

BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

CITY OF DIXON
(Petitioner)

EMPLOYMENT DEVELOPMENT DEPARTMENT

PRECEDENT
TAX DECISION
NO. P-T-447
Case No. T-86-72

Office of Appeals No. S-T-20439

On January 28, 1985 the petitioner filed a claim for refund for contributions paid into the Unemployment Insurance Fund for the period July 1, 1983 through September 30, 1984. On February 28, 1985 the Department denied the claim for refund. On March 27, 1985 the petitioner petitioned for review of the denial of refund. There was no hearing on this matter. Instead, the case was submitted on stipulated facts. On March 25, 1986 this Board acting as a whole removed the proceedings to itself for review and decision pursuant to section 412 of the Unemployment Insurance Code.

STATEMENT OF FACTS

Starting in 1978 the City of Dixon became an "employer" for the purposes of unemployment compensation. It was given the choice of paying contributions required of regular California employers or paying the cost of benefits provided its former employees. It chose the latter method of financing when it completed a form DE 1 PE, Selection of Financing Method and Election to Cover Excluded Services, on February 15, 1978.

From 1978 until the date of the petition for review, the petitioner paid to the Local Public Entity Employees Fund contributions sufficient to pay the cost of unemployment benefits, extended duration benefits, and federal-state extended benefits based on base period wages with respect to employment with it and charged to its account.

On May 22, 1984 the District Court of Appeal issued City of Sacramento et al v. State of California, 156 Cal. App.3d 182. The petitioner maintains that as a result of this decision local government employers are not required to pay contributions for financing unemployment compensation for its former employees. It argues that the 1978 amendments to the Unemployment Insurance Code imposed a state-mandated program for which reimbursement is required under California Constitution, Article XIII(B), section 6, and Revenue and Taxation Code, section 2231(a). It is therefore claiming a refund of the contributions it paid into the Local Public Entity Employees Fund for the period July 1, 1983 through September 30, 1984, and is now paying contributions under protest.

The Department maintains that the State of California, in order to remain in conformity with federal requirements, must cover employees of governmental entities. The entity then, as a California employer, is required to pay contributions to the Unemployment Fund. While some local entities may be entitled to reimbursement for the cost of coverage, the Legislature has not amended the provisions of the Unemployment Insurance Code which require all employers to pay contributions. Therefore, it is contended the Department must collect employment taxes from the local government entities on either the regular tax or reimbursement basis.

The Department does not contest that the court held the local entities were entitled to reimbursement but maintains that the entities as California employers are still required to pay contributions. To obtain relief the entity must apply to the Controller pursuant to the States Mandates Apportionment System.

REASONS FOR DECISION

Under the Federal Unemployment Tax (FUTA), 26 U.S.C. sections 3301, et seq, employers must pay federal unemployment taxes on wages paid to its employees. However, if the Secretary of Labor "certifies" a state to the Secretary of Treasury, employers in that state may obtain a credit of up to 90 percent against their basic FUTA tax liability for unemployment taxes paid to the state Unemployment Fund (26 U.S.C. section 3304(a) and (c)).

Prior to January 1, 1978, states were not required to cover employees of public entities in order to obtain certification from the Secretary of Labor. Although the entities could elect coverage for employees, California had not required such coverage. In 1976 Congress provided that in order to receive certification, a state must cover employment which had been excluded solely by reason of section 3306(c)(7). This provision had excluded service in the employ of a state or one of its subdivisions. Accordingly, after the enactment of Public Law 94-566, except for certain services not relevant herein, all service in the employ of a subdivision of the state had to be covered for unemployment compensation.

In order to comply with requirements of Federal Law, the State Legislature enacted Chapter 2, Statutes of 1978. This Chapter made, inter alia, the following changes:

- (1) An "employment unit" for the purposes of the Unemployment Insurance Code was defined to include a subdivision of the state, county, city, etc.
- (2) The term "employment" was extended to include employment by individuals in the service of subdivisions of the State of California, including cities.
- (3) Public entities were given authority to elect financing either by paying regular contributions or by paying into the Unemployment Fund the cost of benefits, including extended duration benefits and federal-state extended benefits, based upon base period wages paid with respect to employment and charged to its account.
- (4) Governmental employers were permitted to utilize the financing provided by Article 7 (commencing with section 841) of Chapter 3, Part 1, Division 1 of the Unemployment Insurance Code.

Section 842 (a) then provided as follows:

"Each local public entity may, in lieu of the contributions required of employers, elect pursuant to this article to pay into the Unemployment Fund the cost of benefits paid, including extended duration benefits and federal-state extended benefits, based on base period wages with respect to employment for such local public entity and charged to its account in the manner provided by Section 1026. . . ."

Article 7 established the means by which an election would be made and payments would be made into the Unemployment Fund. Section 848, for instance, provided;

"For each fiscal year each local public entity . . . shall remit on or before the last day of the calendar month following the close of each calendar quarter, to the State Treasurer for deposit in the Local Public Entity Employees Fund in the State Treasury, an amount computed by multiplying the tax rate by total wages as defined by Section 940. . . ."

Since 1972, with certain exceptions, the state was required to reimburse each local entity for the cost of a new program or higher level of service mandated by the state. Section 2271 of the Revenue and Taxation Code excluded from subvention cost mandated by the Federal Government. The statutory provisions were inserted in the State Constitution (Article XIII B of the California Constitution). Section 6 of the article provides:

"Whenever the Legislature . . . mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service"

The City of Sacramento and the County of Los Angeles filed claims with the State Board of Control for reimbursement of the cost of unemployment insurance. The Board had denied the claims on the ground that the coverage was mandated by the Federal Government. In City of Sacramento v. State of California (1984), 156 Cal.App.3d 182, the Court of Appeal found that these costs were not federally mandated, and local government was entitled to reimbursement. The court granted a peremptory writ of mandate compelling the Board of Control to grant a hearing on the claims of the local entities.

Although the court had decided the state must reimburse the local entities, it did not thereby declare the provisions requiring the local entities to make payments into the Local Public Entities Employees Fund or the Unemployment Fund unconstitutional. The court did not establish a procedure for reimbursement. The city contends that even though the court did not affect these provisions, the import of the decision indicated that the employer should be relieved of payment.

In County of Contra Costa v. State of California (1986), 177 Cal.App.3d 62, the plaintiffs attempted to escape the effect of legislation enacted after 1975 which imposed mandates which were reimbursable under Article XIII B of the Constitution. The trial court ruled that the legislation was void or had become unenforceable because the state had failed to reimburse local governments. The Court of Appeal reversed. Unlike the constitutional provisions adopted by other states, the California Constitution did not make the statutes which imposed mandates themselves unenforceable. The Constitution instead required the state reimburse the entity through some mechanism. The local entities are still required to comply with state statutes and to exhaust any administrative remedies provided thereunder. Accordingly, the fact that the state is required to subvent funds does not invalidate the other provisions in the California law.

On March 10, 1986, the state adopted a procedure for reimbursing some local entities, including cities, the cost of unemployment insurance. The Legislature appropriated \$44,000,000 for making reimbursements to local public entities, except fee-supported special districts, for the cost of unemployment compensation for the fiscal years ending 1985 and 1986 (Chapter 1217, Statutes of 1985). Reimbursement is limited to claims and other costs incurred for the period beginning July 1, 1984. No reimbursement is allowed for claims filed before that date. In the present instance, the last quarter of the period for which the petitioner seeks a refund is included in the appropriation, but the rest of the period is outside the period covered by the appropriation.

It may be contended that since the Legislature has not made provision for payment for years before the fiscal year 1985, there is no administrative procedure open to the petitioner. Therefore, presumably it should have an opportunity to seek redress otherwise. While a court may have the authority to make this decision, an administrative agency may not declare statutes unconstitutional (Appeals Board Decision No. P-T-13). Since section 842 during the period in question required the petitioner to pay into the Local Public Entity Employees Fund, we cannot absolve it of that responsibility.

DECISION

The petition for review is denied.

Sacramento, California, June 24, 1986.

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

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