BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

RANDALL R. WHELCHEL
(Claimant)

LUCKY STORES
(Employer)

PRECEDENT
BENEFIT DECISION
No. P-B-443
Case No. 84-5449

Office of Appeals No. UPL-14736

The employer appealed from the decision of an administrative law judge which held that its reserve account was not relieved of benefit charges and that the claimant was not disqualified for unemployment insurance benefits under the separation provisions of the California Unemployment Insurance Code.

STATEMENT OF FACTS

The Employment Development Department issued a notice of determination and ruling holding the claimant not disqualified for unemployment insurance benefits under Unemployment Insurance Code section 1256 and the employer's reserve account subject to benefit charges under code sections 1030 and 1032. The employer appealed therefrom to an administrative law judge who found that the claimant had not been absent in excess of 24 hours from work within the meaning of section 1256.1 of the code and accordingly was discharged for reasons other than misconduct. The employer appealed to this Board.

The claimant was employed by the employer-appellant as a meat cutter for nearly six years. The claimant completed his last full shift of work on January 17, 1984. He was scheduled to report for work January 19, 20 and 21, but did not do so.

The claimant was arrested January 18, 1984, taken into custody, charged with the felony offense of assault with a deadly weapon, and incarcerated until January 23, 1984. He subsequently pleaded nolo contendere and was convicted of a lesser included misdemeanor offense.

As a consequence of his failure to report for work as scheduled, the claimant was discharged from employment on January 22, 1984.

REASONS FOR DECISION

Section 1256 of the Unemployment Insurance Code provides that an individual is disqualified for benefits and sections 1030 and 1032 of the code provide that the employer's reserve account may be relieved of benefit charges, if the claimant left his most recent work voluntarily without good cause or he has been discharged for misconduct connected with his most recent work.

Code section 1256.1(a) provides in pertinent part as follows:

> "If the employment of an individual is terminated due to his absence from work for a period in excess of 24 hours because of his incarceration and he is convicted of the offense for which he was incarcerated or of any lesser included offense, he shall be deemed to have left his work voluntarily without good cause for the purposes of Section 1256. A plea or verdict of guilty, or a conviction following a plea of nolo contendere, is deemed to be a conviction within the meaning of this section . . ."

In the case before us, it is clear that the claimant was terminated because of his failure to report for work January 19, 20 and 21, 1984. It is equally clear that his failure to report was due to incarceration for an offense for which he was subsequently convicted on a plea of nolo contendere. These elements invoke the provisions of code section 1256.1 and support a conclusion that the claimant is subject to disqualification under code section 1256 if it is established that he was absent from his work for a period in excess of 24 hours as a consequence of that incarceration. The administrative law judge held that the claimant was not shown to have been absent for the requisite period of time, in accordance with section 1256.1-1, Title 22, California Administrative Code (an Employment Development Department regulation) which provides in pertinent part:

> "(b) Definitions. As used in Section 1256.1 of the code, 'absence from work for a period in excess of 24 hours' means absence from work for a period in excess of 24 hours of actual working time. As used in Section 1256.1 of the code, 'incarceration' refers to incarceration either before or after conviction . . . ." (Emphasis added.)

The Administrative Code section contains the following examples of application of the term, "absence from work for a period in excess of 24 hours":

> EXAMPLE 1. A carpenter works an 8-hour shift. The carpenter must be absent from work for more than 3 workdays to be subject to disqualification under Sections 1256 and 1256.1 of the code.
>
> EXAMPLE 2. A teacher aide works four hours per school day. The teacher aide must be absent from work for more than 6 workdays to be subject to disqualification under Sections 1256 and 1256.1 of the code.
>
> EXAMPLE 3. A firefighter works a duty period of 72 consecutive hours. The firefighter is subject to disqualification under Sections 1256 and 1256.1 of the code if more than 24 consecutive hours of duty is missed.

We find the department's regulation contrary to section 1256.1 of the code with respect to the meaning of the phrase, "absence from work for a period in excess of 24 hours." We believe the Legislature meant 24 clock hours, not working hours. Thus, in the case before us, when the claimant failed to report for duty on January 19, 1984, he started the statutory clock running, and when again on January 20 he failed to report for work at the appointed time, an absence from work of 24 hours had occurred. An instant in time later, he had been absent from work within the meaning of the statute for more than 24 hours. He thus became subject to the disqualifying provisions of code section 1256, and the employer's reserve account was entitled to relief from benefit charges under code section 1030 and 1032.

To view the matter in any other manner would be to construe the relevant portions of code section 1256.1 as effecting disqualification of individuals, dependent entirely upon the peculiarities of their working hours,

rather than for the reason that their absence from work was occasioned by the commission of offenses resulting in incarceration and conviction.

Thus, in the foregoing examples used by the Department to illustrate its regulation, for an incarceration of 24 hours for identical offenses, only the firefighter would suffer disqualification. Other examples demonstrate the point. Take the instance of a part-time bookkeeper who works only 12 hours per week. Such an individual under the Department's regulation would be subject to disqualification only after two weeks in custody. Again, in the situation of an on-call worker whose hours were subject to the vagaries of an employer's fluctuating workload, it would be virtually impossible to determine when a disqualification would be effective.

In P-B-84 this Board invalidated a Department regulation, stressing that:

> "It is well settled that a tribunal of appropriate jurisdiction is empowered to set aside an administrative regulation which is illegal in the sense that it is not in accordance with constitutional or general law (2 Am. Jur. 2d 496, Adm. Law, sec. 646), or the specific statutory enactment it purports to implement. (Whitcomb Hotel v. California Employment Commission (1944), 24 Cal.2d 753, 151 P.2d 233.) It is also established that such a tribunal may set aside a regulation which is arbitrary, unreasonable or discriminatory, because such a regulation is, in the legal usage of the term, an abuse of administrative discretion and, accordingly, an unlawful exercise of administrative power. (2 Am. Jur.2d 131, Adm. Law, sec. 303.)"

The Board further emphasized that:

> "California follows the general rule that an unreasonable administrative regulation is unlawful and may be invalidated by a tribunal of appropriate jurisdiction. In Sandstrom v. California Horse Racing Board (1948), 31 Cal.2d 401; 189 P.2d 17, the California Supreme Court said:
>
> > " 'Whether the regulation is reasonable depends on the character or nature of the condition to be met or overcome.' "

In our view, that portion of the Department's regulation abstracted above is an abuse of administrative discretion resulting in an unreasonable regulation. It discriminates against persons solely on the basis of factors which have no reasonable relationship to the legislative purpose and is, accordingy, invalid. It is clear that the statutory scheme is to deny benefits to those individuals whose criminal convictions and resulting incarceration prevented them from reporting for work, as a consequence of which they were discharged. The statute deems such a separation to be a voluntary leaving of work without good cause. The claimant in the instant case engaged in a course of conduct proscribed by the statute. Hence, we are required to find that the claimant voluntarily left his most recent employment without good cause and is disqualified from the receipt of unemployment insurance benefits.

DECISION

The decision of the administrative law judge is reversed. The claimant is disqualified for benefits under code section 1256 and the employer's reserve account relieved of benefit charges.

Sacramento, California, September 26, 1985.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT L. HARVEY, Chairman

JAMES J. HAGARTY

HERBERT RHODES

J. RICHARD GLADE

DISSENTING - Written Opinion Attached

LORETTA A. WALKER

CHET WRAY

DEBRA A. BERG

DISSENTING OPINION

We dissent.

We hold that the claimant should not be disqualified for unemployment insurance benefits under Unemployment Insurance Code section 1256.1, nor should the employer's reserve account be relieved of benefit charges.

The principle to be settled herein is whether the phrase in code section 1256.1, "absence from work for a period in excess of 24 hours", means working or consecutive (clock) hours. The majority holds that consecutive hours are comprehended by the statute. We think the better view is that the statute refers to working hours.

In 1968, the legislature enacted the code section, subsection (a) reading as follows:

> "(a) If the employment of an individual is terminated due to his absence from work for a period in excess of 24 hours because of his incarceration and he is convicted of the offense for which he was incarcerated or of any lesser included offense, he shall be deemed to have left his work voluntarily without good cause for the purposes of Section 1256. A plea or verdict of guilty irrespective of whether an order granting probation or other order is made suspending the imposition of the sentence or whether sentence is imposed but execution thereof is suspended, or a conviction following a plea of nolo contendere, is deemed to be a conviction within the meaning of this section."

The statute was amended in 1972 to include a plea of nolo contendere in the second sentence as among those factors which constituted a "conviction."

The department promulgated in 1980 implementing regulations, in section 1256.1-1(b), Title 22, California Administrative Code. The regulation defines the phrase in terms of working hours, and reads in pertinent part as follows:

" 'absence from work for a period of 24 hours' means absence from work for a period in excess of 24 hours of actual working time." (emphasis added)

The regulation also contains specific examples to guide application of its principles.[1]

In our view, the department has correctly interpreted the meaning and intended effect of the statute.

We concur with the majority that this Board has the power and authority to invalidate a department regulation not in accord with constitutional or general law, but we think that this is not a proper case for the exercise of that authority. The Supreme Court of California has held that courts may not interfere with the exercise of an agency's discretion nor substitute its independent judgment for that of the agency unless it can be shown that a regulation lacks a reasonable basis in fact. Ferrante vs. Fish & Game Commission (1946), 29 Cal.2d 365, 369. That case, as the one before us, dealt with different classifications of persons, such classifications having been created by a regulation. The court held that the agency could make such a regulation, based as it was on a reasonable, factual basis. Certainly, a quasi-judicial body, such as this Board, is bound by this principle as well, and may not supplant a reasonable regulation promulgated by the Employment Development Department.

---

[1] EXAMPLE 1. A carpenter works an 8-hour shift. The carpenter must be absent from work for more than 3 workdays to be subject to disqualification under Sections 1256 and 1256.1 of the code.

EXAMPLE 2. A teacher aide works 4 hours per school day. The teacher aide must be absent from work for more than 6 workdays to be subject to disqualification under Sections 1256 and 1256.1 of the code.

EXAMPLE 3. A firefighter works a duty period of 72 consecutive hours. The firefighter is subject to disqualification under Sections 1256 and 1256.1 of the code if more than 24 consecutive hours of duty is missed.

In the regulation at issue, sanctions are imposed if a claimant is terminated from employment due to his absence from the employment for a period in excess of 24 hours due to incarceration for which he is later convicted. Statutory language is to be given its ordinary meaning and reference made to common understanding. County of Los Angeles v. Frisbie (1942), 19 Cal.2d 634, 642.

In addition, a statute must be read as a whole to divine its overall purpose. In doing so, we contend that code section 1256.1 purports to punish volitional conduct which causes an individual to be absent from his employment, where that absence results in a loss of employment. The key element here is the employment relationship, not an inflexible emphasis on passage of a period of time. In order for an individual to be absent from work, he or she must be absent during a period in which he or she is required to be present at work. Therefore, in computing the time of an "absence from work" attention must be directed only to those hours when the individual's presence is required at work, not to those hours in which he or she is otherwise free to engage in personal activities without restriction or control by the employer. We think that this is the ordinary meaning and common understanding of the phrase at issue: absence from work means absence during working hours only.

Applying these principles to the case before us, we would hold that it has not been established that the claimant was absent from work for a period in excess of 24 hours, hence disqualification under code section 1256.1 and relief of the employer's reserve account is inappropriate.

LORETTA A. WALKER

CHET WRAY

DEBRA A. BERG