BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

EDWARD L. JOHNSON
(Claimant)

PRECEDENT
BENEFIT DECISION
No. P-B-57
Case No. 69-653

TRANS WORLD AIRLINES, INC.
(Employer)

DEPARTMENT OF HUMAN RESOURCES DEVELOPMENT

The employer and the department appealed from Referee's Decision No. LA-22513 which held that the claimant was not disqualified for benefits under section 1256 of the Unemployment Insurance Code and that the employer's reserve account is not relieved of charges under section 1032 of the code. Written argument has been filed with this board by the department and the claimant. The employer declined to file such argument.

STATEMENT OF FACTS

The claimant was employed five months by the employer as a janitor. He worked from midnight to 8:30 a.m. and was paid $3.05 an hour. On October 26, 1968 this employment ended under the following circumstances.

The claimant testified: After leaving work at his usual time on that day, a Los Angeles Police Department officer in a patrol car "came upon me with the lights flashing" and stopped the claimant in his automobile at a place variously described by him as (1) a public street, (2) on Pershing Drive going towards Manchester Boulevard, (3) on a dirt road behind the airport, (4) by a large apartment house on Pershing Drive going towards Manchester Boulevard, and (5) at a place on Pershing Drive coming towards Manchester clearly off airport property about two or three miles from his place of employment.

According to the claimant the officer asked to see the claimant's driver's license and ordered the claimant out of his automobile. The claimant testified he had committed no motor vehicle violation and asked the officer the reason for being stopped. He was told it was a routine check. The officer cautioned the claimant to step away from his automobile. He then opened the door and looked in. On the passenger's side of the seat lying on the seat was a blanket belonging to the claimant. The claimant continued:

> ". . . He picked up the blanket and he said, 'What is this?' I said, 'It's not mine' . . . . and after he had taken the things out the front seat and kind of underneath the seat, he went to the glove compartment and also pulled out, I don't know what items he pulled out."

The officer removed a number of packaged food items and 20 miniature bottles of liquor. The liquor bottles were labeled "TWA." The claimant at that time denied knowledge of the items being in his automobile. He did not protest the search. It was the claimant's position that the merchandise which was found was placed there by some unknown person:

> ". . . They were in the front seat down. I have a blanket I use on the seat because the seat is worn and these someone had planted on the front seat with this blanket I have over them."

* * *

> "These were to the far right side where a passenger would usually sit."

* * *

> ". . . They were in a container -- tin container. I can't describe the size of it. Maybe a six by twelve. I don't know the regular size of this thing."

The claimant later altered his version of where the employer's property was found by the police officer and testified that "It was not on the seat. It was on the bottom of the seat, on the floor boards."

The officer asked for and was given the keys to the trunk of the claimant's automobile. Nothing incriminating was found. The items found in

the passenger compartment were placed in the police car and tha claimant was handcuffed and ordered to accompany the officer in the police car. He was taken by the officer to the Los Angeles International Airport where inquiry was made by the police officer at Continental Air Lines as to the legal ownership of the merchandise found in the claimant's automobile. The claimant had not informed the officer where he worked until after employees of Continental were unable to recognize either the claimant or the merchandise.

The claimant was then taken to the employer's office where the items were inventoried in the presence of the claimant and the police officer. After a brief consultation between the employer's representatives and the shop steward, the claimant was asked to resign from his job. The shop steward advised him to take this course of action. The claimant did not protest and made a written statement resigning from his employment.

The resignation signed by the claimant reads as follows:

"26 Oct 1968

"To Whom It May Concern:

"Please be informed herein that the undersigned is resigning from the employment of Trans World Airlines Inc as of 1100 Oct 26 1968 because of the accusation and involvment [sic] in LAPD investigation of company material in my custody

/s/ Edward L. Johnson

"I also accept the responsility [sic] for the commodities being in my vehicle

/s/ Edward L. Johnson

The claimant testified that he saw the second paragraph of the resignation for the first time at the hearing; that he was told to sign his name the second time because his first signature was not legible; and that the second paragraph was added without his knowledge. He admitted the truth of the first paragraph and that it was prepared in his presence. A machine copy of the resignation was entered as Exhibit No. 4 to the record. We find both signatures to be legible.

It is not known whether the police officer had in his possession an arrest or a search warrant when he accosted the claimant. No arrest was made. The claimant was released after he signed the resignation. No criminal charge has been brought against him as a result of his being found with the employer's property. The claimant testified that throughout the incident, from the moment he was accosted by the police officer and displayed his driver's license until handcuffed and returned to the employer's premises, he was ordered to stand his distance: "'You get out of the car. You make me nervous . . .'" or the officer stated, "'Get further back. If you don't, I'm going to have you handcuffed.'" The claimant was finally handcuffed: "So he at that time he said, 'I can't drive with you. You make me nervous,' so he handcuffed me."

As a janitor, the claimant worked in areas where the employer's food and liquor items were accessible to him. While at work he parked his automobile about 150 feet from his work station. The claimant had a ten minute break and lunch period during his shift with an opportunity to go to his automobile.

REASONS FOR DECISION

Section 1256 of the California Unemployment Insurance Code provides that a claimant shall be disqualified from receiving unemployment insurance benefits if he has been discharged for misconduct connected with his most recent work. Sections 1030 and 1032 of the code provide in these circumstances that the employer's reserve account may be relieved of benefit charges.

A forced resignation is a discharge. The claimant in the present case was advised to resign by his representative, the shop steward, after the steward had consulted with the employer's representatives. The claimant was forced to resign. The terminal issue before us is whether his discharge was for misconduct within the meaning of section 1256 of the code. To reach its resolution we must examine the present record in light of current notions of "administrative due process."

The Second District Court of Appeals for the State of California in Maywood Glass Company v. Stewart (1959), 170 Cal. App. 2d 719, 339 Pac. 2d 947, adopted for this jurisdiction the principle first enunciated by the Supreme Court of Wisconsin in Boynton Cab Company v. Giese (1941), 237 Wis. 237, 296 N.W. 630, that in cases of alleged misconduct the burden

of proving deliberate violations or disregard of the standards of behavior which an employer has a right to expect of his employee must be initially borne by the employer. Derived from the common law rule that a master must go forward to sustain the burden of showing sufficient cause for his servant's discharge on the grounds of alleged wrongdoing, the servant being under no obligation to first show he was without fault, it was authoritatively established for this board in the Maywood case that a claimant is eligible to receive benefits unless his employer proves some valid reason for his disqualification. Thus a claimant comes to our proceedings with a prima facie case for his eligibility created by force of law. He is entitled to prevail in the absence of a showing of his wrongdoing. (The concept of employee fault has been definitively treated by us in Appeals Board Decision No. P-B-3.)

Conversion of another's property, whether belonging to an employer or one of its employees, is "any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein . . . ." (Ballentine Law Dictionary, 1948 ed.) We will not hesitate to hold that misappropriation of an employer's property by an employee is conclusive evidence of misconduct, because such conduct is the type which evinces a "wilful or wanton disregard of an employer's interests," a deliberate violation of the standards of behavior which an employer has a right to expect of his employees (Maywood Glass Company, supra, the court quoting with approval the reasoning expressed in Boynton Cab Company v. Neubeck (1941), 237 Wis. 249, 259, 296 N.W. 636, 640).

In Benefit Decision No. 5070, the eligibility for benefits of a claimant who with her husband had been discharged for alleged misappropriation of company property was considered. Subsequent to their discharge a warrant was issued for the arrest of the husband, and a jury trial was conducted before a justice of the peace which resulted in the husband's acquittal. No criminal charges were preferred against the claimant. There was no question that the property had been found in the possession of the claimant and her husband.

The claimant maintained before the referee that she and her husband had purchased the property at the company commissary, but she was unable to support her testimony by furnishing copies of invoices covering the alleged purchase. A company official denied that the purchase had been made at the commissary. On this conflicting evidence, the referee held that the claimant had been discharged for misconduct.

In exercising its power of appellate review, the board there held that the acquittal of the husband was not conclusive of the evidentiary issue presented to the referee; namely, whether the claimant had taken the employer's property. Secondly, it held that the same degree of proof was not required to sustain a finding of misconduct under the Unemployment Insurance Act (now Unemployment Insurance Code) as would be required to sustain a conviction for an illegal act in a criminal proceeding; that is, guilt beyond a reasonable doubt need not be proved in our proceedings. A preponderance of the evidence showing an unsatisfactorily explained possession of an employer's property will support a conclusion that a claimant has been discharged for misconduct. Put another way, the quantum of proof which is required in our administrative proceedings need not amply support a particular finding of fact. It need only outweigh opposing evidence. We thoroughly approve of both the reasoning and result of this case.

The quality of evidence necessary to sustain such a finding has been explicitly defined in our regulations as follows:

> "Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions." (Section 5038(c), Title 22, California Administrative Code)

This criterion implements our legislative mandate, expressed in section 1252 of the Unemployment Insurance Code, that we administer the unemployment insurance program under our charge in accordance with rules of evidence having as their basic purpose and design the exclusion from the record of unreliable forms of proof, not the suppression of truth. (Compare Appeals Board Decision No. P-R-38 in which we held that our refusal to strictly adhere to rules of evidence - therein the hearsay rule - in ex parte ruling cases does not deprive a party of procedural due process but rather results in substantial justice being done)

No substantive right of a claimant is violated if otherwise unreliable hearsay is introduced to corroborate direct evidence (Swegle v. State Board of Equalization (1954), 125 Cal. App, 2d 423, 270 Pac. 2d 518), or to explain or further support direct evidence (Cooper v. State Board of Public Health (1951), 102 Cal. App. 2d 27). Such circumstantial evidence may also be sufficiently preponderant and persuasive in a given unemployment insurance

benefit case to result in a holding that a claimant has been discharged for misconduct when the act committed by him will "justify the reasonable inference that the employee should have known that injury or damage to his employer's interests was a probable result." (Appeals Board Decision No. P-B-14)

In Benefit Decision No. 5114, this general rule was specifically applied by an earlier board to facts similar to those found by this board in the present case. The claimant had been discharged after being found with company property in her possession contrary to an employer rule which stated that an unauthorized removal from or possession of company property would not be tolerated. The board concluded:

> "We are unable to agree with the Referee that the failure of the employer to give a plausible explanation as to how the claimant might have accumulated the material in her possession should be a reason for deciding in her favor. The evidence has established that it was possible for her to obtain the materials, either from her foreman or fellow employees on her shift. Under these circumstances, it appears to us that when it was proven the property was in her possession, the burden of going forward then shifted to her to explain how and why she acquired it. This she has failed to do."

Again, this reasoning and result are as appropriate now as when written by our predecessors.

Substantially all of the evidence developed at the hearing in the present case which might clarify or explain the circumstances leading to the claimant's discharge was supplied by him. His credibility and the weight to be attached to his testimony is therefore a major issue before us.

A respected legal authority in this jurisdiction has stated that the "inherent improbability rule" is a statement of the power possessed by a trier of fact, not a doctrine of appellate review (Witkin, California Evidence, 2d ed. 1966, page 1029). This administrative tribunal, however, has assumed wide and now unchallenged power in reviewing our referee's decisions by virtue of our authority to make separate and different findings of fact after carefully reweighing all the evidence of record in cases calling for our appellate review. (See Appeals Board Decision No. P-T-13)

In doing so, however, we recognize the important role of our referees in their capacity as hearing officers presiding over quasi-judicial proceedings. In one sense their title of "referee" is a misnomer, for they alone in the last analysis are the true advocates of justice in conducting these nonadversary proceedings. They therefore have broad discretion and authority with the duty to do all things necessary for the attainment of a full and fair hearing for each of the parties, the fulfillment of which is frequently referred to as "administrative due process." (See sections 5038-5045, Title 22, California Administrative Code) As triers of fact, they are initially the exclusive arbiters of the credit and weight to be given testimony unless there are sound and relevant considerations for rejecting it. (See also Huth v. Katz (1947), 30 Cal. 2d 605, 609, 184 Pac. 2d 521, 523, for a general discussion of this proposition)

To more fully understand the role of this tribunal and our stature with respect to our referees, it is necessary to refer to section 401 of the Unemployment Insurance Code, which provides for the vesting in us of the adjudicatory functions pertaining to the California disability and unemployment compensation programs, and to section 404 of the code, which provides for our appointment and direction of the activities of
"one or more impartial referees who shall hear and render a decision in every matter in which a petition is filed with, or an appeal is taken to, a referee . . . ."

In reviewing our referees' findings of fact, generally greater weight must be given to a party's direct testimony under oath than to indirect evidence. But direct testimony may be disbelieved where it appears unreliable, contradictory, or inherently improbable. (See Camp v. Ortega (1962), 209 Cal. App. 2d 275, 25 Cal. Rptr. 873) The United States Supreme Court expressed this view in Quock Ting v. United States (1891), 140 U.S. 417, 420-421, 11 S. Ct. 733, 851:

> "Undoubtedly, as a general rule, positive testimony as to a particular fact, uncontradicted by any one, should control the decision of the court; but that rule admits of many exceptions. There may be such an inherent improbability in the statements of a witness as to induce the court or jury to disregard his evidence, even in the absence of any direct conflicting testimony. He may be contradicted by the facts he states as completely as by direct adverse testimony; and there may be so many omissions in his account of particular transactions, or of his own conduct, as to discredit his whole story. His manner, too, of testifying may give rise to doubts of his sincerity, and

> create the impression that he is giving a wrong coloring to material facts. All these things may properly be considered in determining the weight which should be given to his statements, although there be no adverse verbal testimony adduced."

Our application of these standards must be tempered by reasonableness to the end that a referee's decision be affirmed unless an error committed by him be prejudicial to a party and result in a miscarriage of justice. (See California Constitution, Article VI, section 13) This is why, when we review appeals from our referees' decisions we consistently apply the principle of limiting our jurisdiction to a review of the applicable law and sufficiency of the evidence upon which that decision rests. So long as there is sufficient evidence to support the referee's decision, the sufficiency of the evidence may not be relitigated on appeal.

When dealing with matters of procedure, we follow this same principle of restraint to the point of not upsetting the decision of the trier of fact unless the record be so fatally defective and unless the referee's error be so gross as to result in substantial prejudice to the basic rights of a party to a full and fair hearing. If it is clear from the record that substantial and prejudicial error has been committed and may not be remedied at this stage of the proceedings, we will require another hearing so that each party is assured in practice the safeguards promised to each in theory.

We are reminded in this connection of the words spoken by one federal appellate court jurist in an opinion dealing with the exclusion of evidence by a Federal Trade Commission examiner. In Samuel H .Moss, Inc. v. F.T.C. 148 F. 2d 378, 380 (2d. Cir.1945), cert. den., 326 U.S. 734, the Court of Appeals for the Second Circuit stated:

> "The last question is whether the examiner excluded evidence which he should have admitted. This testimony was presented in very disjointed form, and it is somewhat difficult to know . . . just what it was designed to prove; [In these circumstances] . . . if the case was to be tried with strictness, the examiner was right. It is quite true . . . a less confusing record would have resulted. [But] Why . . . he . . . should have thought it desirable to be so formal about the admission of evidence, we cannot understand. Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, evidence and in such proceedings as these the only conceivable interest that

> can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence. In the case at bar it chances that no injustice was done, but we take this occasion to point out the danger always involved in conducting such a proceeding in such a spirit, and the absence of any advantage in depriving either the Commission or ourselves of all evidence which can conceivably throw any light upon the controversy."

This is one statement of the proper function of an examiner charged with developing an administrative record. Another and more likely result of erring on the side of liberality to fully develop a case, of course, is the avoidance of

confusion; for, again, a hearing examiner may not sit idly by and permit a meaningless record to be made. (Bethlehem Steel Company v. N.L.R.B., 120 F. 2d 641 (D.C. Cir. 1941))

From this preliminary discussion we now proceed to the essential matters for decision in this case. Did the employer carry its burden of establishing misconduct? The answer depends upon the propriety of the referee's suppression of the merchandise found in the claimant's possession and his exclusion of the claimant's confession to having unauthorized possession of the employer's property.

Since the California Supreme Court's decision in People v. Cahan (1955), 44 Cal. 2d 434, 282 Pac. 2d 905, it has been settled in this jurisdiction that illegally obtained evidence in criminal prosecutions shall be excluded and rendered inadmissible. However, the court stated: "In developing a rule of evidence applicable in the state courts, this court is not bound by the decisions that have applied the federal rule, and if it appears that those decisions have developed needless refinements and distinctions, this court need not follow them. Similarly, if the federal cases indicate needless limitations on the right to conduct reasonable searches and seizures or to secure warrants, this court is free to reject them. Under these circumstances the adoption of the exclusionary rule need not introduce confusion into the law of criminal procedure. Instead it opens the door to the development of workable rules governing searches and seizures and the issuance of warrants that will protect both the rights guaranteed by the constitutional provisions and the interest of society in the suppression of crime." (44 Cal. 2d at 450-451)

In criminal investigations as opposed to prosecutions, the State of California, contrary to federal practice, permits a temporary detention for questioning without an arrest. Circumstances short of probable cause may justify an officer's stopping of a motorist for questioning when suspicious conduct in or about his automobile takes place.

> "Experienced police officers naturally develop an ability to perceive the unusual and suspicious which is of enormous value in the difficult task of protecting the security and safety of law-abiding citizens." (People v. Cowman (1963), 223 Cal. App. 2d 109, 117, 35 Cal. Rptr. 528)

Therefore, when an officer is performing his legal duty on a public street or in the proximity of a defendant's automobile and observes contraband which has been placed within the range of the officer's senses, the seizure thereof does not violate the defendant's constitutional guarantees. (People v. Holloway (1964), 230 Cal. App. 2d 834, 41 Cal. Rptr. 325)

The court in People v. Manis (1969), 74 Cal. Rptr. 423, summarized the law in California on the subject of temporary detention for investigation (page 426 et seq.): A valid detention involves a determination of fact and must result from a rational suspicion by a police officer that some illegal activity is or has taken place and that the individual under suspicion is connected with the unusual activity. (74 Cal. Rptr. at 427)

Despite the accepted fact that the Los Angeles Police Department officer approached the claimant in the present case with the lights of his patrol car flashing, the claimant's unrebutted testimony is that he had committed no motor vehicle violation on that occasion. Accepting the version of his testimony which would place the employer's property upon the seat of his automobile rather than on the floor boards, there is no probative evidence supporting a conclusion that the employer's property was in plain view so as to justify its seizure by the police officer. There was, in our opinion, a search upon less than suspicious circumstances. If that search was inherently unreasonable, that is, illegal, the claimant's constitutional guarantees under the Fourteenth Amendment to the United States Constitution and Article 1, section 19, of the California Constitution, which prohibits "unreasonable searches and seizures," would be violated by admission of the seized contraband in a criminal proceeding. Parenthetically, we do not believe the record will sustain a finding in the present case that the claimant freely consented to remove himself from his automobile to allow the police officer to

observe and then to examine the merchandise lying hidden beneath the blanket, and, finally, to the officer's entry into the claimant's automobile and seizure of the employer's property. (Compare People v. Williams (1957), 148 Cal. App. 2d 525, 307 Pac. 2d 48)

But we conclude in the circumstances of this case - a civil proceeding, that there was no "search and seizure," merely a return without objection by the claimant of the property belonging to the employer. Further, the police officer did not participate in eliciting from the claimant a confession or damaging admission to be used in a criminal proceeding. The officer merely returned the claimant to the employer's premises. This board respects the essence of all constitutional provisions as being supreme law and a mandate of the highest order, and appreciates, as an administrative tribunal created by the legislature within the framework of a constitutional government, that its members and its referees must entertain no doubt regarding the implications of their duty to observe as well as respect all applicable constitutional provisions in carrying out the functions of our quasi-judicial administration of the code. But, we are not required to torture plain facts and apply exclusionary constitutional or statutory rules of procedure to reach a desired result, because in analyzing the effect of a violation of an individual's Fourth Amendment guarantee against unreasonable searches and seizures (the amendment applies generally to the states under the Fourteenth Amendment to the Federal Constitution), we must consider the purpose of the guarantee in its proper setting.

> "The rule of inadmissibility arose and was developed in criminal cases, and its object - deterrence of unlawful activity by law enforcement officers - would indicate that it has little, if any, application to ordinary civil actions. But where the proceeding, though 'civil' in nature, is 'quasi-criminal' in effect, i.e., where it involves penalties or forfeitures, the exclusionary rule will be applied." (Witkin, supra, page 60)

This conclusion relieves us of the task of deciding whether the claimant's behavior contributed to the police officer's "nervousness" and determination that the claimant be handcuffed - taken into custody - since, as we read the record, whatever violation of the claimant's constitutional guarantees might have occurred is not a relevant consideration in our inquiry. Nor is it necessary to discuss, in terms of the question of custody, the leading United States Supreme Court decisions referred to in the department's brief or to People v. Dorado (1965), 62 Cal. 2d 338, 398 Pac. 2d 361, which deal with the necessity for warning a suspect of his right to counsel and to remain silent when the shift from an investigatory to an accusatory process occurs in criminal cases. (See discussion in Manis, supra, at page 428 et seq.)

In our proceedings a plenary disclosure of all facts pertinent to a claim for unemployment insurance benefits is illustrated by a provision for waiver of a witness's right to be protected from testimony or evidence which might "tend to incriminate him or subject him to a penalty or forfeiture." The legislature has gone as far in section 1955 of the Unemployment Insurance Code as to provide immunity from subsequent prosecution when full disclosure is made. (See Escamilla v. People (1969), 76 Cal. Rptr. 704)

The minority members of this board, however, rely upon the principle set forth in People v. Franklin (1968), 68 Cal. Rptr. 231, that if a police action in stopping a citizen's automobile is illegal, the subsequent search, even though with the consent of the owner of the automobile, "does not breathe legality into the resultant find by the officers." Their opinion then takes a giant leap from the obiter dictum in Elder v. Board of Medical Examiners (1966), 241 Cal. App. 2d 246, 50 Cal. Rptr. 304, an administrative licensing case involving a forfeiture, to an "assumption" that the constitutional guarantee against illegal searches and seizures prohibits the denial of unemployment insurance benefits based solely upon evidence obtained by such methods. It does so in the face of their own rules; namely, section 5038(c) of Title 22, California Administrative Code, set forth hereinabove. The minority's reasoning by force of its own logic must result in an employer overlooking palpable conversions of its property at the risk of sustaining a charge to its reserve account. No such result was ever contemplated by our legislature.

In our view, undue reliance is then placed by our colleagues upon the "fruit of the poisonous tree" doctrine to invalidate the claimant's admission that he was apprehended in possession of the employer's property - and this is the core of the case: What probity may we attach to the claimant's confession?

In criminal cases, the common law theory for the exclusion of a confession was its presumed unreliability, although demonstrative evidence discovered through its use was not deemed untrustworthy and was admissible. In criminal cases today, however, public policy as expressed in judicial constitutional interpretation holds that an involuntary confession results in a denial of due process. (Witkin, supra, page 439)

The claimant in the present case was under no duress or coercion to sign his resignation and was offered no inducement to admit to possession of company property. Moreover, section 1256 of the code is in no sense a penal statute, although its invocation may result in punitive sanctions, but merely

establishes certain eligibility standards as conditions precedent to the receipt of unemployment insurance benefits. The claimant's statements were admissible in the present proceeding subject to his right to explain them away or otherwise discredit them, and subject to his proof of the threats or other circumstances of duress which may have extorted it, or promises of reward which may have induced it. In accord is California Evidence Code, Section 1220.

This conclusion, in addition to our disposition of the "search and seizure" question, is in harmony with the Court's reasoning in Thomas v. California Emp. Stab. Comm. (1952), 39 Cal. 2d 501, 247 Pac. 2d 561, wherein the Supreme Court of California stated:

> "In our opinion the benefits provided for by the Unemployment Insurance Act are property rights within the meaning of the term as used in the cases requiring a trial de novo. When a claimant has met all requirements of the act, and all contingencies have taken place under its terms, he then has a statutory right to a fixed or definitely ascertainable sum of money. . . . The determination of the exact amounts due is essentially a mathematical and mechanical process, and the administrative authorities have no discretion to withhold benefits from any particular claimant once it is determined that the facts support his claim and the condition of the fund permits payment. . . ." (39 Cal. 2d at page 504) (Emphasis supplied)

Acceptance of this principle is implicit in Appeals Board Decision No. P-B-17, which applied a rule of reason propounded by the United States Supreme Court in Sherbert v. Verner (1963), 374 U.S. 398, 10 L. Ed, 2d 965. The Supreme Court in Sherbert cautioned that some religious practices can cause an individual to become "a nonproductive member of society" in terms of eligibility for unemployment insurance benefits, and that, despite a constitutional guarantee respecting the free exercise of one's religious beliefs, there is no constitutional guarantee to receipt of unemployment insurance benefits. Nor would anyone seriously contend that our decision in Appeals Board Decision No. P-B-40 resulted in an impairment of the parties' substantive rights - their freedom from impairment of contract under Article 1, section 10 of the United States Constitution or Article 1, section 16 of the California Constitution - when we held that once the employer-employee relationship has been terminated and the issue of entitlement to unemployment insurance benefits is raised, it becomes the statutory duty of the department to construe the significance of collective bargaining provisions so as to determine a claimant's eligibility for benefits.

We distinguish herein the holding in Syrek v. California Unemployment Insurance Appeals Board (1960), 54 Cal. 2d 519, 354 Pac. 2d 625. The court in that case stated that a claimant who refuses to take a loyalty oath for a civil service job cannot be denied benefits for that reason alone, because the Unemployment Insurance Code does not make any such requirement of a claimant in order to receive benefits. In other words, the court concluded only that swearing or not swearing to the loyalty oath was not a test of eligibility for benefits and that a claimant who believes an oath is morally objectionable is justified in his refusal to do that which he considers improper.

But we are now dealing with a matter of procedural due process. Due process signifies the right to be heard in a fair hearing, "heard before a tribunal which at least meets currently prevailing standards of impartiality." (Corwin, Analysis and Interpretation of the Constitution of the United States of America, 1953 ed., page 849) It depends upon a disinterested inquiry, an evaluation of a balanced order of facts fairly stated. (Rochin v. California (1952), 342 U.S. 165, 72 S. Ct. 205)

The claimant in the present case was found with company property in his possession hidden beneath a blanket in the passenger compartment of his automobile. He offered an explanation that some unknown third party had placed the merchandise there, but the claimant could not give a plausible reason for such curious action. He voluntarily signed a written statement admitting to possession of and accepting responsibility for the employer's property. Such corroboration fortifies the independent proof of misappropriation established by his unauthorized possession of company property. Only at the hearing did he repudiate these statements by asserting that he had been tricked into confessing his guilt. We believe the employer has sustained its burden of going forward to prove conversion of its property. As in Benefit Decision No. 5114, supra, the evidence establishes that it was possible for the claimant to obtain the merchandise and to remove it from the employer's premises. His denials that he was not implicated, without more, are not worthy of belief. Since the referee's findings are not supported by the weight of the evidence, they are not approved. (Appeals Board Decision No, P-B-10) The claimant was discharged for misconduct connected with his most recent work. Consequently, the employer's reserve account is entitled to relief of benefit charges.

DECISION

The decision of the referee is reversed. The claimant was discharged for misconduct connected with his most recent work and is disqualified from receiving benefits under section 1256 of the code. The employer's reserve account is relieved of benefit charges under sections 1030 and 1032 of the code.

Sacramento, California, November 20, 1969.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

ROBERT W. SIGG, Chairman

CLAUDE MINARD

JOHN B. WEISS
DISSENTING - Written Opinion Attached

LOWELL NELSON

DON BLEWETT

DISSENTING OPINION

We would add the following findings to the findings of fact found by our colleagues; namely, that the claimant's car in which the merchandise was found could be opened by anyone through a broken window; that the employer also reported to the department that when the claimant was stopped by the police officer it was for a "routine check"; and, that since the officer stopped the claimant for a "routine check" it must be concluded that the officer had no warrant for the claimant's arrest nor a search warrant.

In the present case it must be decided whether the employer has sustained the burden of proving the misappropriation of its property by the claimant. This depends on what proof may be considered herein. The proof of misappropriation is made up of the finding of articles with the employer's labels in the claimant's automobile. Such evidence is the result of a search by a police officer of the Los Angeles Police department.

The Fourth Amendment of the Federal Constitution and section 19 of Article I of the California Constitution guarantee that people are entitled to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. The Fourth Amendment is applicable to the states under the due process clause of the Fourteenth Amendment of the Federal Constitution. (People v. Cahan (1955), 44 Cal. 2d 434, 282 P. 2d 905)

In Mapp v. Ohio (1961), 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, the court held "that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."

In general, a search of a person's house, papers, or effects without his consent, or as an incident to a lawful arrest, or without a search warrant, is a violation of the person's constitutional guarantee prohibiting unlawful search and seizure. (Zap v. United States (1946), 328 U.S. 624, 66 S. Ct. 1277, 90 L. Ed. 1477; United States v. Rabinowitz (1950), 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653; United States v. Ventresca (1965), 380 U.S. 102, 85 S. Ct. 741, 13 L. Ed. 2d 684) Consent must be obtained prior to any illegal action of the governmental officer and not immediately after such conduct. (People v. Haven (1963), 59 Cal. 2d 713, 31 Cal. Rptr. 47, 381 P. 2d 927)

The stopping and searching of an automobile without a lawful arrest or warrant is a violation of the constitutional guarantee prohibiting unlawful search and seizure unless there was probable cause, such as suspicious circumstances, for such conduct. (Wiren v. Horrall (1948), 85 Cal. App. 2d 497, 193 P. 2d 470; People v. Gale (1956), 46 Cal. 2d 253, 294 P. 2d 13) If the stopping of the automobile by the police is illegal, the search, though by consent of the owner of the vehicle "does not breathe legality into the resultant find by the officers." (People v. Franklin (1968), 68 Cal. Rptr. 231)

The above principles apply to seizures by governmental agents only, as distinguished from private individuals, and they apply to both criminal and civil proceedings. (See 5 ALR 3rd 670 and People v. McGrew (1969), 75 Cal. Rptr. 378)

The next question is whether the constitutional guarantee prohibiting unlawful search and seizure applies to administrative proceedings such as hearings conducted under the Unemployment Insurance Code.

Elder v. Board of Medical Examiners (1966), 241 Cal. App. 2d 246, 50 Cal. Rptr. 304, involved a proceeding before the Board of Medical Examiners of the State of California to revoke the license of a medical doctor to practice medicine. In this case governmental agents entered the doctor's office while he was on vacation and seized certain documents regarding patients for whom narcotics had been prescribed and at the same time arrested the doctor's nurse on the charge of practicing medicine. The hearing officer ruled that the policy of excluding evidence seized by unlawful search and seizure does not apply to administrative hearings. The ultimate finding of the board was that the doctor's license should be revoked because of illegal prescription of drugs to narcotic addicts. The trial court set aside the order of the board which revoked the doctor's license to practice medicine, partly on the ground that the illegally obtained evidence was used to support the board's order. Upon appeal, the District Court of Appeal held that the evidence that was seized by the governmental agents was not used to support the board's order nor were the "fruits" of such evidence used for that purpose. The court held that there was substantial probative evidence to support the board's order revoking the doctor's license and therefore reversed the trial court's judgment. Hearing was denied by the State Supreme Court. Certiorari was denied by the United States Supreme Court.

Since the evidence that was seized from the doctor's office was not used to support the order of the Board of Medical Examiners in the Elder case, the court did not have to pass directly on the question of the applicability in administrative hearings of the constitutional guarantee prohibiting unlawful search and seizure. The court had the following to say regarding this subject:

> "The hearing officer ruled that the policy of excluding evidence seized by an unlawful search and seizure (People v. Cahan (1955) 44 Cal. 2d 434, 445, 282 P. 2d 905, 50 A.L.R. 2d 513) did not apply to administrative hearings, at least where there was some right to inspect and investigate the business of a licensee. (See Cooley v. State Bd. of Funeral Directors (1956) 141 Cal. App. 2d 293, 298, 296 P. 2d 588.) The question was postulated but not decided in Thorp v. Dept. of Alcoholic Bev. Control (1959) 175 Cal. App. 2d 489, 492, 346 P. 2d 433. Since the trial court pronounced judgment the Supreme Court in People v. One 1960 Cadillac Coupe (1964) 62 Cal. 2d 92, 41 Cal. Rptr. 290, 396 P. 2d 706, applied the rule to proceedings for forfeiture of property. The following language appears to bear out the foresight of the trial judge in this case who ruled that it was erroneous for the hearing officer to rule as outlined above. 'The People also contend that, conceding the unlawfulness of the seizure, the exclusionary rule should not be applied in a car-forfeiture case, as the action is civil in nature. Whatever the label which may be attached to the proceeding, it is apparent that the purpose of the forfeiture is deterrent in nature and that there is a close identity to the aims and objectives of criminal law enforcement. On policy the same exclusionary rules should apply to improper state conduct whether the proceeding contemplates the deprivation of one's liberty or property. (See People v. Cahan, 44 Cal. 2d 434, 445, 282 P. 2d 905, 50 A.L.R. 2d 513.)' (62 Cal. 2d at pp. 96-97, 41 Cal. Rptr. at p. 293, 396 P. 2d at p. 709.)
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> "In view of the foregoing it will be assumed herein that the exclusionary rule will apply to an administrative hearing where the proceeding contemplates the deprivation of a license which is recognized as a property right, as is the right to practice medicine. (See Hewitt v. Board of Medical Examiners (1906) 148 Cal. 590, 592, 84 P. 39, 3 L.R.A., N.S., 896.)"

Benefits provided for by the Unemployment Insurance Code are property rights. (Thomas v. California Employment Stabilization Commission, et al. (1952), 39 Cal. 2d 501, 247 P. 2d 561)

Since an appellate court of this state "assumes" that the constitutional guarantee prohibiting unlawful search and seizure applies in administrative hearings where property rights are involved, we are constrained to find that that guarantee applies in administrative hearings such as is now before us under the Unemployment Insurance Code.

In reaching this conclusion we are not unmindful of the provisions of section 1952 of the Unemployment Insurance Code and section 5038(c) of Title 22, California Administrative Code.

Section 1952, Unemployment Insurance Code:

> "The Appeals Board and its representatives and referees are not bound by common law or statutory rules of evidence or by technical or formal rules of procedure but may conduct the hearings and appeals in such manner as to ascertain the substantial rights of the parties. . . ."

Section 5038(c), Title 22, California Administrative Code:

> "(c) Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions."

In regard to the Elder case, we note that hearings conducted before the Board of Medical Examiners of the State of California are governed in matters of receiving evidence by subdivision (c) of section 11513 of the Government Code which provides:

> "(c) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining

> other evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions. The rules of privilege shall be effective to the extent that they are otherwise required by statute to be recognized at the hearing, and irrelevant and unduly repetitious evidence shall be excluded."

(Rules of privilege also apply to hearings under the Unemployment Insurance Code (Benefit Decision No. 68-279))

The Government Code provision last quoted did not prevent the court from assuming that the constitutional guarantee prohibiting unlawful search and seizure applied in administrative hearings involving property rights. We must therefore reach the same conclusion regarding the effect of section 1952 of the Unemployment Insurance Code and 22 Cal. Adm. Code 5038(c) on administrative hearings under the Unemployment Insurance Code.

No suspicious circumstances are shown in the record before us to warrant the search that was made of the claimant's automobile by the police officer, a governmental agent. It was as concluded by the referee, merely a routine check during daylight hours on a public highway. The search was not made as an incident to a lawful arrest. The claimant had not given his consent prior to being stopped by the police officer. The police officer had no warrant for such action. The items that were removed from the claimant's automobile were therefore taken in violation of the constitutional guarantee prohibiting an unlawful search and seizure. Since we must respect that guarantee in proceedings such as is now before us under the Unemployment Insurance Code, evidence concerning the possession by the claimant of the items which the police officer removed from the claimant's automobile cannot, in our judgment, be received by this board because such evidence is present only as a result of the illegal act of the police officer.

In regard to Exhibit No. 4, which we assume was executed for the purpose of obtaining a confession, we need not determine its authenticity because it too is not evidence which, in our judgment, can be considered in this proceeding.

Wong Sun v. United States (1963), 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441, involved an unlawful search and seizure by federal narcotic agents followed by statements of the accused. The court stated:

". . . verbal evidence which derives so immediately from an unlawful entry and an unauthorized arrest as the officers'

action in the present case is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."

People v. Stoner (1967), 65 Cal. 2d 595, 55 Cal. Rptr. 897, 422 P. 2d 585, involved an unlawful search and seizure followed by an arrest in Las Vegas, Nevada, on October 29, 1960 for robbery, and a confession in a Temple City, California jail on November 1, 1960. During the last mentioned 72-hour period the only persons the defendant saw were police officers, the defendant's parole officer, and possibly other prisoners. The court stated the following:

"Defendant contends that the trial court erred in admitting the confession into evidence on the ground that it is a product of the illegal search and seizure and was therefore 'a fruit of the poisonous tree' . . . .

"In Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441, the United States Supreme Court considered statements of the defendant made after the police had unlawfully entered his home and illegally arrested him. It held that once the 'verbal evidence . . . derives so immediately' from the misconduct, it must be excluded . . . .

". . . there was no break in the chain between the illegal search and seizure and defendant's confession. It was not 'sufficiently an act of free will to purge the primary taint.' (Wong Sun v. United States, supra . . . .

"Since the confession was inadmissible under the rule of Wong Sun . . . as fruit of the poisonous tree, we need not consider defendant's contentions that it was involuntary and also inadmissible under Escobedo v. State of Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977, and People v. Dorado, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P. 2d 361 . . . ."

In the instant case there was no break in the chain between the illegal act of the police officer and the obtaining of the confession (Exhibit No. 4), so as to make the latter sufficiently an act of free will of the claimant so as to purge the taint of the unlawful search and seizure.

None of the decisions cited in the majority opinion regarding the misappropriation of an employer's property by an employee involve the factual situation found herein; namely, the discovery and seizure of an employer's property illegally by a governmental agent followed by a confession with no break in the chain between the illegal act and the confession.

Even though we cannot, in our judgment, accept the confession as evidence, in any event, we object to the language of the majority that "He voluntarily signed a written statement admitting to possession of and accepting responsibility for the employer's property." There is no probative evidence to rebut the claimant's testimony that the second paragraph was added without his knowledge. Both signatures are quite legible. Why then did the employer request the second signature? It is only the second paragraph that admits "responsibility." The first paragraph merely admits "accusation and involvement." It is certainly understandable that under the circumstances of the present case, a reasonable person might be willing to sign a statement reading as the first paragraph does, whereas he would not be willing to sign a statement such as is contained in the second paragraph.

Since, in our judgment, the employer has not presented any legal probative evidence showing that the claimant's discharge was because of misconduct, we must conclude that the employer has not sustained its burden of proof, as required by the Maywood Glass Company case, and, accordingly, we would conclude that the claimant is not disqualified for benefits under section 1256 of the code.

LOWELL NELSON

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