirm, reverse, modify, or set aside any determination which is appealed under this article. The claimant, any employer becoming a party to the appeal by submitting a protest or information pursuant to Section 1326 to 1333, inclusive, of this article, and the director shall be promptly notified in writing of the referee's decision,

together with his reasons therefor. The decision shall be final unless, within 20 days after mailing of such decision, further appeal is initiated to the appeals board pursuant to Section 1336. The 20-day limitation may be extended for good cause." (Emphasis added)

Section 1334 is supplemented by section 1336, which states:

"The director or any party to a decision by a referee may appeal to the appeals board from the decision. The appeals board may order the taking of additional evidence and may affirm, reverse, modify, or set aside the decision of the referee. The appeals board shall promptly notify the director and the parties to any appeal of its order or decision."

The significance of the "finality" clause in section 1334 was considered by the Supreme Court of California in the case of Isobe v. California Unemployment Insurance Appeals Board, 12 Cal. 3d 584, 116 Cal. Rptr. 376, 526 P. 2d 528 (1974). The Isobe court analyzed an earlier and slightly different wording of the statute. However, its rationale is dispositive of the matter under consideration.

The prior wording of section 1334 read as follows

"The appeals board may remove to itself or transfer to another referee the proceedings on any claim pending before a referee."

Though the quoted language has since been deleted the procedures it encompassed are now covered by sections 412 and 413 of the Unemployment Insurance Code. Section 412 authorizes the Board to assume jurisdiction prior to issuance of the administrative law judge's decision; section 413 allows it to do so not later than 30 days after issuance. This power is granted to the Board alone, not to administrative law judges or parties.

The precise procedural question in Isobe was whether the Appeals Board was bound by the time limit set forth in section 1334 for "transfers" and "removals." The court answered in the affirmative. In so doing the court also stressed the finality of the decision of an administrative law judge. We find the following language (at page 591) to be significant:

> "Neither can we avoid the inconsistency by deciding the board's action is excepted from the provisions of section 1334. Making the actions of the board exceptional would ignore the statute's clear demand that the referee's (administrative law judge's) decision 'shall be final.' Disregarding the mandatory language would produce an anomalous result - the referee's order would theoretically be perpetually subject to future action by the board. In face of clear language directed at creating finality in the proceedings, we cannot conclude the Legislature intended to allow the board unlimited time to assume jurisdiction."

Except for the appeal and "transfer" procedures delineated above, and the reopening procedures discussed below, there are no other devices provided in the Unemployment Insurance Code or in the California Administrative Code for actions to affect such a decision.

While the Appeals Board possesses specific power under section 412 and 413 to assume jurisdiction over a case if it acts in a timely manner, there is no statutory authority, express or implied, permitting an administrative law judge to set aside or otherwise alter the decision of another administrative law judge that has become final. In this context, "final" means that the time limits for appealing, reopening, or "transfer" have expired.

We next examine the regulatory methods provided in Title 22 of the California Administrative Code, which pertain to appeals to this Board.

Sections 5101 through 5108 set forth the procedures involved in appealing decisions of administrative law judges to the Appeals Board. Those sections do not create any rights of appeal not covered in the Unemployment Insurance Code.

Section 5045 allows nonappearing parties to petition, in writing, for reopening. Upon a showing of good cause for not appearing at the hearing, the administrative law judge's decision may be set aside and a new proceeding can be scheduled. Such parties are allowed 20 days from the date of the adverse decision in which to petition for such relief. Paragraph "g" of section 5045 states:

> "Subject to the foregoing, after a decision has been mailed or served it shall not be changed except to correct clerical errors, in which case a corrected decision shall be prepared by the administrative law judge and mailed or served." (Emphasis added.)

Thus, once a decision has been issued by an administrative law judge the only avenue of redress specifically available by law to an aggrieved party is the appeal procedure granted by sections 1334 and 1336 of the Unemployment Insurance Code, and the reopening process allowed by Title 22, section 5045, of the California Administrative Code.

None of the procedures mentioned above were followed with respect to the administrative law judge's decision of July 19, 1979. No appeal was filed and no written petition to reopen was made within 20 days of July 19, 1979. The employer did not, and could not, take any action because it knew nothing at that time about the determination, the hearing, or the decision.

The rights of the claimant and those of the employer appeared to be in total conflict. Neither was responsible for the problem. The claimant, in good faith, filed his claim for benefits; he appealed in a timely fashion from an adverse determination and gave testimony and evidence at a hearing; he received a favorable decision, with respect to which the 20-day appeal expired without any appeal having been filed to this Board, or any reopening request made in writing. As far as the claimant was con-concerned, that concluded the matter. He does not understand why it should be otherwise. This is the thrust of his legal argument to us.

On the other hand, the employer (through its authorized agent) also acted in good faith. It complied with all statutory procedures. The employer did not receive a ruling when it should have and was thereby deprived of its right to participate in the hearing.

The Department, upon receiving an inquiry from the employer's agent as to the status of the matter, communicated with an administrative law judge in an effort to learn what should be done. The administrative law judge's advice was to "issue a ruling consistent with the original determination." Although at that point there was a final decision by another administrative law judge which had reversed the original determination, the Department issued a determination and ruling adverse to the claimant. A week later the administrative law judge, who had advised the Department to issue a ruling, promulgated an order purporting to set aside the decision of the first administrative law judge. We are of the view that the order setting aside the administrative law judge's decision was not proper.

There is no statutory authority for the issuance of such an order. Administrative agencies are purely creatures of statute. They possess no powers except those given to them by the legislation that brought them into being. Beyond this they may not go. Here there are two avenues available to parties (including the Department) that will affect the decision of an administrative law judge. One is to appeal to this Board pursuant to sections 1334 and 1336 of the Unemployment Insurance Code. The other is to petition, in writing, for reopening under Title 22, section 5045, of the California Administrative Code. Neither was used in this case. There are no other statutory avenues of redress. There was no legal authority for the issuance of the order setting aside the administrative law judge's decision. It is therefore a nullity.

On the other hand, it is evident that the decision of the administrative law judge issued on July 19, 1979 had become final with respect to the claimant's entitlement to benefits, regardless of the fact that it did not address the chargeability of the employer's reserve account. For the reasons discussed hereafter we conclude that the administrative law judge's decision was valid under section 1334 of the code.

If the employer has a reserve account, and has timely furnished adequate separation information, it is entitled to a ruling pursuant to section 1032. Usually such determinations and rulings are combined carrying the legend "determination/ruling."

From time to time inadvertent error or oversight results in a bifurcation of sections 1256 and 1032. Where the issue under section 1256 is decided by an administrative law judge without concurrent adjudication of a section 1032 issue, and the employer is afforded an opportunity to protect his account, it is our view that the decision is valid. The statutory scheme does not inseparably fuse issues under sections 1256 and 1032 to the point that a bifurcation of the two is impermissible.

Section 1032 provides that employers with California reserve accounts will be relieved of charges to their accounts if the claimant voluntarily quit without good cause or was discharged for misconduct, provided the employer furnishes proper separation information in a timely manner. Section 1032 contains cross-references to sections 1030 and 1328, but none of these three sections of the code contains any cross-reference to section 1256. It follows that section 1256 was not intended to be irrevocably conjoined to issues under other sections of the code.

When an employer does not respond to a notice of claim filed, he foregoes his right to a ruling under section 1032 (Appeals Board Decisions Nos. P-R-371 and P-R-372).

In the instant case we accordingly find that while both the section 1256 and section 1032 issues should have been considered at one hearing and adjudicated in one decision, the inadvertent omission of the section 1032 issue did not invalidate either the hearing that was held on the section 1256 issue or the decision that resulted therefrom.

In short, the claimant received an adverse determination under section 1256; he filed a timely appeal; he testified at a hearing; he received a favorable decision; no appeal was taken to this Board under sections 1334 and 1336, and no written petition was filed under Title 22, section 5045, of the California Administrative Code. The decision of the administrative law judge therefore became final (Isobe v. California Unemployment Insurance Appeals Board, supra).

The courts have recognized that it is possible for an employer, through no fault of its own, to lose the opportunity to contest a claim for benefits yet salvage its opportunity to contest charges in order to protect its reserve account. The case of Bell-Brook Dairies, Inc. v. Bryant (1950), 35 Cal. 2d 404, 218 P. 2d 1, involved a situation in which the Department had failed to send an employer notices of claims filed by former employees.

As a result, charges were posted to its reserve account that it did not learn about until quite some time later. The employer then brought an action to have the charges removed. In affirming a judgment for plaintiff Bell-Brook Dairies, the Supreme Court said (at pp. 407-408):

> "It is clear that plaintiff was prejudiced by the failure of defendant to give the required notice. Although it eventually received statements of charges to its account which showed that claims for benefits had been made and allowed, lack of proper notice deprived plaintiff of the opportunity to defeat the claims by offering the claimants suitable employment. Further, because of the lapse of time before learning of the charges against its account, it may have been deprived of the means of showing that the claimants were ineligible for benefits on other grounds." (Emphasis added)

Here the court clearly conceded that there comes a point when it is too late for the employer to contest payment of benefits, even though it lost the chance to do so through no fault of its own. Equally clear, however, is the proposition that a reserve account employer shall not irrevocably suffer the improper posting of charges against its account.

The primary interest of the employer is the protection of its reserve account. Thus, in Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 P. 2d 947, at 725, the Court characterized the employer's role as one in which it ". . . has the burden of establishing 'misconduct' to protect its reserve fund." (Emphasis added) That principle was reiterated by the California Supreme Court in Interstate Brands Corporation v. California Unemployment Insurance Appeals Board (1980), 26 C 3d 770. The court emphasized that the employer's concern in an unemployment insurance claim is the protection of its reserve account. There the court repeatedly alluded to an employer's right to have its reserve account protected against the imposition of erroneous charges, and indicated that there need not be consistency between the claimant's entitlement to benefits and the relieving of the employer's account. In this respect the court said:

> "[W]e should not be understood to espouse a principle of necessary reciprocity between the right of an applicant to benefits and the right of the employer." (Emphasis added)

If the inadvertent bifurcation of issues under sections 1256 and 1032 results in the deprivation of an employer's right to protect its reserve account, there could well be a failure of due process of law. However, under the California statutory scheme there need be no such result.

As previously pointed out, the administrative law judge's decision of July 19, 1979 in favor of the claimant on a section 1256 issue became final. The employer, though legally entitled to a ruling, received none. Nor did it receive notice of the hearing.

In these circumstances the Department should have promptly issued a ruling to the employer. The ruling need not have conformed to the decision made by the administrative law judge on the section 1256 issue. That decision was not, and could not be res judicata against the employer, since the employer was not a party to the appeal hearing (Appeals Board Decision No. P-B-408). If the ruling was adverse to the employer, it would have an independent right of appeal to an administrative law judge, regardless of the holding on the section 1256 issue.

The Department should not have issued the determination and ruling of August 17. The administrative law judge, in the July 19, 1979 decision, had decided the section 1256 issue in favor of the claimant. That decision had become final with respect to the issue it addressed, namely the claimant's entitlement to benefits under section 1256. The Department had no authority to issue another determination on that issue, and the purported determination of August 17, 1979 was therefore a legal nullity. This would be true irrespective of whether the determination was issued on the Department's own initiative or, as happened in this case, it was issued at the suggestion of an administrative law judge.

The issuance of the ruling was completely proper for the reasons stated.

The order of an administrative law judge issued on August 24, 1979 setting aside the decision of July 19, 1979 was invalid. The administrative law judge had no legal authority to set aside that decision.

If either party files a written petition with the Office of Appeals within the 20-day limit prescribed in Title 22, section 5045, of the California Administrative Code,which presents a showing of good cause for not appearing at the hearing, the decision of the administrative law judge should be set aside. A new hearing should be scheduled at the earliest possible date. The issue of whether there was good cause for the nonappearance must be included on the notice of hearing and the matter adjudicated. However, if the reason given by the nonappearing party is obviously frivolous, or clearly does not constitute good cause, the petition should be denied. The nonappearing party would, of course, still have a right to appeal such an order denying reopening to this Board.

Where the administrative law judge has issued a decision favorable to the claimant under section 1256, and the time to petition for reopening or to appeal to this Board has expired, the section 1256 issue must be considered as finally adjudicated. The Department should promptly issue a ruling to the employer, based on all available evidence, regardless of whether such ruling accords with, or is contrary to, the administrative law judge's decision under section 1256.

We recognize that inadvertent bifurcation of issues under sections 1256 and 1032 may at times produce an anomalous result, as it will in the present case. Such anomalies cannot always be prevented. Nevertheless, the claimant who has had a full and fair hearing and has received a favorable decision from an administrative law judge is entitled to finality at some point. That point is reached when neither a petition to reopen nor an appeal to the Appeals Board has been filed within the time limits provided by law. On the other hand, the employer inadvertently deprived of participation in the hearing may not be denied the right to contest charges against its reserve account. If the employer establishes that it was entitled to a ruling, one should be issued. Additionally, the employer is unquestionably entitled to all statutory rights of appeal with respect to an adverse ruling (or to the denial of a ruling, if that is the case).

Where the claimant's failure to appear at the hearing is due to lack of proper notice, the employer is entitled to the same considerations of finality. This means that if the employer attends the hearing, receives a favorable decision from the administrative law judge, and the appeal or reopening time has run before the claimant learns about the hearing, the issue under section 1032 should be deemed final. The claimant should be afforded a hearing under section 1256 and entitlement to benefits should be determined by the facts developed regardless of the decision under section 1032.

In conclusion, we emphasize that our holding herein applies only to situations involving employers with reserve accounts.

DECISION

The decision of an administrative law judge dated October 15, 1979 is set aside.

The order of an administrative law judge dated August 24, 1979 is a nullity.

The decision of an administrative law judge dated July 19, 1979 holding the claimant not disqualified under section 1256 of the code is final. Benefits are payable if the claimant is otherwise eligible.

The ruling of the Department dated August 17, 1979 relieving the employer's account of charges is final. The employer's account is not subject to benefit charges under section 1032 of the code. The determination of the Department dated August 17, 1979 is a nullity.

Sacramento, California, February 11, 1981.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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