BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

DAVID G. GRIB
(Claimant)

PRECEDENT
ABT, INC.   BENEFIT DECISION
(Employer)   No. P-B-453
                                                                              Case No. 86-10679
Office of Appeals No. S-14102-A

The employer appealed the decision of an administrative law judge which set aside an earlier decision favorable to it and dismissed the employer's appeal to the administrative law judge for nonappearance at a hearing. The decision effectively held the claimant not disqualified from receiving benefits under section 1256 of the Unemployment Insurance Code and held the employer's reserve account subject to charges for benefits potentially payable to the claimant.

STATEMENT OF FACTS

The claimant was employed by the appellant until June 21, 1986, after which he filed a claim for unemployment insurance benefits. The Employment Development Department determined that the claimant was not disqualified from receiving benefits and that the employer's reserve account was subject to charges in a determination and ruling issued July 17, 1986. The employer filed a timely appeal therefrom and a hearing was duly scheduled before an administrative law judge on September 16, 1986. The employer-appellant, but not the claimant-respondent, appeared at such hearing. After receiving nine exhibits and hearing the testimony of three witnesses, an administrative law judge issued a decision on September 18, 1986 reversing the Department's determination, disqualifying the claimant from receiving benefits, and holding the employer's reserve account relieved of potential benefit charges.

Pursuant to a timely application of the claimant-respondent to reopen the matter, a second hearing was set for November 10, 1986, at which the claimant-respondent, but not the employer-appellant, appeared and presented evidence. Following such hearing, the administrative law judge issued a decision vacating the earlier decision favorable to the employer and dismissing the employer's appeal for nonappearance. From such action, the employer has appealed to this Board.

REASONS FOR DECISION

The immediate issue before us is the propriety of the administrative law judge's decision which dismissed the employer's appeal due to its failure to attend a second hearing. Resolution of this question requires an examination of the procedural steps established for quasi-judicial adjudication.

Section 1328 of the Unemployment Insurance Code provides that a party may appeal a determination of the Employment Development Department to an administrative law judge within 20 days from mailing or personal service of the notice of determination.

Section 1334 provides that the administrative law judge shall afford the parties a reasonable opportunity for a fair hearing, after which he shall affirm, reverse, modify or set aside any determination under appeal.

With respect to post-hearing remedies, section 5045(c), Title 22, California Administrative Code, provides:

> "If an appellant or petitioner fails to appear at a hearing, the administrative law judge may issue a decision dismissing the appeal or petition. A copy of the decision shall be mailed to each party together with a statement concerning the right to reopen the appeal as provided in subsection (d)."

Section 5045(d) provides in pertinent part:

"Any such dismissed appeal or petition shall be reopened by an administrative law judge if the appellant or petitioner makes application in writing within twenty (20) days after personal service or mailing of the dismissal decision and shows good cause for failure to appear at the hearing. . . ."

Section 5045(e) recites that a party other than the appellant or petitioner who fails to attend a scheduled hearing may make application to vacate the decision within 20 days after personal service or mailing of the decision to such party. Upon a showing of good cause for failure to appear at the hearing, the administrative law judge shall issue an order vacating the decision and the matter shall be set for further hearing.

Section 5041 of the Administrative Code provides that a hearing may be held simultaneously, separately or by telephone.

Both parties in this case attended a hearing before an administrative law judge. Unfortunately, they did not attend at the same time because of circumstances beyond the control of either one of them. In view of the appellant's attendance, its appeal cannot be dismissed pursuant to section 5045(c) of the Administrative Code. This prohibition follows not only from the mechanics of judicial due process but also from the acceptance of reality. The hearing of September 16, 1986 generated a record consisting of several exhibits and the testimony of three witnesses. This product cannot be expunged by procedural fiat. Were it otherwise, the purposes to be achieved by administrative legal process would be defeated.

We accept the administrative law judge's finding that good cause exists to vacate the earlier decision under section 5045(e) due to the claimant-respondent's failure to receive proper notice of the hearing. Setting aside that decision, however, does not set aside or annul the employer-appellant's appearance and presentation of evidence. Consequently, the administrative law judge should have taken the claimant-respondent's evidence at the second hearing and issued a decision on the merits of the case, taking into consideration the entire record. Since this was not done, the matter must be remanded to an administrative law judge for a decision in accordance with the views expressed herein.

DECISION

That portion of the decision of the administrative law judge vacating the decision of September 18, 1986 and reopening the hearing is affirmed. That portion of the decision dismissing the appeal for nonappearance is set aside. The matter is remanded to an administrative law judge for a further hearing, if necessary, and a decision based upon the entire record in this case.

Sacramento, California, March 31, 1987.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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