BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

SO. CALIF. INTERVIEWING SERVICE
HERMAN AND RUTH LEVINE, DBA
(Petitioner)

DEPARTMENT OF HUMAN
RESOURCES DEVELOPMENT

PRECEDENT
TAX DECISION
No. P-T-104
Case No. T-69-26

The petitioner appealed from Referee's Decision No. LA-T-1420 which denied a petition for reassessment under the California Unemployment Insurance Code. We have received and considered written argument submitted to us by the petitioner and the Department.

STATEMENT OF FACTS

The petitioner is engaged in market research studies and public opinion polls for clients interested in learning the needs and desires of consumers in Southern California. Interviewers furnish the primary contacts in soliciting these viewpoints.

The petitioner's clients require the testing of public reaction to anything from specialty foods to cosmetics. The petitioner may be asked to supply the interviewers, who contact consumers, with anything from bologna to be dispensed on the spot to instant coffee to be left with the consumer for later call-back and reaction to competing brands. The interviewers must be facile in verbal communications and appear to be selected for their ability to engender confidence and obtain spontaneous responses to questions asked of consumers.

The work is of a pressure variety in that clients require expedition in the conduct of surveys and immediate reporting of results upon their completion. Interviewers are recruited by numerous research firms such as the petitioner's and may from time to time conduct surveys for more than one firm at a time when there is no conflict in schedule or product. One interviewer, the principal witness in this matter, testified she had engaged in "hundreds of jobs for maybe 25 companies" during the several years she conducted surveys.

Interviewers are not under written contract. They undergo no formal training program. When a client requests a survey or poll, the petitioner refers to a call list of approximately 100 experienced interviewers. New interviewers are recommended by interviewers of known ability and are accepted by the petitioner sight unseen without examination of their credentials for the particular job. Many are housewives who work on an intermittent or casual basis. They may object to the segment of the public to be interviewed (one interviewer testified she objects to interviewing men) and may prefer to conduct their interviews only during daylight hours or in locations close to their homes. The petitioner attempts to satisfy these preferences.

Most surveys are relatively uncomplicated and an average of three days in duration. Because of the interviewers' experience, written instructions submitted by a client through the petitioner usually need no clarification. They may be paraphrased and reissued to interviewers for their guidance in conducting a survey or poll. The petitioner may supplement them with oral instructions. Interviewers are not always aware of the client's identity.

The technique utilized in completing a job varies from survey to survey and poll to poll. However, because of the necessity of scientifically derived conclusions, a number of verbatim questions to be presented is usually set forth in the exact sequence they are to be asked and with specific instructions from the client on the manner in which they are to be asked.

When spontaneity of answers is essential, a client will instruct the interviewers to probe the consumers' likes and dislikes of a product with open-ended questions allowing for narrative responses. The value of a survey depends upon responses which are intelligible to the client.

Supervision of interviewers is minimal. There are no supervisors as such and once an interviewer is given a survey area no further contact between the interviewer and the petitioner takes place until the job is completed, unless an unusual problem arises. These circumstances might involve inability to locate sufficient numbers of subjects to test, or where the area of sampling directed by the client proved unproductive of results.

If an interviewer's work production is unsatisfactory, the interviewer is not discharged. She is simply not engaged for further surveys or polls. She is, however, paid for all time spent in conducting the survey, whether properly conducted or not. During the assessment period the petitioner was required

by its clients to verify up to 15 percent of the interviewers' work. This verification was to determine whether the interview was conducted and not whether it was properly conducted. Within the ten-year period preceding the hearing in this matter only two instances occurred wherein the conduct of a survey resulted in petitioner's failure to reengage an interviewer.

If an interviewer was unable to complete a job, either because of illness or other inability to perform, a substitute or replacement might be engaged by the interviewer and compensated by the interviewer without requiring the petitioner's approval. An assistant might also be engaged by an interviewer without reference to the petitioner.

Many jobs, while remunerated on the basis of an eight-hour day, required as little as five hours actual work. The client, through the petitioner, was billed for an eight-hour day. This appears to be customary within the industry. If a specific job required alterations to be made before its completion, the client, after being so notified by the petitioner, could substitute territory and shorten or extend the hours of work.

The petitioner's compensation was 25 percent of the cost of a survey or poll plus its own expenses. During the assessment period the cost was the aggregate of the interviewer's hourly wages of $1.75 plus expenses of transportation, postage and telephone calls. The interviewers were reimbursed only after the job was completed and the petitioner paid by the client. Time sheets were submitted by the interviewers to the petitioner and forwarded to the client. Normally at the completion of each job there was a break in the relationship between the petitioner and the interviewers.

Clients were sometimes consulted directly by an interviewer when it was felt that remuneration for a particular job was not commensurate with the effort exerted by the interviewer in reaching its desired result. While consultations did not effect a change in the remuneration for a particular job, they might effect a change in the remuneration paid for subsequent jobs. During the assessment period clients remitted paychecks directly to the interviewers in approximately ten percent of the completed jobs.

The petitioner is required to operate its business under license. However, interviewers were not licensed during the assessment period except in Beverly Hills and San Marino. In those areas the interviewers obtained permission to work and the client reimbursed them for the cost of the license.

The interviewers did not advertise, did not list themselves in the telephone directory, and provided consumers no business cards of their own. Although the petitioner did not advertise, it was listed in the telephone directory and when a client provided no business cards the petitioner supplied cards for the interviewer.

In addition to business cards, instructions and expense sheets furnished the interviewers, usually at the client's expense, interviewers were also furnished questionnaires to be used during a survey or poll. They furnished their own pencils, erasers and clipboards, and, since they provided their own transportation, were reimbursed by the client through the petitioner at seven to nine cents per mile.

The clients determined whether the interviewers were to be considered independent contractors from a tax standpoint. When the petitioner was requested by a client to report interviewers to the appropriate agency as employees, the petitioner paid the interviewers' withholding taxes, social security contributions, unemployment insurance and disability insurance. The client reimbursed the petitioner a standard nine percent of its fees for these deductions. Most of the interviewers considered themselves to be employees.

A Revenue Ruling issued by the Internal Revenue Service (Rev Ruling 65-188, 26 CFR 31, 312 (d)(1)), presented by counsel for the petitioner, holds that interviewers engaged in substantially the same character of undertaking as those in the instant case are not employees of the firm directly engaging them for federal employment tax purposes but are in a trade or business for purposes of the Self-Employment Contribution Act of 1954. On April 10, 1968 after reviewing the same major evidentiary findings as set forth hereinabove, a District Director, Internal Revenue Service, issued a Determination Letter to the petitioner. It holds:

> "Based on the information submitted, it is held that you neither exercise nor retain the right to exercise over the services of Miss Lessin the control necessary under the usual common law rule to establish the employer and employee relationship. Accordingly it is determined you do not incur liability for the taxes under the Federal Insurance Contributions Act, the Federal Unemployment Tax Act and the income tax withholding on the compensation paid to her for services as an interviewer."

At the hearing and in written argument, the petitioner has contended that federal preemption has occurred in the field and the federal agency's legal conclusions are binding on the Department. On the other hand the Department contends that state laws concerning benefits paid to claimants or fixing the tax rates affecting employers are not uniform. Therefore, California need not be bound by a federal ruling.

Additionally, petitioner urges laches on the part of the Department as grounds for relief. In this connection petitioner states:

> "Petitioner respectfully requests the dismissal of both cases due to the failure of respondents to proceed with diligence on these proceedings."

The issue presented for decision is whether the interviewers were employees or independent contractors with relation to the petitioner during the period of assessment July 1, 1962 through June 30, 1965.

REASONS FOR DECISION

Before turning to what we consider the primary issue, we feel it appropriate to address ourselves to the contentions of the petitioner.

On the matter of preemption, we have given thoughtful consideration to the positions taken by both the Department and the petitioner. We can agree with neither. We do not believe that the federal agency has preempted the field, thus depriving the Department of authority to act. On the other hand, we do not believe the Department may ignore federal rulings in matters such as the one under consideration.

The Legislature has made the Department a taxing authority. Such power is not to be regarded lightly. The Department has a statutory duty which it may not shirk and which it may not delegate. In conformance with this duty the Department may act to impose a tax only after a careful consideration of the facts in an individual case. One of the facts to be considered might well be a ruling of the type herein involved.

The Internal Revenue Service Statement of Procedural Rulings, section 601.201(1) (9) and (10) states:

> "(9) With respect to revenue rulings posed in the Internal Revenue Bulletin, taxpayers generally may rely upon such rulings in determining the rule applicable to their work transactions. . . ."
>
> "(10) Since each revenue ruling represents the conclusion of the Service as to the application of the law to the entire set of facts involved, taxpayers, service personnel, and others concerned are cautioned against reaching the same conclusion in other cases unless the facts and circumstances are substantially the same. . . ." (Mertin's, Vol. 9, section 49.95)

Moreover, Internal Revenue Service Regulation, section 31.3401(c)-1 (cited in Internal Revenue Ruling 65-188, supra) is in harmony with the definition of "employee" accepted by the California courts and this board, since derived from the common-law rule with respect to master-servant relations.

As pointed out by the Department in its argument, rights and responsibilities under the California Unemployment Insurance Program are creatures of the California Legislature and decisions and interpretations accorded a given set of facts or particular provision of law are not controlled by principles enunciated by sister state tribunals even where a similarity exists with respect to the factual situation or specific provision of law. Even then, however, we recognize that such decisions may be relevant under some circumstances. However, when the circumstances give rise to a decision of the federal government, in connection with comparable facts, we are of the opinion that such a decision is entitled to greater weight. This conclusion is supported by section 101 of the California Unemployment Insurance Code which provides:

> "101. This part is a part of a national plan of unemployment reserves and social security, and is enacted for the purpose of assisting in the stabilization of employment conditions. The imposition of the tax herein imposed upon California industry alone, without a corresponding tax being imposed upon all industry in the United States, would, by the corresponding penalty upon California industry, defeat the very purposes of this law as set forth in this article. Therefore when

> existing federal legislation which provides for a tax upon the payment of wages by employers in this State, against which all or any part of the employer contributions required under this part may be credited is repealed, amended, interpreted, affected or otherwise changed in such manner that no portion of such contributions may be thus credited, then upon the date of such change, the provisions of this part requiring employer contributions and providing for payment of unemployment compensation benefits shall cease to be operative and any assets in the Unemployment Fund or Unemployment Administration Fund shall in the discretion of the State Treasurer be held in the then existing depositaries or otherwise in the State Treasury. In the case of the Unemployment Administration Fund, such money may thereafter be dealt with by the State Treasurer pursuant to the conditions of the grant thereof to the State by the United States Government or agency thereof."

A Federal District Court held in In re Blackwood (N.D. Cal. 1957), 147 F. Supp. 93-96 that the construction accorded the Federal Social Security Act should not be disregarded in construing the California Unemployment Insurance Code,

> "[b]ecause the state and federal legislation are so closely allied in purpose and provision, well-reasoned construction regarding the scope of the federal statute should not be readily disregarded in construing the scope of the state act. The courts of California are in accord, Union Oil Association v. Johnson, 2 Cal. 2d 727, 43 P. 2d 291, 98 A.L.R. 499, and have looked closely to federal decisions in settling problems under the State Unemployment Act. Scripps Memorial Hospital v. California Employment Commission, 24 Cal. 2d 669, 151 P. 2d 109, 155 A.L.R. 360; California Employment Commission v. Bowden, 52 Cal. App. 2d Supp. 841, 126 P. 2d 972."

Affirmed sub. nom. Lines v. State of California Department of Employment (9th Cir. 1957), 242 F. 2d 201, certiorari denied, 355 U.S. 857, 78 Sup. Ct. 86, the Court of Appeals for this jurisdiction stating that the reason for enacting the California Unemployment Insurance Code was practically identical with the Social Security Act, "and therefore well-reasoned construction regarding the scope of the federal statute should have great

weight in applying the California code. (Gillum v. Johnson, 7 Cal. 2d 744, 62 P. 2d 1037, 63 P. 2d 810, 108 A.L.R. 595)"

Justice Carter dissenting in California Employment Commission v. Butte County Rice Growers Association (1944), 25 Cal. 2d 624, 154 P. 2d 892, reflects another equally authoritative judicial opinion in this regard. In construing the technical language in the provisions of the code relating to agricultural labor, the justice stated as follows:

> "It should also be noted that the act was adopted in California in the light of contemplated conformity to the federal act. Because of the interrelation of the acts, the obligations imposed by them, and the necessity for the adoption of an approved state act in order that benefits under the federal act may be enjoyed, there is a strong justification for the policy that they operate uniformly and harmoniously. (See Industrial Commission v. Woodlawn Cemetery Assn., 232 Wis. 527 [287 N.W. 750]; Woods Bros. Const. Co. v. Iowa U. Compensation Com., 229 Iowa 1171 [296 N.W. 345]; Matcovich v. Anglim, 134 F. 2d 834; Buckstaff Bath House Co. v. McKinley, 308 U.S. 358 [60 S.Ct. 279, 84 L.Ed. 322].) That policy is evinced by the state act.) (citing section 2, now section 101 of the code)"

Further support for the position that the California Code and Federal Social Security Act should be given similar construction may be found in California Portland Cement Company v. California Unemployment Insurance Appeals Board (1960), 178 Cal. App. 2d 263, 3 Cal. Rptr. 37; California Employment Commission v. Bowden (1942), 52 Cal. App. 2d Supp. 841, 126 P. 2d 972; and Gutenberg v. Celebrezze (1963), U.S. District Court, Minn., 3d Div., Civil No. 3-63, Civil 256, CCH Unempl. Ins. Rptr., Social Security-New Matters, Oct. 1963 - Jan. 1965, paragraph 16,034, p. 1949 (Transfer Binder; back reference to Revenue Ruling 65-188 at paragraph 10,416.787).

The facts presented in the last case concerned a telephone interviewer who contacted residents in a specified area to ascertain their preference for a radio program during certain periods of the day. The results of such interviews were tabulated to establish the so-called Hooper Ratings. The calls were made from the interviewer's home phone to individuals selected from the telephone book. The calls were to be made during the stipulated hours of certain days. The interviewer received $1.25 per hour for this work. When finished, she completed information furnished to her and returned it to the

company at the company's expense. It was held in this memorandum opinion that such interviewers were not employees and their engagement by the Hooper Company did not subject it to liability for contributions under the Social Security Act.

Parenthetically, the court accepted the hearing examiner's opinion that an Internal Revenue Service determination finding the interviewer to be an independent contractor, while not binding, had become an established administrative construction and, as such, was "highly persuasive."

Both California and the federal government adhere to and follow the common-law concept of master and servant, and in view of the several judgments rendered by California courts of appellate jurisdiction in analogous cases, we believe it would be anomalous to ignore rulings and determinations of the Internal Revenue Service under similar facts and circumstances.

We conclude therefore that neither the Department nor this board is conclusively bound by a Federal Agency Ruling in matters similar to that under discussion. However, it is our opinion, and we hold, that a Federal Agency Ruling in such case is a fact which must not only be given consideration but must also be accorded great weight in reaching a status determination.

As to the matter of laches, we are certain the petitioner cannot be requesting "dismissal" of his petition, as spelled out in argument. For us to take this in a serious vein would require that we dismiss the petition and leave stand the Department's assessment without further review. We are certain the petitioner is concerned with the delays in bringing this matter to a conclusion. We share this concern and regret the delay. However, such delay is certainly not attributable to any failure of the Department to act. Rather, the delay has been in the appeals process over which the Department has no jurisdiction or control.

We turn now to the problem which has brought about this petition - the status of the interviewers as employees or independent contractors.

Section 601 of the California Unemployment Insurance Code provides:

> "'Employment,' means service, including service in interstate commerce, performed for wages or under any contract of hire, written or oral, express or implied."

The relationship contemplated by the act as the basis for requiring contributions to the Unemployment Insurance Fund is that of employer and employee. A principal for whom services are rendered by an independent contractor does not come within the scope of these provisions. (Empire Star Mines Company, Ltd. v. California Employment Commission (1946), 28 Cal. 2d 33, 168 P. 2d 686) The Supreme Court in that case summarized the rules for determining the existence of either an employer-employee or principal-independent contractor relationship as follows:

> ". . . In determining whether one who performs services for another is an employee or an independent contractor, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the authority to exercise complete control, whether or not that right is exercised with respect to all details, an employer-employee relationship exists. Strong evidence in support of an employment relationship is the right to discharge at will, without cause. [Citations omitted] Other factors to be taken into consideration are (a) whether or not the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the workman supplies the instrumentalities, tools and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (Rest., Agency, 220; Cal. Ann. § 220.)

In Appeals Board Decision No. P-T-2 we discussed these factors and we pointed out from abundant judicial authority that the most important factor to consider is the extent to which a principal has retained the right to control a workman's manner, mode, method and means of performing the details of his work. We stated at page 11 of that decision that to be indicative of an employment relationship, the right to control must be of that type and degree

which the courts have characterized as "complete" and "authoritative." The test involves the existence of such a right as distinguished from its exercise although, of course, its exercise may provide an indication of the right's existence.

We further pointed out at pages 13 - 15 of that decision that in evaluating a working relationship due consideration must also be given to the secondary factors relating to the background under which the services were rendered, and that we must reach our determination of status from the overall integrated picture of the relationship that is found by considering its overall component parts. This is the standard set down by section 220 of the Restatement of Agency, cited by the Court in Empire Star Mines.

Of particular interest to the instant case is our discussion in Appeals Board Decision No. P-T-2, pages 12 - 13, on the right to control and extent of that right's existence. We stated the right to discharge a workman at will without cause "is generally incompatible with the control which an independent contractor usually enjoys over his work . . . [Such right] loses persuasive force where . . . a threat [of discharge] is neither explicitly or implicitly present, and is not very convincing in most situations where the parties have only dimly contemplated their termination rights. . . . The right to discharge at will must also be distinguished from the right of every principal to refuse to enter into further contracts. This latter right does not constitute evidence of a right of control or of an employment relationship." In outlook as well as activity the interviewers in the instant case were independently oriented, once given their initial assignments and the geographical area in which their portion of a survey or poll was to be conducted.

As reflected in our recent precedent decision, the judicial authorities which have considered the right of control are legion and the circumstances under which the issue may be raised are as varied as they are numerous. Press Publishing Company v. Industrial Accident Commission (1922), 190 Cal. 114, 210 P. 820, a case involving an implied right of control, states the principle that this right is really an abstraction and care must be taken not to confuse the abstract right with concrete evidence of the actual exercise or nonexercise of control. Further, there is no minimum amount of actual exercise of control which must be shown before the right can be established. (Hillen v. Industrial Accident Commission (1926), 199 Cal. 577; 250 P. 570)

In drawing the distinction between control of the desired results and control of the manner and means of obtaining those results, Justice Learned

Hand in Radio City Music Hall Corporation v. United States (2d Cir. (1943), 135 F. 2d 715, a case involving liability for contributions under the Federal Social Security Act, states, in part at pages 717 - 718:

> "The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said, though the regulation redundantly elaborated it. In the case at bar the plaintiff did intervene to some degree; but so does a general building contractor intervene in the work of his subcontractors. He decides how the different parts of the work must be timed; and how they shall be fitted together; if he finds it desirable to cut out this or that from the specifications, he does so. Some such supervision is inherent in any joint undertaking, and does not make the contributing contractors employees. . . ."

Considering now the overall picture of the working relationship which emerges from the present facts in relation to the primacy of the control factor, it may be conceded that the petitioner was engaged in a specific business and that the services of the interviewers were in furtherance of that business. It may also be conceded that the interviewers did not require a license except in two instances in metropolitan Los Angeles. They also did not advertise their services, and worked only in connection with a direct call on a specified assignment. It does not necessarily follow, however, that any one of the interviewers was not engaged in a separate undertaking designed to further the business of the petitioner just as a subcontractor works to further a work product of a general contractor.

The petitioner was interested, as an independent agent or contractor of a particular client, in the results obtained. Because of long experience it had learned to accept uniformity of techniques and standardized procedures. In turn, it was immaterial to the petitioner whether the interviewers, who could accept or reject a particular job, accepted the work personally and individually or whether they selected successors or obtained assistants.

This specific right of the interviewers would alone support the inference that there was no right of control over the manner or means of accomplishing the end product.

A distinction between what (the results) and how (the manner or means of accomplishing the end product) is further seen in the fact that the petitioner only twice in ten years exercised its prerogative of not engaging for further surveys or polls an unsatisfactory interviewer and not once during this period discharged an interviewer during a survey or poll.

Providing no instructional training for the interviewers and relying upon their reputations for accomplishing the desired results, the petitioner was eager to satisfy an interviewer's preferences for performing her individual portion of the end product. Despite the detailed instructions necessary for insuring a meaningful result of a survey or a poll, supervision during the conduct of the project was limited to resolving the unusual unanticipated problem when an interviewer in her judgment concluded that the original plan submitted by a client was inadequate to overcome any difficulties that might arise and would not provide the client with productive results.

Although a client would often require that the interviewers meet a certain quota in interviewing consumers and a corresponding time in which to conduct the interviews, this period could be extended if necessary as could the interviewer's hours of work be extended or shortened. In reviewing the assigned work, the petitioner checked only for completion of the interviews in order to satisfy its clients' requirements for complete as well as valid responses to the questionnaires provided the interviewers. Except for the questionnaires and postcards, the interviewers furnished their own instrumentalities for accomplishing their work.

In sum, we conclude that the nature of the distinct occupation engaged in by the interviewers, the fact of minimal supervision of their work, their experience and skill in achieving the end product, as well as the intermittent nature of their work, payment only on completion of the job, and use of personal facilities in accomplishing this work, are the decisive factors in establishing the true character of the working relationship between the interviewers and the petitioner.

The controls accepted by the interviewers as part of their jobs were accepted as part of the specifications of their jobs or limitations on their scope. They were only controls over the end results sought to be achieved, and, at most, did not reach beyond the limited controls over the means directly related to such end results, controls which may be retained by a beneficially interested party without becoming an employer. Giving due weight therefore to the asserted intentions of the petitioner and the several interviewers who

testified or gave statements, we hold that the interviewers were independent contractors during the period of assessment and that the payments made to them for the retention of their services were not subject to the contribution provisions of the code.

Insofar as the conclusions reached by this board in Tax Decision No. 2302 differ from the holding herein, they are disaffirmed.

DECISION

The decision of the referee is reversed. The petition for reassessment is granted.

Sacramento, California, March 9, 1971.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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