

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD  
P O Box 944275  
SACRAMENTO CA 94244-2750

GREGORY J. BANISH  
Claimant

Precedent Benefit  
Decision No. P-B-496

SANTA BARBARA INVESTMENT CO.  
Employer/Appellant

DECISION

Attached is the Appeals Board decision in the above-captioned case issued by Board Panel members:

FRED AGUIAR

ANN M. RICHARDSON

LIZ FIGUEROA

CINDY MONTANEZ

Pursuant to section 409 of the California Unemployment Insurance Code, AO-144947 is hereby designated as Precedent Decision No. P-B-496.

Adopted as Precedent: October 14, 2008

**Case No.:** AO-144947  
**Claimant:** GREGORY J BANISH

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## REM

The employer appealed from the decision of the administrative law judge that held the claimant not disqualified for unemployment insurance benefits under section 1256 of the Unemployment Insurance Code<sup>1</sup> and the employer's<sup>2</sup> reserve account subject to benefit charges under sections 1030 and 1032.

The administrative law judge did not decide the issue of the claimant's employment status under sections 601 and 621, subdivision (b), referring<sup>3</sup> it instead to the Employment Development Department (Department).

### ISSUE STATEMENT

The issue in this case is whether the administrative law judge had subject matter and notice jurisdiction over the issue of the claimant's employment status when the Department's determination and ruling only specified the separation and ruling issues under sections 1256, 1030 and 1032.

### FINDINGS OF FACT

The claimant worked as a bookkeeper for two weeks. The understanding of both parties was that the claimant provided services as an independent contractor and not as an employee. The employer discharged the claimant due to dissatisfaction with his work performance and the claimant then filed a claim for unemployment insurance benefits effective May 21, 2006.

The employer filed a timely protest to the Notice of Claim Filed contending that its reserve account should not be subject to benefit charges because the claimant performed services as an independent contractor.

The Department issued a Notice of Determination (determination) and Ruling (ruling) holding that the reasons for the claimant's discharge "do not meet the

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<sup>1</sup> All section references are to the Unemployment Insurance Code unless otherwise noted.

<sup>2</sup> The term "employer" is used for convenience only and not as a legal conclusion, as that is a pending issue.

<sup>3</sup> The administrative law judge "remanded" the employment status issue, but the preferable terminology when the Department is asked to consider an issue is a referral.

definition of misconduct connected with the work” and subjecting the employer’s account to benefit charges. The determination did not contain the employment status issue.<sup>4</sup>

The employer appealed and the matter was set for hearing. The Notice of Hearing (notice of hearing) that was mailed to the parties listed the issues for consideration as under sections “1256” and “1030/32”, and specifically stated in reference to section 1256: “Did the claimant voluntarily leave his or her most recent employment without good cause. Was the claimant discharged for misconduct connected with his or her most recent work?” The notice of hearing did not include the issue of employment status. At the hearing the employer again raised that issue.

The administrative law judge affirmed the Department’s determination and ruling that held the claimant not disqualified for benefits and subjected the employer’s account to benefit charges. He declined to consider the issue of the claimant’s employment status on the grounds he did not have jurisdiction as that issue was not specifically listed in the Department’s determination and ruling.

The employer appealed to the Board restating its position that the claimant was an independent contractor and that the administrative law judge should have considered the status issue at the hearing.

### REASONS FOR DECISION

In Precedent Benefit Decision, P-B-494, the Board found that in order to assert jurisdiction over issues in a case, the administrative law judge must have both subject matter and notice jurisdiction.<sup>5</sup>

California Code of Regulations, title 22, section 5062(b), addresses the circumstances under which the administrative law judge has subject matter jurisdiction. It provides in relevant part that:

“An administrative law judge shall consider only those issues **in a department action** which are appealed, petitioned, or noticed by the agency.” (Emphasis added)

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<sup>4</sup>The Board takes official notice (Cal. Code Regs., tit. 22, § 5009) that the Department, in a claim note entry for December 11, 2006, concluded that the claimant was an employee.

<sup>5</sup> Subject matter jurisdiction is the authority or competency of a body to adjudicate the type of action that is before it. Notice jurisdiction encompasses a due process right to be advised of an adverse action and an opportunity to prepare a defense. Both legal concepts were extensively discussed in P-B-494.

The Department action in this case was its issuance of the determination that the claimant was not disqualified for benefits under section 1256 because he did not engage in “misconduct connected with the work,” and the related ruling, charging the employer’s account under sections 1030 and 1032.

In examining whether the administrative law judge had subject matter jurisdiction over the claimant’s status as an employee we consider 1) whether the Department’s action under sections 1256, 1030 and 1032 included a finding on the issue of employment status; and 2) whether the employer’s appeal put at issue all of the elements in that action, even if not specifically listed in the Department’s determination and ruling or the Office of Appeal’s notice of hearing.

An individual is disqualified for benefits if he or she has been discharged for misconduct connected with his or her most recent work. (§1256.)

The employer's reserve account may be relieved of benefit charges if the claimant was discharged for misconduct. (§§1030 and 1032.)

Section 1256 only applies where the claimant leaves or is discharged from “his or her most recent work.” “Most recent work” for this purpose means work in employment for wages, not in self-employment (Precedent Decisions P-B-5 and P-B-210). Similarly, sections 1030 and 1032 (rulings and charges to reserve accounts) are both based upon employment.<sup>6</sup>

It is also well established that the relationships of employer and employee and of principal and independent contractor are mutually exclusive and cannot exist simultaneously with respect to the same transaction. (*Empire Star Mines v. California Employment Commission* (1946) 28 Cal.2d 33, 168 P.2<sup>nd</sup> 686). Accordingly, work performed as an independent contractor cannot be work in “employment” within the meaning of code section 601.

Inasmuch as a separation for purposes of unemployment insurance can only be for work performed as an employee, we find that employment status is a necessary element inherent in every decision under sections 1256, 1030 and 1032.<sup>7</sup> The Department’s action on a separation issue necessarily presupposes that services were performed as an employee and not as an independent

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<sup>6</sup> “‘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.” (§ 601) “[E]mployee’ includes any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.” (§ 621, subd. (b))

<sup>7</sup> An issue is inherent when it is a fundamental and necessary element or component in the analytic process when considering and deciding that issue.

contractor, irrespective of whether the Department's conclusion on status is the result of deliberation or presumption when there is little or no evidence to the contrary.

The employer's appeal to that Department action put at issue **all** of the elements inherent in that action and provided the administrative law judge with subject matter jurisdiction to hear and decide the issue of the claimant's employment status. This is so whether that element is explicit, implied, or never mentioned in the Department's action.

The question of employment status is, in fact, a jurisdictional issue. In Precedent Ruling P-R-432, the Board stated that employment status is jurisdictional and when its existence is denied by a purported employer, it "must be established before a purported employer may be placed in the position of having to provide information prescribed by the code sections which presuppose the very fact the purported employer denies."

For that reason, the administrative law judge in this case had, and should have asserted, subject matter jurisdiction over employment status since it is an intrinsic and jurisdictional element of the noticed issues.<sup>8</sup>

We next consider whether the administrative law judge had notice jurisdiction over employment status.

The principle of due process requires that a party must have **timely** and **adequate** notice detailing the reasons for a proposed action so that it may prepare its case. (*Goldberg v. Kelly* (1970) 397 U.S. 254, 267, emphasis supplied); See also, *Logan v. Zimmerman Brush Co. et al* (1982) 455 U.S. 422; *Cleveland Board of Education v. Loudermill et al* (1985) 470 U.S. 532); *Sherbert v. Verner*, 374 U.S. 398.)

Said notice must be provided to the parties at least ten days before the date of the hearing, unless a waiver to the ten days is obtained. (Cal. Code Regs. tit. 22 § 5056, subd. (a)). A "waiver" is the intentional relinquishment of a known right (Cal. Code Regs., tit. 22 § 5000, subd. (f)).

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<sup>8</sup> We do not concur with the administrative law judge's decision to proceed with the hearing on the separation and ruling issues while referring the question of employment status to the Department. Those issues should be heard and decided concurrently given the intrinsic relationship between them, as well as the employer's due process right to be timely heard on employment status before its account is potentially subjected to benefit charges. (P-R-432, p.6. See, for example, Precedent Tax Decision, P-T-488, in which the employer was entitled to notice of the potential charges for additional training benefits and an opportunity to timely challenge the claimant's eligibility for such benefits prior to the annual statement of charges being issued.)

In order for the administrative law judge to assert notice jurisdiction, the parties must have notice of both the legal issues and of the factual issues that form the basis of the legal action. (P-B-494, p.7)

In its appeal the employer had raised the issue of employment status as a defense to the Department's action, and the general understanding between the claimant and the employer was that the claimant performed services as an independent contractor. However, in this case the Department's determination did not cite to section 621, subd. (b) or any other section pertaining specifically to employment status. Instead it enumerated the issues under consideration as being under sections 1256, 1030 and 1032, and characterized the claimant's separation as being for reasons other than misconduct *connected with the work*. The notice of hearing was similarly couched in terms of a discharge for misconduct *connected with the work* or good cause for a voluntary quit of his or her *most recent employment*.

While we have found that such language is sufficient to provide the administrative law judge with subject matter jurisdiction over the issue of status for the reasons previously noted, we find that the references to "work" and "most recent employment" are too indirect to satisfy the requirement for notice of the legal issues.<sup>9</sup> Neither the language of the determination and ruling nor of the notice of hearing was "adequate" per the *Goldberg* standard because it was insufficient to apprise the parties that the legal issue of the claimant's employment status was a part of the separation issue that would be heard and decided at the hearing, and for which they had to prepare.

Consequently, we find that the parties did not have adequate notice that the legal issue of employment status would be heard and decided at the hearing, nor did they receive the minimum of ten days notice to that effect.

Nonetheless, as we noted in P-B-494, the administrative law judge could have corrected the lack of legal notice by obtaining waivers from the claimant and any other party at the hearing as to both the legal issue and the ten day notice requirement.<sup>10</sup> Absent such waivers the administrative law judge must continue both the status and separation issues in order for them to be heard concurrently and to provide proper notice. The administrative burden of continuing the case

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<sup>9</sup> Unlike this case which deals with notice of the legal issues, P-B-494 dealt with the question of notice of the factual issues

<sup>10</sup> We recognize that the Department, although not present at the hearing, is an interested party when there is an appeal to its determination. A continuance of the hearing until the Department chose to appear is impractical and impinges on the rights of the other parties to have the issues settled in a timely manner. Ultimately, the Department's rights as a party are safeguarded since it can make an application to vacate the administrative law judge's decision. (P-B-494, §§ 1334 and 1336)

until notice is given is outweighed by the need to protect the parties' core due process rights (P-B-494; *Crosby v. Ward* (7<sup>th</sup> Cir. 1988) 843 F.2d 967, 984.)

Finally, we note that the question that arose in this case regarding notice jurisdiction could have been avoided had the Department issued a written determination specifically addressing the employment status and separation issues. Since the Department is required to provide notice of its determination when a party raises eligibility issues pursuant to sections 1327 and 1328, as the employer did in this case, the Department should have included notice as to both issues in the written determination. (See, P-B-494, which set forth the specific requirement for notice of both the factual and legal issues; P-B-128, indicating that a written determination is required under § 1328 where notice of claim filing is given to the last employer and that last employer provides information pursuant to § 1327; and P-R-432, where the employer was not entitled to a ruling under code § 1030 because it did not provide information about the separation but was entitled to a determination because it provided information about the claimant's status as an independent contractor, which might affect the claimant's eligibility for benefits.)

Inasmuch as the administrative law judge failed to consider and decide the issue of employment status in this case, it is necessary to remand the matter for that purpose. This decision constitutes notice of the factual and legal issues in the hearing. No further waiver or notice is necessary on remand.

## DECISION

The decision of the administrative law judge is set aside and the matter is remanded to an administrative law judge for a hearing and decision on the issue of employment status and, if appropriate, a decision on the merits of the claimant's separation and related ruling. The documentary and testimonial evidence already admitted shall remain a part of the record.