

New York State Department of Labor

A-750 700 Series

A-750-700

Index No. 1310.15
1650B-4

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

February 28, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS

Strike, Lockout or other Industrial Controversy

Voluntary Suspension of Work

Voluntary Leaving of Employment

Wages - Increase Refused

Appeal Board Case No. 12544-45

VOLUNTARY LEAVING – WAGES – INCREASE REFUSED – QUITTING IN CONCERT
SEX DISCRIMINATION, UNFOUNDED CONTENTION OF

A) Quitting in concert by five female employees on the alleged ground that male employees were being paid higher wages for similar work was not a strike, lockout or industrial controversy within the meaning of the statute when picketing or other attempts to induce the employer to change his position or an attempt to resume the employment relationship were not availed of.

B) Where claimant voluntarily left her employment because her employer refused a salary increase to the same wage level as that paid to male co-workers for similar work, and it appeared that the differential in pay was based on experience and ability and not on sex discrimination, held that the leaving was without good cause.

Findings of Fact: A hearing was had at which claimant, the vice-president of her former employer and a representative of the Industrial Commissioner appeared and testified. Claimant, a drug checker, filed for benefits on September 10, 1945. An initial determination was issued on October 3 disqualifying claimant for benefits for 6 weeks effective September 10 because of her voluntary leaving of employment without good cause. In the alternate, the initial determination suspended claimant's benefit rights for 7 weeks beginning with August 31 because the loss of her employment was due to a strike or industrial controversy in the establishment in which she was last employed. Demand for repayment of \$14 paid to claimant as benefits for the statutory week ending September 23 was demanded. Claimant objected and demanded a hearing. Claimant was employed by a drug firm from August 1944 to August 30, 1945. She started as a picker at \$26 for a 40 hour week. During the last 6 weeks of her employment she was a checker at the same wage. In the latter capacity she checked items previously sorted, as against order slips. There were 5 other female checks some of whom earned up to \$28 weekly.

The employer was not in contractual relations with any union. The male checks in the establishment received \$35 weekly and up. It was found that the men were more willing to work after hours; that they were faster in their work because, with one exception, they had been there longer than the female checks; and that the female checkers, being on the average less experienced; were less accurate in their work. On August 30, five of the six female checks requested the employer's vice-president to bring their pay up to the level of that of the male checkers. He refused and pointed out that the differentials in pay were based on experience and ability; and that two of the female checks would soon receive small raises. He discussed the abilities of each female checker. It is not clear if those of claimant were discussed at that time; in this connection, it appeared that by virtue of her relatively limited experience, her knowledge of the stock, which comprised thousands of items, was not as extensive as that of the male checkers. The female checkers then stated that if the raise was not given, they would quit and accordingly did so. A number of other female workers also employed in the establishment also quit. So far as claimant was concerned she quit without intention to return. There was no picket line. Claimant had no prospect of re-employment at the time she left. The employer hired women as checks during the last 2 years. During this time, the female checks were not paid as well as the others.

Referee's Opinion and Decision:

1. The Strike: I hold that claimant's unemployment was not caused by a strike. The concerted nature of the quitting did not, in of itself, render it a strike under the Unemployment Insurance Law. The absence of picketing, of other attempts to induce the employer to change its position, or of an intention to resume the employment relationship, reinforces this conclusion (Appeal Board Case 3809-40).

2. The Voluntary Termination: It is well settled that a voluntary termination of employment because an increase in wages is denied and at a time when there is no prospect of re-employment is without good cause under the Law. An exception to this rule appears where the voluntary termination is caused by circumstances which would have justified a refusal of the same employment in the first instance (section 593.1b of the Law). Such a reason may be found where the wages paid are less than the prevailing scale (Section 593.2d).

That the wages paid to claimant were less than prevailing can be established on the record herein only if the employer discriminated against its female checks including claimant in respect of their sex. Section 199a of the Labor Law, of which Law the Unemployment Insurance Law is a part, was enacted to render illegal such discrimination (Chapter 793, Laws of 1944). It provides that "No employee shal, because of sex, be subjected to any discrimination in the rate of her or his pay. A differential in pay between employees based on a factor or factors other than sex shall not constitute discrimination within the meaning of this section . . ." The record does not justify the conclusion that claimant was discriminated against by reason of her sex. It fairly appears that claimant was paid less by reason of her relative lack of experience as compared with the male checks, and by reason of her consequent lesser efficiency and production. Claimant, therefore, would not have been justified in refusing this employment in the first instance on the ground of the inequality of wages. It follows that in leaving this employment she did so without good cause. The initial determination disqualifying claimant from benefits for voluntary termination of her employment is sustained. The alternate initial determination is overruled. Claimant was overpaid \$14 in benefits. (11/3/45)

Appeal By: Claimant

Appeal Board Opinion: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case.

Decision: The decision of the referee is affirmed. (1/11/46)

A-750-703

Index No. 1215C-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

March 13, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF EMPLOYMENT
Other Reasons for Refusal

Appeal Board Case No. 12,582-45

REFUSAL – FAILURE TO REPORT TO PROSPECTIVE EMPLOYER BECAUSE OF LOSS OF
REFERRAL CARD

Failure to report to prospective employer for interview because of loss of referral card and failure to return to U.S.E.S. until a week later by which time the position had been filled, was tantamount to refusal of employment without good cause.

Finding of Fact: A hearing was held at which claimant and representatives of the Industrial Commissioner of the United States Employment Service appeared and testified. Claimant, a porter-janitor, filed for benefits on July 30, 1945. The local office issued an initial determination, effective September 18, 1945, disqualifying claimant from receiving benefits for refusal of employment without good cause. The local office issued another initial determination holding that claimant had been overpaid \$42 in benefits for the statutory weeks ending September 23, 1945, and September 30, 1945. For a period of about two years and nine months, to July 27, 1945, claimant worked at an aircraft plant as a janitor at \$4.20 per week. For about 20 years prior thereto he had worked as a janitor. On September 18, 1945, the Employment Service offered him a job as a janitor at 79 cents per hour for 40 hours work per week with time and a half after 40 hours. The usual wage paid for similar work ranges from 50 cents to 79 cents per hour. Claimant had no objection to the job or the rate of pay and accepted a referral card to be presented to the prospective employer. While traveling on a streetcar to visit the employer claimant discovered that he had lost the referral card. Believing that it was necessary to present this card in order to secure the job he did not visit the prospective employer but returned to his home. He contends that he did not return to the Employment Service office to secure another referral card believing that he should visit the Employment Service office only on the dates given to him for such visits. He next appeared at the Employment service on September 25, 1945, at which time the job in question had been filled.

Referee's Opinion and Decision: In not reporting to the prospective employer despite his loss of the referral card or at least returning to the Employment Service office immediately or the next day for another referral card, claimant failed to act as I believe a reasonably prudent person would have acted under similar circumstances. Since the job offered was in his usual occupation and at the usual rate of pay, as well as reasonably commensurate with his prior earnings, I hold that without good cause he refused employment for which he was reasonably

fitted by training and experience. The initial determinations are accordingly sustained. Claimant was overpaid \$42 in benefits. (11/29/45)

Appealed By: Claimant

Appeal Board Opinion: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case.

Decision: The decision of the referee is affirmed. (1/30/46)

A-750-705A

Index 785.6

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE
APRIL 1946

INTERPRETATION SERVICE - BENEFIT CLAIMS
AVAILABILITY AND CAPABILITY
Domestic Circumstances

RESTRICTION TO NIGHT EMPLOYMENT - DOMESTIC CIRCUMSTANCES; NO
TRANSPORTATION FACILITIES

Unwillingness to work on day shift because of domestic circumstances, restricting herself to night employment, and refusing referral to night employment because of inability to obtain transportation, rendered claimant unavailable.

A.B. 12,654-46

Referee's Decision: The initial determination of the local office which disqualified claimant from receiving benefits because she was unavailable for employment is overruled. (12/19/45)

Appealed By: Industrial Commissioner.

Findings of Fact: Claimant resides in St. Remy, a rural community with no employment opportunities, located about seven miles from Kingston, New York. She is the mother of three children, twelve, ten and eight years respectively. For about two years prior to August 17, 1945 she worked on the night shift in a powder plant in a nearby locality. She traveled to work by sharing an automobile ride with a co-worker. Claimant was laid off as a result of the cessation of hostilities. Prior thereto, claimant was a housewife. Claimant filed an application for benefits on October 1, 1945. Because of her domestic responsibilities claimant restricted herself to the night shift. On October 10, 1945 claimant was referred to a job on the shift from 4:00 P.M. to 10:00 P.M. in a cigar factory located in Kingston. There were no other opportunities for night work in nearby localities. Claimant refused the referral and signed a statement at the local office on October 16, 1945, which reads as follows:

"I have refused any job referral where I had to take day hours. I am willing at this time to accept a job on night work if I can get the transportation in and out of Kingston. I cannot get a bus in from St. Remy at night. Would have to depend on someone taking me in and out. I worked in H. two and a half years and my means of transportation were share the ride. I cannot accept day work as I

have three children going to school who need my attention during the day. My husband works day at the H.P. Company and can take care of the children at night. I refused referral to V.S. & H. cigar factory as I had no means of traveling in and out at night."

The local office issued an initial determination that claimant was unavailable for employment on the ground that she had no means of transportation to reach the only employer in a nearby locality which offered work on the night shift. There is public transportation between St. Remy and Kingston during the daytime. Claimant testified at the hearing that it would not pay her to work on the day shift because of the expense involved in hiring a person to take care of her children.

Appeal Board Opinion: The referee ruled that claimant was available for employment relying on A.B. 7222-42; 10,672-44 and 10,673-44, from which the referee quoted as follows:

"The referee ruled claimant to be unavailable because there are no employment opportunities in the place of her residence and she is without means of transportation to any place of possible employment. It is not questioned that claimant is willing to work or that she has been and is making an honest effort to solve her transportation problem. Claimant's inability to secure work is not due to her unavailability but rather to the fact that work was not available to her because of conditions over which she had no control.

Under these circumstances, it would be a harsh rule that would deny to the claimant her benefits, at least pending the solution of her difficulties."

The factual situations in the cases cited are clearly distinguishable from that in the instant case. There, the claimants had encountered transportation difficulties but did not restrict themselves to any particular shift because of domestic or other circumstances. Here, claimant was unwilling to work on the day shift in a nearby locality accessible in the daytime only. To take work on the day shift would require her to employ a person to care for her children, an expense she did not wish to assume. For this reason she limited her availability to night work. However, she could not accept a job with the only employer near her home offering night work due to her inability to obtain transportation. It must be held that under these limitations claimant does not meet the test of availability within the meaning of the Law (A.B. 11,550-45).

Decision: The initial determination that claimant was unavailable for employment is sustained. The decision of the referee is reversed. (2/13/46)

A-750-706

Index No. 775.4

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICE OFFICE

April 6, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
DETERMINATION OF BENEFITS

Appeal Board Case No. 12,622-46

AVAILABILITY – DENTIST PRACTICING PROFESSION DURING USUAL BUSINESS HOURS

Claimant, a dentist, devoting usual business hours to the practice of his profession, was held not available for employment notwithstanding his professed desire for night shift employment during which hours he was previously employed in a war factory as an inspector and machine operator; self-employment which requires continuous attention removes one from the labor market.

Referee's Decision: The initial determination of the local office holding that claimant was not totally unemployed within the meaning of the Law is overruled. (12/5/45)

Appeal By: Industrial Commissioner

Findings of Fact: Claimant is a dentist and has been engaged in the practice of his profession for about forty years. During the last few years of his practice, claimant abandoned some branches of his profession and limited himself primarily to mechanical work. During the war claimant accepted a position with a war factory as an inspector and machine operator. While so employed, his hours ranged generally from 5 p.m. to 2 a.m. He was laid off after the war. In accepting work in a war factory claimant was motivated by a patriotic impulse and by a desire to work himself into a position which would permit him to discontinue the practice of the dental profession. While employed in the war plant claimant continued to do some work as a dentist. After he lost his employment, he resumed the practice of his profession on a full-time basis. He kept regular office hours and received all patients who required his services. On August 21, 1945 claimant filed an application for benefits and reported continuously to the date of the hearing. On September 7, 1945 claimant was interviewed at the local office. At that time he signed a statement indicating that he was willing to accept employment either from 5 p.m. to 2 a.m. or from 4 p.m. to midnight. Based on the interview and the claimant's statement, an initial determination was made by the local office holding that claimant was not totally unemployed within the meaning of the Law. Claimant contested the initial determination and demanded a hearing. At the hearing before the referee claimant testified that he would be willing to accept full-time employment during the day and abandon his profession completely, provided he could obtain employment, which was consonant with his professional background and commensurate with his earning capacity. The referee overruled the initial determination and the Industrial Commissioner appealed.

Appeal Board Opinion: While not clearly indicated, this appeal involves primarily the issue of whether or not claimant was available for employment within the meaning of the Law, Section 522 of the Labor Law defines total unemployment as follows:

"'Total unemployment' means the total lack of any employment on any day, caused by the inability of a claimant who is capable of and available for work to engage in his usual employment or in any other for which he is reasonably fitted by training and experience. The term 'employment' as used in this section meaning any employment including that not defined in this title."

An analysis of the section discloses that there must be a total lack of any employment and the claimant must be capable of and available for work in his usual employment or in any other for which he is reasonable fitted by training and experience. In Appeal Board, 3606-40, we said.

"The term 'employment' is defined in section 502.1. Its basic element is a contract of hire.****"

Since claimant did not render services under a contract of hire he was not employed within the meaning of the foregoing provision of Law. However, in view of the fact that claimant was devoting the usual business hours to the practice of his profession, there still remains the question of his availability for employment within the meaning of the Law. The test as laid down in Appeal Board, 5768-41 is as follows:

"The test in these situations is not the amount of income. The test is whether the enterprise is of such a nature that requires the continuous attention of the claimant and thus removes him from the labor market. In accordance with this test, we have held that real estate brokers who rent offices and assume obligations with a view of building up permanent businesses have removed themselves from the labor market (Appeal Board, 4753-41; 804-39). So too in the case of an accountant who entered an enterprise under similar circumstances (Appeal Board, 2488-40); dental mechanic (Appeal Board, 3629-40); attorney (Appeal Board, 4446-40; 1793-39). We have held such claimants ineligible for benefits even though their enterprises yielded no income whatsoever, on the ground that they were unavailable for employment."

Applying these principles, we believe that the claimant's devotion to the practice of his profession was of such a continuous nature as to make him unavailable for employment. Furthermore, the record fails to show any efforts on his part to seek employment during the hours he devotes to the practice of his profession.

Decision: Claimant was unavailable for employment. The initial determination of the local office is sustained. The decision of the referee is reversed. (3/4/46)

A-750-708A

Index No. 760A.6

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICE OFFICE
April 8, 1946

INTERPRETATION SERVICE-BENEFIT CLAIMS
DETERMINATION OF BENEFITS
AVAILABILITY AND CAPABILITY
Restriction of Employment
Days – Hours

Appeal Board Case No. 12,627-46

RESTRICTION OF EMPLOYMENT – HOURS; COLLEGE STUDENT

College student, with previous work history of full-time employment, who would accept any type of employment only during special hours selected by himself which would not interfere with his studies, held unavailable as full-time employment did not exist during the hours desired and whatever work he might engage in would be subordinate to his purpose of perfecting his education.

Referee's Decision: The initial determination of the local office, which disqualified claimant because he was unavailable for employment, is overruled. (12/17/45)

Findings of Fact: Claimant is twenty-two years of age. He worked from October 1941 to August 1945, as an assembler in a war plant. His regular hours of work were from 8:00 a.m. to 6:00 p.m. In September 1944, claimant enrolled at college in Hempstead as a candidate for the degree of mechanical engineer. His hours of attendance at college were from 6:00 p.m. to 10:00 p.m., four nights a week. Commencing September 1944, claimant was given time off at 4:30 p.m. from his employment to enable him to attend to his studies. Claimant's employment was terminated at the end of the war. Prior to the last employment, claimant worked as an usher in a theatre while attending high school. Claimant filed an application for employment and registered for unemployment insurance benefits on August 23, 1945. Commencing September 19, 1945, claimant's hours of attendance at college are changed as follows: On Monday and Wednesday from 2:00 p.m. to 10:00 p.m. and on Tuesday and Thursday from 9:20 p.m. to 10:40 p.m. Claimant's tuition amounted to \$150 a semester. He was unwilling to relinquish his studies to accept full-time employment. Claimant was willing, however, to accept any type of employment within a reasonable distance from his home during such hours as would not interfere with his studies. The local office issued an initial determination that claimant was unavailable for employment, effective September 19, 1945, on the ground that there was no reasonable prospect of claimant obtaining employment meeting his requirements. The representative of the United State Employment Service testified that there were no opportunities in the locality during the hours to which claimant restricted himself. Claimant exerted independent efforts to obtain employment which would not interfere with his studies. He was unsuccessful because the employers had no openings for the hours of work to which claimant limited himself. Claimant was still unemployed at the date of the hearing on November 29, 1945.

Appeal Board Opinion: The referee held that claimant was available for employment on the ground that there is no dearth of employment consistent with the hours of claimant's course of study. We cannot agree with the conclusion reached by the referee. In the first place, the referee's findings that there is no dearth of employment meeting claimant's requirements lacks support in the record. Furthermore, because of a change in claimant's schedule of attendance at college he cannot work during two afternoons a week. The hours to which claimant limits himself do not normally exist in full-time employment in the locality. Since claimant does not show a previous history as a part-time worker he cannot qualify for benefits on that basis. Since he restricts himself to the hours which will not interfere with his attendance in college, it appears that whatever work he may engage in is subordinate to his purpose of perfecting his education by obtaining a degree in engineering and he therefore fails to meet the test of availability of employment within the meaning of the law.

Decision: The initial determination made by the local office disqualifying the claimant on the ground that he is unavailable for employment is sustained. The decision of the referee is reversed. (2/21/46)

April 8, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF EMPLOYMENT
Other Reasons for Refusal

Appeal Board Case No. 12,581-45

REFUSAL – FAILURE TO LOCATE PROSPECTIVE EMPLOYER'S SHOP – LACK OF DUE
DILIGENCE

Failure to locate prospective employer's shop, and failure to make inquiry or communicate with the placement office until a week later, by which time the position had been filled, showed a complete lack of due diligence and was tantamount to refusal of employment without good cause.

Referee's Decision: The initial determination of the local office which disqualified claimant from benefits because she refused an offer of employment on September 20, 1945, is overruled. (11/26/45)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant, whose last employment was that of a trimmer in a factory which manufactured bags and kits, filed an application for employment and registered for unemployment insurance benefits on August 14, 1945. She earned \$18 a week in this last job. On September 20, 1945 claimant was referred by the United States Employment service to a job tying fishing flies on a piece-work basis with a guaranteed minimum of fifty cents an hour. Claimant did not object to the work offered or the rate paid by the employer which compared favorably with that prevailing for similar work in the locality. The employment interviewer gave claimant a referral card bearing the name and address of the prospective employer. Claimant accepted the referral card and went to the building in which the employer's establishment was located. She contends she was unable to locate the employer's shop. Her version with respect thereto is reflected in this part of her testimony:

"A. I came there and I looked around. It all looked like stores. It did say, 'Fishing Tackle' there on the door, so I went in the door and up the steps, because it was stairs there. I went up the stairs and couldn't find anything that looked like a factory or any place that was a working place.

Was there anybody working on the first floor?

No, it was like stores there. I went up the stairs because it said on the street, 'Fishing Tackle.' I went up
the steps.

When you went up the stairs, what did you see then?

It was just like business, lawyers or real estate. I didn't see any women at work or no one at work like in a factory. So I came down and instead of looking any more I went away."

Claimant did not again contact the placement office until September 27, 1945, which was her regular reporting date. She then informed the employment interviewer that she could not find the employer's place of business. On the same day claimant was again referred to the same employment. The interviewer told claimant that the Employer's establishment was located on the first floor. Claimant reported to the prospective employer for an interview, but was advised that the job was filled. On September 28, 1945 the local office issued an initial determination that claimant, without good cause, refused employment on September 20, 1945.

Appeal Board Opinion: The referee overruled the initial determination of the local office on the ground that claimant attempted to locate the prospective employer's place of business, but was unable to do so. We are unable to agree with the conclusion reached by the referee. It is contended on behalf of the Industrial Commissioner that claimant showed a complete lack of diligence in her effort to find the employer. The position of the Commissioner is well taken. Reasonable prudence would dictate that when claimant was not successful in finding the employer on September 20, 1945, she should have made inquiry of persons on the premises or in the vicinity relative to the exact location of the establishment or communicated immediately with the placement office to obtain further directions. Instead, claimant went home and did not report the situation to the placement office until a week later. Claimant's acts amounted to a refusal of employment without good cause.

Decision: The initial determination that claimant, without good cause, refused employment on September 20, 1945 is sustained. The decision of the referee is reversed. (2/13/46)

A-750-715

Index No. 1740D-4

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

April 8, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT
Wages – Failure or Refusal to Pay

Appeal Board Case No. 12,638-46

VOLUNTARY LEAVING – FAILURE TO COMPENSATE FOR HOLIDAY

Receiving no compensation for a holiday was not good cause for voluntary leaving since the employer was under no duty to make payment.

Referee's Findings of Fact: Hearings were held herein at which the claimant and representatives of the Industrial Commissioner and of her former employer appeared and testified. Claimant, a homemaker, filed a claim for benefits on September 14, 1945 and was disqualified for a period of six weeks thereafter for having voluntarily left her last employment without good cause. For a period of approximately 17 years claimant worked as a sewing machine operator with the firm by whom she had last been employed. In recent years, she performed all of her work at home. After the declaration of the holiday on V-J Day, claimant learned that factory workers in the employ of her employer had been paid for that day and she therefore requested that she be compensated for that day. The employer advised her that under its policy no homeworkers were paid for holidays and therefore denied claimant's request. Claimant persisted in her attempts to obtain compensation for that day and when she met with no success she advised the employer that if she were not paid for that day, he could remove the machine from her premises since she would not continue in its employ. She continued to work for several weeks after V-J Day expecting that the employer would reconsider its position and that she would be compensated. Finally, claimant learned several days prior to September 4, 1945, that the employer had finally declined her request and on September 4, 1945, when the employer sent some work to claimant's home, she refused to

accept it and directed the truckman to return it to the employer. The employer assumed that claimant was carrying out her threat to terminate her employment because of the failure to compensate her for V-J Day and therefore arranged to pick up her machine, which was done on September 9, 1945. Shortly after the machine was taken from her, claimant reconsidered and requested more work from the employer and finally re-entered its employ on or about October 19, 1945. Claimant admits that she made the statement to the employer that she would not continue in the employ unless she were paid for V-J Day and that she requested that her machine be taken from her, but contends that the employer knew that she was not serious in her threat and that actually she had no intention of carrying out such threat. She claims that she refused to accept the work on September 4, 1945, because she was busy with personal affairs and was unable to complete the work at that time. However,, when claimant was originally interrogated with respect to the reasons for her failure to accept the work on September 4, she failed to mention that it was due to her personal reasons, but stated that she refused to accept the work because her union representative had advised her to refrain from working for the employer until the question of compensation for V-J Day was settled. When the machine was removed from claimant's premises, work was available for her and the employer placed the machine in another worker's home and furnished work to that worker.

Referee's Opinion and Decision: Upon the credible evidence herein I find that claimant voluntarily left her employment because she was dissatisfied with the fact that she had not been compensated for the holiday on V-J Day. The employer acted on claimant's request that the machine be removed from her premises and her employment thereupon became terminated. The issue is therefore presented with respect to whether or not claimant had good cause to terminate such employment. The only basis for such termination is the employer's failure to compensate claimant for the holiday. The identical question was passed upon by the Appeal Board in Case 10,850-44 and it was there held that an employer's failure to compensate a worker for a holiday does not constitute good cause for the employee's termination of the employment relationship since the employer is under no duty to make payment for that day. On the authority of the foregoing case, I conclude that this claimant voluntarily terminated her employment without good cause and therefore the initial determination herein is sustained. (12/20/45)

Appealed By: Claimant

Appeal Board Opinion: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case.

Decision: The decision of the referee is affirmed. (2/13/46)

A-750-716

Index No. 1650D-3

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

April 8, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT
Other Personal Affairs

Appeal Board Case No. 12,696-46

VOLUNTARY LEAVING – CONTENTION OF EMBARRASSMENT CAUSED BY HUSBAND'S DISCHARGE

Contention of humiliation and embarrassment caused by husband's discharge by same employer was not good cause for voluntarily leaving employment.

Referee's Findings of Fact: A hearing was held herein at which the claimant and representatives of the employer and of the Industrial Commissioner appeared and testified. Claimant was employed for three years to October 27, 1945, as a salesperson in a women's apparel shop in Rochester, New York. Her husband was employed by the same employer as manager of the employer's Hornell, New York store. On October 27, 1945, claimant's husband's employment was terminated by the employer. On the evening of that day when claimant's husband returned home, he informed the claimant of the termination of his employment. Claimant, thereafter, did not return to work for the employer and gave no notice to the employer that she was leaving her job. Claimant filed for benefits on November 2, 1945. Claimant was disqualified for 42 days for voluntary leaving of employment. The employer considered claimant a valuable salesperson and was willing to have her continue in her job. The sole reason advanced by claimant for the voluntary leaving of her employment was that she felt humiliated because of her husband's discharge and it would be embarrassing for her to continue to work with her former co-workers.

Referee's Opinion and Decision: While the reasons advanced by claimant for the voluntary leaving of her employment are sympathetically received, they do not constitute good cause within the meaning of the Unemployment Insurance Law. Claimant's superior considered her a good worker and was anxious to continue the employment relationship. There was no showing that claimant's employment in the employer's Rochester store would have in any way been affected because of the termination of her husband's employment. I hold that claimant did not have good cause for the voluntary leaving of her employment. The initial determination herein is sustained. (1/9/46)

Appealed By: Claimant

Appeal Board Opinion: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case.

Decision: The decision of the referee is affirmed. (2/13/46)

A-750-718

Index No. 1740B-3

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

April 20, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT
Reduction of Hours

Appeal Board Case No. 12,726-46

VOLUNTARY LEAVING, WAGES – ELIMINATION OF OVERTIME; INABILITY TO WORK IN INCLEMENT WEATHER

Reduction in pay due to elimination of overtime and inability to work during inclement weather, such work being optional with employee, was not good cause for voluntary leaving of employment.

Referee's Decision: The initial determination of the local office which disqualified claimant because he voluntarily left his employment without good cause is overruled. (1/5/46)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant worked for twenty-one months prior to October 26, 1945 as a ship cleaner in a shipyard. He voluntarily left his employment on October 26, 1945. Claimant filed an application for benefits on October 30, 1945. At a conference at the local office on November 13, 1945 claimant signed a statement that he voluntarily left his job "because I was not making enough money." The local office issued an initial determination that claimant voluntarily left his employment without good cause. Claimant started at the rate of seventy cents an hour and after periodic raises his basic rate was increased to eighty-five cents an hour about three months prior to his separation. During the war claimant worked overtime in the establishment, for which he received additional compensation. During some weeks claimant earned up to \$50 with overtime. After the cessation of hostilities overtime was discontinued by the employer and claimant then worked on a five-day a week basis. Claimant states that he left his employment because, as a result of the elimination of overtime, he was not able to earn enough money to support his family. Claimant's family consists of seven children, only one of whom is employed. Claimant contended that on some occasions he suffered a further reduction in pay because of his inability to work during inclement weather. Work during inclement weather was optional with the employees. About December 3, 1945 claimant obtained employment as a sweeper in a factory, paying seventy-five cents an hour for a five and one-half day work week. In this employment claimant worked overtime every night, for which he received time and a half.

Appeal Board Opinion: The referee held that claimant was justified in leaving the employment because the elimination of overtime and his inability to work in inclement weather reduced his pay so that it was insufficient to enable him to meet his obligations to his family. We are unable to agree with the conclusion reached by the referee. In the instant case, the employer was compelled to discontinue overtime because of the cessation of hostilities. Although it resulted in a reduction of claimant's aggregate weekly earnings, it did not justify claimant's leaving.

It does not appear that the hours of work or the wages paid to claimant in his employment ending October 26, 1945 were substantially less favorable to claimant than those prevailing for similar work in the locality. While claimant's desire to earn higher wages because of his family responsibilities is understandable, it does not under the circumstances of this case constitute good cause for his voluntary leaving within the meaning of the Unemployment Insurance Law.

Decision: The initial determination disqualifying claimant from benefits because he voluntarily left his employment without good cause is sustained. The decision of the referee is reversed. (3/11/46)

ADJUDICATION SERVICES OFFICE

April 20, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS

REFUSAL OF EMPLOYMENT

Experience and Training

Higher Skill – Employment

Opportunities Existing

Qualifications

Appeal Board Case Nos. 12,319; 12,320; 12,321; 12,322; and 12,323-45

REFUSAL, HIGHER SKILL EMPLOYMENT OPPORTUNITIES EXISTING QUALIFICATIONS –
EXPERIENCE AND TRAINING CONSIDERING (1) PHYSICAL LIMITATION (2) LACK OF
APTITUDE AND INTEREST FOR INDUSTRIAL WORK IN WHICH PREVIOUSLY
EXPERIENCED

Claimants who had progressed through aptitude and efficiency to semi-skilled industrial workers (grinding machine operator and assemblers) receiving pay rates of over \$1 per hour refused with good cause referrals to employment requiring no experience or skill at beginner's rates of approximately 60¢ per hour when the evidence showed (1) claimants had acquired a degree of skill which was of value in the existing labor market (2) large numbers of workers were engaged at similar skills during period in question at rates of pay comparable to claimants last rates.

In contrast to the above, a claimant, under similar circumstances, refused without good cause referral to a trainee position when it was indicated that no great aptitude was shown for industrial work by claimant as evidenced by her numerous absences in the past and a tenuous attachment to the labor market culminating in her discharge by employer because she "will not obey plant rules. Dissatisfied with job."

Likewise refusal was without good cause when it was shown that claimant was no longer able to work at her highest skill as evidenced by her original leaving of her job for health reasons and a subsequent nervous breakdown following her return to such work.

The foregoing decisions are predicated upon the following premises which are made a part of the decisions:

Determining whether a claimant is reasonably fitted by training and experience for employment offered depends on whether a skill has been acquired, whether such skill is of some value in the existing labor market and whether the offer of employment represents an attempt to match the claimants' proved qualifications, in a reasonable degree, to specifications of existing jobs; in arriving at a conclusion a comparison between former wages and those offered provide an additional measuring rod. Finally, it must be determined whether the wages offered are substantially less favorable than those prevailing for similar work in the locality.

Referee's Decision: The initial determinations that claimants refused employment without good cause were overruled.

Appealed By: Industrial Commissioner

Findings of Fact:

Facts Applicable to Claimant E.A.B.

Claimant, a married woman, resides in Buffalo and is the mother of two children, aged three and seven years. Prior to her marriage she worked as a clerk in an office. She was then a housewife for some five years. In response to the call for women workers during the war emergency period, claimant sought and obtained work in a factory in May 1943.

She made arrangements with her mother-in-law to care for her children while she worked. Claimant commenced working as a machine operator on the second shift in a large airplane plant on May 7, 1943. She started as a burrer at ninety-four cents per hour and after five weeks was raised to ninety-seven cents per hour. Two months later, having shown aptitude for the work, claimant was advanced to a grinding machine at \$1.02 per hour. The tool setter in claimant's department testified that, in accordance with existing practice, claimant, as one of the more proficient operators, was promoted to a grinder on his recommendation. She was taught to make minor adjustments or "setup" on the machines and in the absence of the tool setter she set up her own machine. As a grinder, claimant received periodic increases until she earned \$1.17 per hour. She was finally placed on work calling for the finest precision tolerance in her department, for which she received an added two cents or \$1.19 per hour. There were about twenty men and women operators in the grinding department, only two of whom worked on material to be ground to the maximum tolerance. The persons engaged in such work were the only ones in that department who were paid \$1.19 per hour. Claimant continued at this work until March 31, 1944, when she took leave of absence because her mother-in-law became ill and she had no one to care for her children. Claimant remained at home during the illness of her mother-in-law and some time thereafter. On March 5, 1945 claimant was ready to work and she registered for employment and filed an application for unemployment insurance benefits. She reported regularly thereafter. She was classified by the United States Employment service for employment purposes as a multi-purpose machine operator, a semi-skilled code. On May 4, 1945 claimant was referred by the United States Employment Service to a job as a spark tester at another war plant in Buffalo. Claimant visited the prospective employer and was interviewed. She was advised that the starting rate was fifty-eight cents per hour, that after thirty days the rate would be raised to seventy cents per hour with periodic raises thereafter to a maximum of eight-one cents per hour after three months. Claimant refused the offer of employment on the grounds that the rate of pay was too low and the employer's plant was located at too great a distance from her home. The work which claimant was offered was unskilled and required no experience. The operation consisted of running wire from one spool to another and during the process a spark testing machine automatically tested the wire for defects, a signal being given when a defect appeared. The operator was required only to start and stop the machine. The company operated a share-the-ride plan for employees residing in various sections of Buffalo.

Facts Applicable to Claimant L.I.W.

Claimant resides in Buffalo. She is married but lives apart from her husband. Prior to 1943 she was a housewife and worked at times as a domestic and as a hotel maid. Commencing January 12, 1943 claimant obtained employment at the plant of an aircraft manufacturer in Buffalo. She started at the rate of sixty-six cents per hour, was increased five cents per hour after the first month, and thereafter received periodic increases as she progressed in the work until she earned \$1.10 per hour. Her work was as an operator of an automatic hand screw machine which was controlled by the use of hand levers. She was required to manipulate the levers so that the machine would accommodate the different airplane parts on which she was working, and in this manner would cut, shape, ream and put on the "finishing touches," such as filing and grinding down the rough edges of the parts passing through the machine. In July 1944 claimant was compelled to leave the job because she was in poor health and her doctor advised her to rest. On September 15, 1944 she returned to the job and after working for one week suffered a nervous breakdown and had to give up the work. After another period of rest claimant filed application for employment and unemployment insurance benefits on

March 8, 1945. She was classified by the United States Employment Service as a screw machine operator, a semi-skilled code. On April 26, 1945 claimant was referred to employment as a braiding machine operator. The rate of pay was fifty-eight cents per hour on the first shift and sixty-eight cents per hour on the night shift. Automatic increases were provided thereafter to the rate of seventy-seven cents per hour plus a group bonus of about \$5 per week. The duties of the job were to "operate an automatic electric braiding machine, which weaves electric wire covering out of threads of fine wires; places 150 pound reels which are lifted by cranes on to the machine and ties broken threads." Employees were to be trained on the job. Claimant refused the offer of employment on the ground that the wage offered was too low. She stated in an interview that she wanted seventy-five to eighty cents per hour. An initial determination was issued disqualifying claimant from benefits for refusing without good cause to accept the offer of employment. On June 1, 1945 claimant obtained employment as a laundress in a nursing home at the rate of \$5.50 per day plus carfare and one meal. She left this job after one week because of unsatisfactory working conditions. She refiled her claim on June 7, 1945 and reported thereafter.

Facts Applicable to Claimant J.G.P.

Claimant resides in Buffalo and has a child about four years old. She was a housewife prior to August 1943 when she obtained employment as an assembler at an aircraft factory in Buffalo. Her work was to assemble parts of the flat rear cases of airplane motors, such as gears, gear couplings, gaskets and the like. She started at the rate of ninety cents per hour and received periodic increases until she earned \$1.14 per hour. During the period of her employment, claimant lost considerable time from her work because of her own illness and the illness of her mother who was taking care of her child while she worked. Claimant's employment was terminated by the employer on May 1, 1944. In its report submitted to the Division, the reasons for her separation are stated as follows: "Will not obey plant rules. Dissatisfied with job." Claimant filed an application for employment and unemployment insurance benefits on January 15, 1945. She was classified by the United States Employment service as an assembler. On April 28, 1945 claimant was referred to employment with a cereal manufacturer as a packer at the rate of fifty-nine and one-half cents per hour. The duties of the job were to pack and fill boxes with cereals, not entailing the use of any skill. Claimant refused because of the rate of pay and because she would be required to pay someone \$10 per week to take care of her child. She stated at an interview of the local office that she wanted at least \$1 per hour. An initial determination was issued that claimant refused with out good cause to accept an offer of employment, or in the alternative, that claimant was unavailable for employment. Claimant has no work history other than that at the airplane factory and she has not had any work since May 1, 1944.

Facts Applicable to Claimant T.P.O.

Claimant resides in Buffalo. She is married and the mother of two children aged one and one-half and five years. From sometime in 1941 to July 1943 she worked for a tire and rubber manufacturer on the assembling of rubber boats and later assembling accessories on blimps. Her final rate of pay was seventy-eight cents per hour. She left this job because of pregnancy. In May 1944 claimant returned to the labor market and obtained employment as an assembler for a motor manufacturer engaged in war work. She worked with another assembler in the assembling of exhaust pipes to airplane motors. There were fourteen of such pipes, each assembler handling seven. Her starting rate was ninety-nine cents per hour. Her rate at the date she was laid off on April 9, 1945, was \$1.09 per hour, on the day shift. While claimant worked her mother-in-law

took care of her children. On April 9, 1945 claimant filed an application for employment and unemployment insurance benefits. Claimant was classified for employment purposes as an assembler, code 7-03.552, a semi skilled code. On April 27, 1945 claimant was referred by the Employment service to two jobs as an assembler. One referral was to her former employer at the rate of sixty-three cents per hour and the other to a radio manufacturer at the starting rate of sixty cents per hour. Claimant refused to consider these offers of employment on the ground that the rate of pay was too low. The local office determined that claimant should be given thirty days to seek more suitable employment and no action was taken against her on the basis of these refusals. She continued to report thereafter and the payment of benefit checks to her was authorized by the local office. On May 18, 1945 claimant was referred to another war plant in Buffalo as an assembler. The starting rate of pay was sixty cents per hour with a ten cent hourly raise each two months up to eighty-five center per hour, after which the job would be on the piece work basis. The job order specified that no experience was required. On a previous occasion claimant had visited this employer in search of employment and having been offered work at the starting rate of sixty cents per hour, she refused to accept that rate and left the plant. Claimant refused the offer of employment made on May 18, 1945 on the ground that the salary was too low, stating that she would not work for less than eighty cents per hour. An initial determination was issued disqualifying claimant from benefits effective May 18, 1945 for refusing, without good cause, to accept the offer of employment of that date. At the hearing before the Board the Industrial Commissioner made application to amend the initial determination to include claimant's refusal of the previous job offers and to make the disqualification effective April 27, 1945.

Facts Applicable to Claimant D.J.

Claimant, a resident of Buffalo, is twenty-six year of age, married and has no children. She was employed as an assembler in an aircraft plant in Buffalo from October 17, 1942 to March 20, 1945. She started at the rate of sixty-five cents an hour. After a short training course, she was placed on assembly work and thereafter she was advanced to more complicated work, receiving progressively higher rates of pay. Her final work was on the assembling of the tail section of the C-46 plane. She reached the classification of complicated assembler and received the final rate of \$1.15 per hour, the highest rate in that bracket. She was laid off from her employment on March 30, 1945. Claimant filed an application for employment and unemployment insurance benefits on April 3, 1945. She registered with and was classified by the United States Employment Service as a sub-assembler, code 7-03.552, a semi-skilled code. On May 8, 1945 claimant was referred by the United States Employment Service to a radio manufacturer as an assembler. On May 10, 1945 she reported to the employer for an interview. She was offered sixty cents per hour as a starting or beginners' rate and was told that she must enter a training school for a short period. She was advised also that she would eventually be placed on piece work. Claimant refused to accept the offer of employment on the ground that it was piece work and that she had never worked on piece work. On May 21, 1945 an initial determination was issued disqualifying claimant from benefits, effective May 10, 1945, for refusal, without good cause, to accept the offer of employment. On June 8, 1945 claimant on her own initiative obtained employment at a tire and rubber company as an assembler. She was put to work assembling pontoons. She received sixty-three cents per hour for the first two days and after successfully passing a test was raised to seventy-eight cents per hour. She was laid off by this employer on July 16, 1945, when its contract was cancelled. Claimant stated before the Board that she did not consider the sixty cents per hour offer adequate because she felt that after two and one-half years she had acquired some skill as an assembler. She stated also that she was under the

impression that she would be required to work very fast on piecework in order to make an adequate wage. It appears that the radio manufacturer to whom claimant was referred operated on what is known as an "incentive bonus plan." Under this plan a number of workers operated as a group and the amount of the earnings of the individual worker in the group depended upon the production of all. Under this system the lack of production on the part of a new or inefficient worker would tend to reduce the rate and the earnings of the individual members of the group. There is no evidence that any minimum rate was guaranteed, nor that this "incentive bonus plan" of wage payment prevailed in the Buffalo area.

Facts Applicable to All the Claimants Involved in this Proceeding

The labor analyst of the War Manpower Commission of Buffalo area office gave testimony at the Board hearings with respect to the number of workers employed at various plants in that area during the periods in question and subsequent thereto. It was adduced that as of May 1, 1945 the three leading aircraft manufacturers, operating seven plants in the Buffalo area, employed 56,348 workers, of whom 19,991 were women. This figure did not change but remained about constant between May 1 and July 15, 1945. Likewise, the wage rates did not change. Of 179 plants of all descriptions in the Buffalo area, the following figures were given:

	<u>Male Workers</u>	<u>Female Workers</u>	<u>Total</u>
July 01, 1944	144,227	69,132	213,359
July 15, 1945	115,626	44,707	160,333

No figures were available for the period between July 15, 1945 and V-J Day. However, as of October 1, 1945 the number of employees in the three leading plants had dropped to 13,932, of whom 2,857 were women. During the early months of 1945 there were some periodic layoffs and rehiring in the aircraft industry in Buffalo. In May 1945 one of the plants called back a number of workers who previously had been laid off. There does not appear to have been many orders for large numbers of workers in that field. However, on or about July 1, 1945 the United States Employment Service received an order from one of the larger concerns operating two plants for 250 riveters, seventy assemblers and thirty hand burrers having aircraft experience. The rates of pay offered were from ninety cents to \$1.15 per hour, depending on the skill of the worker and the manner in which his services were to be utilized. Another concern, a heater company, had placed orders for assemblers at eighty and eighty-five cents per hour. Testimony was taken on the rates of pay for workers in the aircraft industry in Buffalo. The starting rates for workers with no experience was sixty to sixty-five cents per hour. After a training period automatic increase were rapid as the employee learned to perform more skilled or complicated work. Within a few months the rate of pay was about \$1 per hour and was increased to a maximum of \$1.17 per hour. Highly skilled operations performed by men paid up to \$1.35 per hour. Some existing contracts between unions and employers in the Buffalo area provided for various types of labor or occupational grades and corresponding ranges of pay within such groups. That employees were hired at rates commensurate with their previous experience is shown by the following testimony of the representative of the United States Employment Service:

"Q. Every employee – I'm talking about production workers – does the contract (union) provide that regardless of experience, that every person who comes into the plant starts at the beginner's rate?

No, it provides that the minimum rate shall be paid. You can't start them below the minimum rate but depending on experience they can hire them at the ranges within the labor grade."

Appeal Board Opinion: The question of these cases is whether or not each claimant refused, without good cause, to accept an offer of employment within the meaning of Section 593.2 of the Labor Law, the pertinent portion of which reads as follows;

"Refusal of employment. No benefits shall be payable to any claimant who without good cause refuses to accept an offer of employment for which he is reasonably fitted by training and experience, including employments not subject to this article. No refusal to accept employment shall be deemed without good cause nor shall it disqualify any claimant otherwise eligible to receive benefits if

* * *

"(d) the wages or compensation or hours or conditions offered are substantially less favorable to the claimant than those prevailing for similar work in the locality, or are such as tend to depress wages or working conditions;" (Underscoring ours)

The first requirement of the statute in order to sustain a disqualification for job refusal is that the offer of employment be one for which the claimant is "reasonably fitted by training and experience." This is the primary question to be resolved herein. Under the express wording of the statute it seems to us axiomatic that the previously acquired skills, training and experience of the claimants must be taken into account. This principle has been consistently followed by this Board and has received recognition in the courts. In Matter of Rappaport, 267 app. Div. 930, affirming appeal Board 9637-40, the Board held that an offer of employment was not one for which the claimant was reasonably fitted by training and experience under the following circumstances: the claimant had previously worked as an office manager and bookkeeper at \$30 per week. She was offered employment as a clerk at \$25 per week. The Board pointed out that claimant's skills had not been taken into account in the making of the offer. The Court unanimously affirmed the Board's decision. Matter of Groner, 293 N.Y. 802, affirming appeal Board, 10,105-43, involved a similar question. There, an art director of many years' experience, who had previously earned \$15,000 and later \$10,000 per year, refused an offer as an art director at \$90 per week. In overruling the disqualification the Board emphasized that the claimant had demonstrated exceptional skill in his profession and that there was a wide disparity between the employment offered and his last employment, both as to the type of work involved and remuneration. Here, the Board's decision received the unanimous approval of the highest Court of this State. More recently this same proposition was the subject of discussion in a Court decision. In Matter of Heater, reversing Appeal Board, 11,623-45, Appellate Division, Third Department, decision handed down January 9, 1946, the Court had before it the question of a salesman who formerly sold draught beer at a salary of \$50 per week and who refused employment as a salesman of bottled beer at \$45 per week. Although it reversed the decision of the Board, which held that the job offered was not in the claimant's customary occupation, the Court was careful to point out that the employment offered involved only "some smaller degree of skill than his last employment." The following language of the Court is applicable here:

"Section 593, subdivision 2, of the Unemployment Insurance Law provides: 'No benefits shall be payable to any claimant who without good cause refuses to accept an offer of employment for which he is reasonably fitted by training and experience, including employments not subject to this article.' The very wording of this opening sentence precludes the theory that a claimant may refuse employment simply on the basis that it involves some smaller degree of skill than his last employment. The Unemployment Insurance Law was never intended as a guarantee that a claimant might always obtain benefits unless he was offered

employment at precisely the same level of skill at which he was last employed. The only obligation imposed, insofar as this phase of the statute is concerned, is that the employment offered must be one for which the claimant is reasonably fitted by training and experience." (Underscoring ours)

It will be noted that in all of these cases the wage rate is accepted as an indicia of the degree of skill acquired, and its worth in the labor market. Necessarily, therefore, in reaching a conclusion in each case, the wage rate becomes an important element. A comparison between former wages and those offered usually provides an additional measuring rod to determine whether employment offered is that for which the claimant is reasonably fitted by training and experience. In making his decision in the instant cases, the referee employed as a test, and we believe properly so, a comparison between the work formerly performed by the claimants and that offered them, as well as the differences between their former rate of wages and the wage rate offered. The Commissioner challenges these tests applied by the referee. It is contended (1) that there is nothing in the Law justifying a refusal of employment on the basis of a comparison between former wages and these offered; (2) that the referee erred, in any event, in that his decision upholding the refusals is based on a comparison between wartime emergency wages and normal peacetime prevailing wages when, the Commissioner contends, war emergency employment having become extinct, employment opportunities for women in the skills gained in such employment no longer exist. It is difficult to understand how the question of wartime or peace time rates can be seriously advanced in these cases. We believe that it has no bearing on the questions before us. In the first place, the offers in question were made in April and May 1945, prior to the war's end. The testimony shows that there was no reduction in the wage rates in the Buffalo area prior to the offers in question here or even subsequent to V-E and V-J days. As a matter of fact, when the referrals were made there were many thousands of women employed in the area at the going rates. Speaking as of the time of the offers, it must be assumed that the natural turnover of labor would provide placement opportunities for qualified workers in the skilled and semi-skilled categories. The record establishes that there was no reduction or even an appreciable change in the number of such workers employed in the Buffalo area between May 1 and July 15, 1945, although the number of industrial workers had previously suffered some decline. There is reference in the testimony to recalls to employment in May 1945 of previously displaced skilled and semi-skilled workers, as well as additional placements in those categories in May and subsequent periods. Much also has been made during these appeals of the argument that the type of employment at which these claimants and many thousands of other women were engaged was abnormal employment for women in industry. The attempt is made to discount entirely the experience or skills gained by women at such wartime work, so that it may not be considered part of their prior "training and experience" for the purposes of the Unemployment Insurance Law. It is asserted as a fact that further employment in jobs of this nature will never again be available to claimants and other women similarly situated. We are compelled to reject this assertion as purely speculative. We do not presume to predict the future of women in industry in this nation during the present difficult re-conversion period or the normal peacetime period to follow. The present record shows that claimants and other women worked side by side with men, doing comparable work and receiving comparably pay. As to the policy of this state in that regard, Governor Dewey, addressing the New York State women's Council on October 23, 1945, stated significantly:

"The story of progress is equally gratifying in business and industry. In 1943, the number of employed women in our State was almost 2,000,000. And in June 1945 the number of women employed in the state's war industries alone, was 275,253 or 32.2% of the total employment in these industries. The startling thing is that

women's conspicuous contribution was in fields where no one had believed it possible before – in the manufacture of electric machinery, scientific instruments and ordinance.

"This is a summary of an amazing record and the picture of a new economic and social world. No longer are there to be artificial bars against useful employment and opportunity on account of sex any more than there are to be bars on account of race, color, creed or national origin. I am proud of the record of our state in meeting the challenge of our times and I know you share that pride. This great emancipation will not only make millions of our people happier. It will enrich our society with the talents of millions of women in new fields. It will make our civilization firmer on the broadest possible base of full participation by all its citizens."

The answer to the question of whether the employment offered was that for which each claimant was reasonably fitted by training and experience must depend on an appraisal of the facts in each case. It must be determined whether the claimant had acquired a skill, whether such skill was of some value in the existing labor market and whether the offer of employment represented an attempt to match the claimant's proved qualifications, in a reasonable degree, to the specifications of jobs that were open. Later in this opinion we will discuss this subject as it applies to the case of each individual claimant. In addition to the requirement that the offer be one for which claimant is reasonably fitted, the statute provided that the wages offered must not be substantially less favorable than those prevailing for similar work in the locality. It would appear to be the contention of the Industrial Commissioner that under this provision, the exclusive test is whether the wages in the employment offered satisfied the requirements as to "prevailing wage." Clearly, this is an erroneous interpretation of the statute. We cannot say that subdivision (d) of section 593.2 nullifies the main provisions of the section relating to the offer of employment. Such a result could never have been intended. Great stress is placed by the Industrial Commissioner in his brief on the "supposed" determination of the referee that the starting rate at the offered employment governed the "prevailing" rate of wage for such employment. In this connection it is stated that all employers fix a starting rate for new employees in most instances and the future progress of the employee might be effected in a relatively short period, based on his previous experience and ability. This may very well be so and it has not escaped the attention of the Board. While it is true in the instant cases that the referee did compare the proffered starting rate with claimants' last earnings to show the great disproportion between them, this does not mean that in the determination of prevailing rate of wage, the starting rate would necessarily govern. Furthermore, the testimony of the representative of the United States Employment Service discloses that "you can't start them below the minimum rate but depending on experience they can hire them at the ranges within the labor grade." The Board had occasion in a recent case (Appeal Board, 11,354-44) to discuss this subject at some length. There, an assembler, after a year of experience had progressed from the rate of sixty cents an hour to eighty cents per hour. She refused to accept an offer as an assembler at sixty cents per hour because of the rate. The contention was raised that the offer was at prevailing rate of wage, since with few exceptions employers in the area started new employees at the beginner's rate, regardless of experience. In resolving the question of prevailing rate of wage in that case, the Board said in part:

"In order to reach a conclusion as to whether or not the job offered the claimant was one which she was justified in refusing without disqualification from benefits under the above section of the Law, we must determine whether or not the wages offered were substantially less favorable to her than those prevailing for similar work in the locality. What definition must be given with the clause 'wages. . . are

substantially less favorable . . . than those prevailing for similar work in the locality . . .? Is the proper definition the one urged by the Industrial Commissioner: that the clause means the rate the employer is willing to pay?

"We think not. We may look to the labor Law itself for some guidance. The Unemployment Insurance Law, as such, contains no definition of 'wages prevailing in the locality.' However, the Labor Law (in which the Unemployment Insurance Law is included as Article 18 thereof), at Article 8, section 220, subdivision 5, defines prevailing rate of wage, and 'locality' as follows, in part:

"a. The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality as hereinafter defined to the majority of workmen, laborers or mechanics in the same trade or occupation. In the event that it be determined that there is not a majority in the same trade or occupation paid at the same rate, then the rate paid to the greater number in such trade or occupation shall be the prevailing rate, provided such greater number constitutes at least forty per centum of the laborers, workmen or mechanics engaged in such trade or occupation; in the event there is less than forty per centum of the laborers, workmen or mechanics engaged in the same trade or occupation in the same locality paid at the same rate, then the average paid to such laborers, workmen or mechanics in the same trade or occupation shall be the prevailing rate. Laborers, workmen or mechanics for whom a prevailing rate of wages is to be determined shall not be considered in determining such prevailing wage.

"b. The "locality" for the purposes of this article, shall be the town, city, village or other civil division of the state wherein the physical work is being performed. * * *

"Comparison of Section 593.2 and Section 220 shows a similarity of language used. Section 593.2 uses the clause 'the wages or compensation or hours or conditions offered are substantially less favorable to the claimant than those prevailing for similar work in the locality.' Section 220 declares 'The prevailing rate of wages. . . . shall be the rate of wages paid in the locality.' (Underscoring ours.) Although Section 220 deals specifically with the definition of prevailing rate of wages to be paid on public works, it illustrates the complexity of the factors which must be considered, and it does shed some light on the legislative intent with respect to the meaning of the term 'prevailing for similar work in the locality' as used in Section 593.2.

"We are of the opinion that, for the purpose of unemployment insurance, 'wages . . . prevailing for similar work in the locality' are determined by the rate being paid to employees of comparable skill actually engaged in similar work. In other words, 'wages prevailing for similar work in the locality' are not the wages employers may be willing to pay new employees, but are the wages being paid to employees actually engaged in work of a like nature in the locality. Webster defines 'prevailing' as 'prevalent; most frequent; widespread; generally current; applies especially to that which is predominant or which generally or commonly obtains.'

"In the case at hand we have a claimant who refused to accept an offer of employment as an assembler at the rate of sixty cents an hour. She had worked as an assembler for an employer who manufactures complicated electrical instruments. The skill she acquired on this job is useable by other employers. Her wage rate was predicated on such skill and was raised at intervals as she progressed. The testimony shows that there are a large number of employers in the metropolitan area who employ assemblers, and that their wages are predicated on the skills they possess and are increased periodically from the sixty cent minimum beginner rate to the highly skilled rate of \$1.17½ per hour. Furthermore, the United States Employment Service itself referred to a job as an assembler at the rate of seventy-five cents an hour.

"The testimony shows that assembler with skill comparable to claimant are and were paid more than sixty cents an hour in the metropolitan area at the time the offer was made, and that such sixty-cent rate was substantially less favorable to claimant than the rate prevailing in the locality.

"We reach the conclusion that claimant did not, without good cause, refuse the offer of employment on September 7, 1944."

We have stated that we believe to be the principles governing the determination of the issues in these cases. It remains to apply these principles to each individual case and reach a conclusion as to the propriety of the respective disqualifications by the local office.

Claimant E.A.B

We have here a claimant who had last worked as a grinding machine operator. Having shown great aptitude for the work she was progressively advanced to the highest skill in her department. Her wage rate was predicated on such skill. The testimony shows that at the time of the referral there were a large number of workers engaged in that skill and at wages comparable to claimant's last rate. The hearings held before this Board establish and we have found as a fact that claimant, although her industrial experience was limited in point of time, had acquired a degree of skill which was of value in the labor market. This was recognized by the employment service, where she was classified as a semi-skilled industrial worker. We have found as a fact that the job to which claimant was referred was of an unskilled nature and did not involve the utilization of any of claimant's acquired skill. Moreover, the wage rate offered represented a drastic reduction from her former rate and was substantially less favorable to her than the rate prevailing in the locality for work for which she was fitted. We reach the conclusion that the employment offered claimant was not that for which she was reasonably fitted by training and experience and the initial determination disqualifying claimant was properly overruled.

Claimant L.I.W.

This claimant previously worked as a screw machine operator, earning \$1.10 per hour. This work proved too great a strain on her physically, as evidenced by her original leaving of the job in July 1944 for health reasons, and her subsequent nervous breakdown following her return to such work. That she was no longer able to perform such work appears to have been acknowledged by claimant in the requirements she set forth for prospective employment and when she obtained work as a laundress at \$5.50 per day. Claimant's situation may be likened to that of the claimant in the recent Court case of Matter of Mednick, decided by Appellant Division, Third Department, on November 20, 1945. That claimant, formerly a machinist, was

no longer able to work at his highest skill because of physical limitations. He refused employment as a stock clerk and inspector of machine parts at a wage lower than he had formerly earned. The Court upheld a disqualification for refusal, stating in part:

". . . The Industrial Commissioner found that the two offers made to claimant were for jobs for which he was fitted by learning and experience when his physical limitations were considered, and that they were offers which would utilize his highest skill. The Commissioner therefore found that claimant had refused suitable employment . . ." (Underscoring ours)

Thus, for the purpose of judging whether claimant L.I.W. was offered employment for which she was reasonably fitted by training and experience, her qualifications as a semi-skilled machine operator must necessarily be discounted. The employment which she was offered was as a braiding machine operator. The work appears to have involved a simple automatic operation, not entailing much physical or mental strain. The wages offered, considering the automatic increases, was in keeping with her then existing qualifications and may not be said to have been substantially less than the rate prevailing for similar work in the locality. We conclude, therefore, that this claimant did refuse, without good cause, to accept employment for which she was reasonably fitted by training and experience and that the disqualification was proper.

Claimant J.G.P.

This claimant's sole employment experience was as an assembler for some months, last earning a rate of \$1.14 per hour. The record indicates numerous absences on her part and some difficulty with the employer with respect to plant rules. It would appear that, unlike claimant E.A.B., this claimant failed to show any great aptitude for industrial work. Her domestic difficulties may have contributed to this in some part. However, consideration of these facts, as well as claimant's tenuous attachment to the labor market, compels us to the conclusion that the offer of work of an unskilled nature was justified in her case. Since the rate of pay offered claimant was not substantially less favorable to her than that prevailing for similar work in the locality, it must be held that the disqualification was proper.

Claimant T.P.O.

The first question to be decided with respect to this claimant is whether the Commissioner's application to amend the initial determination by imposing a disqualification on the basis of the April referrals should be granted. The local office, with full knowledge of all the facts, determined that claimant's refusal to accept the job offers of April 27, 1945 was with good cause. The first offer as an assembler at sixty-three cents per hour was with her former employer, for whom she worked in this capacity at the rate of seventy-eight cents an hour. We must assume that the local office considered the disparity in the offered wage and her former wage with this employer in holding that the refusal of this offer was with good cause. It seems to us that the determination was proper. The second offer likewise was an assembler at sixty cents per hour. Her last rate in such work was \$1.09 per hour. Since the second offer was at three cents per hour less than the first offer, there would appear to have been no plausible reason for the local office to hold that this refusal was without good cause. In so doing, a policy and line of action laid down by the administrator was followed. Benefits were paid to claimant for the period between the date of such refusals and the date of the subsequent disqualification. Under these circumstances we do not believe that the Commissioner should be permitted to repudiate his former action to the prejudice of the claimant, who was guilty of no concealment or fraud. Furthermore, we have found as a fact that at the date of these referrals a majority of these with comparable skills were employed at a rate comparable to her last rate of \$1.09 per

hour. The motion of the Industrial Commissioner to amend the initial determination is accordingly denied. Therefore, the only issue in this case is whether or not claimant's refusal of an offer of employment as an assembler on May 18, 1945 was justified. This claimant has a substantial history as an industrial worker. Starting as a simple assembler in 1941, she progressed to more complicated work and was receiving \$1.09 per hour when she was laid off in April 1945. Claimant had acquired a degree of skill which was of value in the labor market and the employment service recognized this in classifying her in a semi-skilled code. As pointed out, large numbers of workers were engaged at similar skills during the period in question and at rates of pay comparable to claimant's last rate.

The employment offered claimant was one requiring no previous experience and even considering the automatic raises represented a substantial reduction in rate. We are of the opinion that the offer failed to take into account claimant's previously acquired skills and was not one for which she was reasonably fitted by training and experience. The disqualification was properly overruled.

Claimant D.J.

This claimant, too, by virtue of the length and nature of her experience in industrial work, had acquired a degree of skill which had recognized value in the labor market. She had been rated by her last employer as a complicated assembler and had advanced to the highest wage rate in her bracket, receiving \$1.15 per hour. The employment service classified her for employment purposes as a semi-skilled sub-assembler. Many other workers of similar skills receiving comparable rates of pay were employed in the area during the period in question. The employment offered was as a trainee assembler in a substantially lower occupational grade than the classification given her by the United States Employment Service. The offer failed to give due consideration to claimant's previously acquired skills. Moreover, the job paid a beginner's rate, approximately one-half of her previous earning. We are not impressed with the testimony relating to the "incentive bonus plan" of this employer or the allegation that claimant would eventually earn a rate of pay comparable to her former earnings. We are convinced from the record that the rate of pay in the prospective employment was substantially less favorable to claimant than that prevailing for similar work in the locality for which she was reasonably fitted. We hold that the disqualification of this claimant was properly overruled.

Decision: The initial determinations made by the local office disqualifying claimants E.A.B., T.P.O. and D.J. from benefits on the ground that they refused, without good cause, to accept offers of employment for which they were reasonably fitted by training and experience are hereby overruled. The initial determinations disqualifying claimants L.I.W. and J.G.P. on the same grounds are affirmed. Separate orders are to be entered in each case. The decisions of the referee in the cases of E.A.B., T.P.O. and D.J. are affirmed. The decisions of the referee in cases of L.I.W. and J.G.P. are reversed. (1/20/46)

A-750-721

Index No. 1310-4

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE
April 29, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
STRIKE, LOCKOUT OR OTHER
INDUSTRIAL CONTROVERSY
Definition of Industrial Controversy

Appeal Board Case No. 12,521-45

STRIKE CAUSED BY FAILURE OF EMPLOYER TO COMPLY WITH WAR LABOR BOARD
DIRECTIVE

Where employees, all members of a union local, left their employment in concert after a strike vote because the employer failed to comply with a War Labor Board directive, held the loss of employment was due to an industrial controversy resulting in a strike in the establishment. Referee's decision that the War Labor Board directive terminated an industrial controversy was reversed as applying too narrow a meaning to the term whereas the Legislature obviously intended to give it a broad concept with the effect of requiring the State to stand aside for a stated period of time in the case of a breach in the employer-employee relationship.

Referee's Decision: The initial determinations that claimants' loss of employment resulted from an industrial controversy is overruled. (11/7/45)

Appealed By: Industrial Commissioner

Findings of Fact: The facts in this case are not disputed and they are properly set down by the referee as follows:

"All of the claimants herein had been employed by L. Furniture Company at Beacon, New York, as upholsterers, operators, sprayers or in some other capacity. Each claimant was a member of the United Furniture Workers of America, Local 78, CIO. Prior to 1944, the employees in that establishment voted in an election held in accordance with the statute in such case made and provided, to designate the aforesaid union as the bargaining agent for the employees in the establishment. Notwithstanding the outcome of such election the employer refused to enter into a collective bargaining agreement with the union. Complaint was made to the National War Labor Board and after proceedings were had before that Board in accordance with federal law, a directive order was issued on June 16, 1944, specifying the terms and conditions of employment which shall govern the relations between the employer and the employees in that establishment. The employer nevertheless failed and refused to comply with the directive order. Among other things the order required the employer to grant an increase in wages, to provide certain annual paid holidays and vacation, to provide additional compensation for overtime, to afford union security, and to dispose of grievances of arbitration procedure and to (provide for) review, but the employer admittedly refrained from obeying its mandate intending to await further action for its enforcement.

"The employees continued in the employ after the order had been made despite non-compliance therewith and the union failed to order any further action taken against the employer because of the union's desire to refrain from ordering a strike during the war. On August 8, 1945 without any prior notice to the employer and without any attempt to further negotiate with the employer or to induce compliance with the directive order of June 16, 1944, the membership of the union determined to declare a strike and to suspend employment in the employer's establishment. Accordingly, on August 8, 1945, stoppage of work occurred in the employer's establishment when each of the claimants herein walked out because of the declaration of the strike. Each of the claimants, except claimant E.M., had been regularly employed up to the declaration of the strike and it is conceded that work was available for each of the claimants and that their employment would not have been interrupted except for the

strike. E.M. was still in the employ of the employers, but was not in the establishment just prior to the declaration of the strike because he was ill.

"Immediately after the commencement of the strike as aforesaid, each claimant filed a claim for benefits. An initial determination was issued in each case that the accumulation of benefit rights by the claimant was suspended during a period of seven consecutive weeks beginning with August 9, 1945, for the reason that each of such claimants was deemed to have lost his employment because of an industrial controversy. Objection was made to such determinations and hearings were requested."

Appeal Board Opinion: Section 592.1 of the Labor Law, under which the initial determinations of the local office were issued, reads as follows:

"Industrial controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated."

The referee ruled that, in order to determine whether or not there was a strike within the meaning of the above section, it is necessary to establish first the existence of an industrial controversy or labor dispute. He concluded that the labor dispute in this case had terminated when the War Labor Board issued its directive order on June 16, 1944; that consequently there was no strike when claimants left their work, and on that ground he overruled the initial determinations of the local office. We cannot accept the referee's reasoning in this case. In the first place, it seems clear to us that the Legislature, in using the words "other industrial controversy" in Section 592.1, intended to broaden the field in which this provision of the statute was to operate rather than to narrow the meaning of strike or lockout as set forth in that section. This view is more in keeping with the spirit of the statute, it being the intention of the State to stand aside for a stated period in the case of a breach of the employer-employee relationship. In the instant case, as found by the referee, we have concerted act on the part of a large group of employees in calling a strike and walking out in protest against the failure of the employer to comply with the War Labor Board directive. The employees might have chosen some other remedy or aired their grievance in a different manner, but the fact remains that they elected to strike. In holding that the industrial controversy had ceased with the order of the governmental agency settling the issues under dispute, the referee relies on court cases dealing with injunction proceedings against striking and picketing workers. These cases turned on the general equity powers of the court to restrain unlawful or coercive acts and are not determinative of the issue of whether or not a strike existed under the statute now being considered. It is undisputed that, as a result of a strike vote taken by the claimants' union, the claimants herein went on strike on August 8, 1945. It seems to us that such action clearly constitutes an industrial controversy within the meaning of Section 592.1. We accordingly held that claimants lost their employment as a result of a strike in the establishment in which they were employed and that their benefit rights were properly suspended by the local office pursuant to Section 592.1 of the Labor Law.

Decision: The initial determinations of the local office suspending claimants' benefit rights on the ground that they lost their employment as the result of a strike in the employer's establishment within the meaning of Section 592.1 of the Labor Law (formerly Section 504.2 and Section 504-a) is sustained. The decision of the referee is reversed. (12/29/45)

A-750-722B

Index No. 735A.2
785.4

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICE OFFICE
May 20, 1946

INTERPRETATION SERVICE
BENEFIT CLAIMS DETERMINATION OF BENEFITS
AVAILABILITY AND CAPABILITY
Employment Opportunities
Transportation Facilities
No Removal of Residence

Appeal Board Case No. 12,489-45

AVAILABILITY; EMPLOYMENT OPPORTUNITIES -TRANSPORTATION FACILITIES, NO
REMOVAL OF RESIDENCE

Where claimant moved to a small isolated community and for only four months commuted to distant employment under a share the-ride plan, subsequent layoff and inability to obtain any transportation to any possible place of employment rendered her unavailable.

Note: This case is distinguishable from those cases in which claimants earned their wage credits while residing in isolated areas and were making honest efforts to solve their transportation problem. (See Appeal Board No.9431-43; Serial No. A-750-473; Index No. 722B-3)

Referee's Decision: The initial determination of the local office which disqualified claimant from benefits because she was unavailable for employment is overruled. (11/1/45)

Appeal By: Industrial Commissioner

Findings of Fact: Claimant is married and has no children. From 1937 to sometime in 1942 she and her husband maintained a home and resided in Copenhagen, a small community located sixteen miles from Watertown. In 1942 claimant's husband was inducted into military service and claimant worked for a short period near the army camp at which he was stationed. In February 1943 she commenced working as an inspector in a war plant in Utica. In March 1943 her husband was discharged from the army. In July 1943 he obtained employment at the same war plant and both claimant and her husband worked there until December 23, 1944, when they were laid off. During this period they gave up their rented home in Copenhagen and took a furnished apartment in Utica. Claimant and her husband thereafter obtained employment in Watertown. From January 4, 1945 to August 17, 1945, when she was again laid off, claimant worked as an inspector in a factory at the rate of ninety-one cents per hour. In May 1945 claimant and her husband purchased a home in Copenhagen and moved there. From May to August 1945 she traveled to her work in Watertown daily by sharing a ride with a co-worker. Claimant filed an application for benefits on August 21, 1945. On August 23, 1945 she was referred to a job as clerk in Watertown. Claimant refused to accept this referral because it was not her line of work. As a result of an interview at the local office relative to claimant's refusal, it was discovered that she could not accept any employment in Watertown due to inadequate transportation facilities. The local office issued an initial determination holding that claimant was unavailable for employment effective August 27, 1945. The person with whom

claimant previously shared rides to Watertown was no longer available to claimant. The only transportation facilities at claimant's disposal was a bus, which left Copenhagen at 10:05 A.M. and arrived in Watertown between 10:30 a.m. and 10:45 a.m. Claimant stated that she is ready, willing and able to work in any nearby locality to which transportation is available from her home. It does not appear that there were opportunities for employment in any nearby locality accessible to claimant. In a letter to the Board dated November 29, 1945 claimant states that for more than a month prior to that date she had been living apart from her husband that she must have some means of earning a livelihood and that if a job could be found for her she would close her house and go wherever necessary in order to work.

Appeal Board Opinion: The referee held that claimant, was ready and willing to work and that the lack of transportation from claimant's residence to nearby localities offering employment should not render her unavailable for employment. We are unable to agree with the conclusion reached by the referee. The factual situation herein is clearly distinguishable from the ones involved in Appeal Board 10, 672-4 and 10,673-44. In those cases we held that the claimants were available for employment despite the temporary lack of transportation from their residences to a nearby locality with opportunities for, work. There, the claimants had earned their wage credits for several years in Perry, New York while residing in Nunda, where there were no employment opportunities, and they had made an honest effort to solve their transportation problem. In the instant case, claimant had not resided in Copenhagen for several years prior to her return in May 1945. She has never earned any wage credits there or in nearby communities. Her only record of work while a resident of Copenhagen is the comparatively short period during which she commuted to Watertown. This arrangement was no longer available to her as of the time of the determination. There was no public transportation facilities at her disposal to any possible place of employment. So long as this situation obtained there remained no prospect of claimant becoming employed while she resided in Copenhagen. It appears from claimant's statement on appeal that her status may have changed sometime in October 1945 because of her expressed willingness to leave Copenhagen at such time in order to accept employment in other localities. In view of this change of circumstances, this matter should be referred back to the local office for further investigation and for the issuance of an appropriate initial determination.

Decision: The initial determination that claimant was unavailable for employment, effective August 27, 1945, is sustained. This case is referred back to the local office for further investigation and for the issuance of another initial determination in accordance with the alleged new facts. The decision of the referee is reversed. (3/11/46)

A-750-724

Index No. 760A.4

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICE OFFICE
May 20, 1946

INTERPRETATION SERVICE-BENEFIT CLAIMS
DETERMINATION OF BENEFITS
AVAILABILITY AND CAPABILITY
Training Courses and Students
General

AVAILABILITY – ENROLLMENT IN AN INTENSIVE COURSE LEADING TO A DEGREE IN MEDICINE

Claimant who voluntarily left full-time satisfactory employment to enroll in an intensive course leading to a degree in medicine, was held unavailable for employment since his statement that he would work full-time while doing so was incredible; neither was credence given to claimant's contention that he would immediately abandon his chosen career if he obtained a "good job offer."

Referee's Decision: The initial determination of the local office which disqualified claimant from benefits on the ground that he was unavailable for employment is sustained. (12/17/45)

Appeal by: Claimant

Findings of Fact: Claimant filed an application for employment and for unemployment insurance benefits on October 4, 1945. At a conference at the local office on October 22, 1945 claimant signed a statement that he voluntarily left a job in New York City to enroll as a student at the medical school of the University of Buffalo under the Servicemen's Readjustment Act of 1944. As a result of said conference, and on October 24, 1945, the local office issued an initial determination holding claimant unavailable for employment as of October 4, 1945. The basis for the determination was that claimant, after leaving his employment in New York City, enrolled as a candidate for a degree requiring an intensive course of study at the University of Buffalo. Claimant protested and requested a hearing. Claimant is married and has one child. He completed his pre-medical course in 1942 by attending evening sessions at a college in New York City. While pursuing his studies claimant worked as an ambulance aid on alternate twenty-four hour shifts. He was inducted in military service December 28, 1942, was placed with a medical unit, and was discharged September 4, 1943. Claimant subsequently worked at several full-time jobs of short duration until April 1944, when he became employed on the editorial staff of a publishing company in New York City and earned \$52.50 a week. Claimant left his employment in September 1945 to enroll for an accelerated three-year course in the medical school of the University of Buffalo under the Servicemen's Readjustment Act. His hours of attendance were from 9:00 a.m. to 12:00 noon Monday to Saturday and, in addition, 1:00 p.m. to 3:00 p.m. on Mondays and Tuesdays. The tuition fee for the course is \$500 a year, which is paid by the Federal government. Claimant had applied to the government for the payment of a subsistence allowance for himself and his family under the Act. Before going to Buffalo he had applied for admission to several medical schools in New York City but was not accepted. Claimant expressed a willingness to accept any type of full-time employment which did not conflict with his hours of attendance in the medical school. He further stated that he was willing to abandon his studies entirely in the event he obtain "a good job offer." Claimant contends that it is necessary for him to work because the subsistence allowance would be insufficient to support his family.

Appeal Board Opinion: The issue to be decided is whether or not claimant was available for employment. Claimant voluntarily left a satisfactory position in New York City to enroll in a long and intensive course of study, leading to a degree in medicine. He has completed his pre-medical training, and has directed all of his efforts during the last number of years to the attainment of a degree in medicine. Under these circumstances we cannot give credence to claimant's contention that he would immediately abandon his chosen career if he obtained a "good job offer." His statement that he would work full-time appears equally incredible. In view of the nature of his studies, it is extremely doubtful that claimant could accept full-time

employment and at the same time pursue the course he has undertaken, despite his assertions to the contrary. We agree with the referee that claimant cannot be considered available for employment within the meaning of the Unemployment Insurance Law.

Decision: The initial determination of the local office that claimant was unavailable for employment is sustained. The decision of the referee is affirmed. (3/11/46)

A-750-725A

Index No. 1215A-7

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

May 20, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF EMPLOYMENT
Personal Reasons

Appeal Board Case No. 11,307-44

REFUSAL OF EMPLOYMENT – REFUSAL TO FILL OUT EMPLOYMENT APPLICATION

Where claimant after accepting referral refused to execute a Civil Service application, which was a prerequisite to employment, it was held that claimant refused an offer of employment without good cause.

Referee's Decision: The local office determination that claimant, without good cause, refused to accept an offer of employment is overruled. (9/15/44)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant, forty-three years of age, is a mechanical engineer. In 1924 he received a Bachelor of Science degree in Mechanical Engineering from Cooper Union. He has had extensive experience in the marine and building and construction fields. He was last employed from sometime in 1943 to January 15, 1944 by the Materials Division of the United States Navy as an expeditor and searcher at a salary of \$3600 plus time and a half for overtime. His earnings averaged about \$4200 per annum. He voluntarily left this employment in January 1944 because "I could not work any more at ten percent of my efficiency." On May 17, 1944, claimant filed an original claim for benefits. Because claimant did not have earnings in covered employment during the base year 1942, he was declared ineligible for benefits for the benefit year 1943-44 and his claim was post dated to June 5, 1944, the first day of the new benefit year. Claimant contended that the period between May 17 and June 5, 1944 should be credited as a waiting period in lieu of the two-week waiting period required in the new benefit year. The local office overruled claimant's contention and its action was sustained by a referee and by this Board (see Appeal Board, 11,095-44). Claimant reported regularly after June 5, 1944 for twenty-two weeks, thus exhausting his potential benefit rights for the benefit year 1944-45. In order to facilitate the hiring of personnel, the United States Army Port of Embarkation in New York City stationed a warrant officer of the United States Army at the offices of the United States Service to act as the hiring representative of the Port of Embarkation. It was the practice of the United States Employment Service to refer prospective applicants to said employer's representative with respect to jobs offered by the employer. On June 28, 1944, the Professional and technical Section of the United States Employment Service

had a job order from the United States Army Port of Embarkation for a construction engineer. When claimant reported at the United States Employment Service on the latter day the Professional and Technical Section offered him said position of construction engineer. Claimant was informed that the salary offered was \$3200 per year plus time and a half for overtime and that the job called for a forty-eight hour work week. The earnings, including overtime, would average about \$3850 per annum. Claimant was given an appropriate referral card and was requested to report to said representative of the Port of Embarkation stationed at a different section of the United States Employment service office in the same building. Claimant reported at the latter section. He was given an application blank known as Standard Form No. 57 issued by the United States Civil Service Commission, and was instructed to fill out said form. He was told that upon submission of the completed form he would be interviewed by the warrant officer, the employer's representative, with respect to the position in question. The position offered, being for a United States agency, was under the jurisdiction of the United States Civil Service Commission. In order to be accepted for the position, the approval of both the employer and of the United States Civil Service Commission was required. No oral interview was granted to an applicant unless he first filled out and submitted said application form. The application form in question had been prepared by the United States Civil Service Commission and was the usual form which said commission required all applicants to fill out prior to interviewing or considering applicants for employment. Claimant refused to fill out said application form. He contended that on previous occasions when he had applied for other positions under the jurisdiction of the United States Civil Service Commission he had prepared and filed similar application forms with said commission. He stated that two such forms containing a complete statement of his prior training and experience were then on file with the commission, one in its main office in Washington, D.C. and the other in its main New York City office. Claimant felt that he should not be required to again fill out Form No. 57. He claimed that the preparation of said form was a long and tedious task. Claimant had no objection to the type of work offered, to the prospective employer, to the salary, to the hours or to the job's location. His sole reason for refusing the employment offered was because he did not want to fill out another Form No. 57. Claimant felt that the prospective employer's representative should have granted him an oral interview before requiring him to fill out the application form. Claimant returned to the Professional and Technical Section of the United States Employment Service and informed its representative of his contentions. On July 6, 1944 the local office received from the Employment service a "Report on Disqualifying Conditions" setting forth the facts with respect to claimant's referral. On July 7, 1944, after interviewing the claimant, the local office made an initial determination disqualifying the claimant "from 6/28/44 until 7/6/44 because you failed to report for interview for work by not completing the application form for work as requested by the U.S.E.S. You did not register and report properly as directed by the regulations of the Industrial Commissioner." Claimant objected thereto and requested a hearing. At the hearing before the referee, the local office amended its initial determination by withdrawing the original determination and superseding it with a disqualification of claimant's benefit rights as of June 2, 1944 on the ground that claimant refused, without good cause, to accept an offer of employment. The effect of this determination was to charge claimant with an overpayment in the sum of \$90, representing five benefit checks, each in the sum of \$18, previously received by him. Claimant had no objection to proceeding before the referee, on the merits, with respect to the amended initial determination. Since January 15, 1944 and up to the date of the hearing held before the Board on February 23, 1945 claimant has been continuously unemployed.

Appeal Board Opinion: The issue presented herein is whether or not claimant refused, without good cause, to accept an offer of employment for which he was reasonably fitted by training and experience. The sole ground for claimant's refusal of the employment was that he did not

desire to fill out the application form designated as Form No. 57 of the United States Civil Service Commission. In his decision, the referee reasoned:

"An employer always has it within his power to determine the manner in which he will interview and hire prospective applicants for employment. Where such regulation is reasonable, there can be no quarrel with it. A refusal to abide by such reasonable regulation may be construed to be tantamount to refusal to accept suitable employment."

With this reasoning we are in complete accord. However, the referee continued with "Here, there is doubt about the reasonableness of the requirement." With the latter and with the balance of the referee's reasoning, we do not agree. In our view, there is no doubt about the reasonableness of the requirement of a United States agency, engaged in the most vital type of war work, to require an applicant for a responsible position to fill out a particular application form, previously prepared by the United States Civil Service Commission. The two application forms, designated as Form No. 57, previously prepared by the claimant and filed by him in the Washington, D.C. and in the New York City offices, respectively, of the United States Civil Service Commission, were for positions different from and having no relationship to the position offered to him on June 28, 1944. Furthermore, in the placement of workers in war jobs, time is an important factor. If the prospective employers were compelled to requisition application forms previously submitted by applicants and on file in the offices of the United States Civil Service Commission in Washington, D.C. or in New York City, a great deal of valuable time would necessarily be expended. Undoubtedly, one of the reasons for using the present method of having a separate application for submitted for each position is to expedite the placement of workers in war work. The procedure adopted by the prospective employer with respect to the hiring of its personnel was neither arbitrary nor capricious. The procedure was not confined to the instant claimant. There is no evidence of any undue hardship inflicted upon or of any discriminatory action taken against the claimant. He was treated in the same manner as all other applicants for the positions were handled. Claimant's refusal to fill out the application form was tantamount to a refusal of employment. The job offered to him was one for which he is reasonably fitted by training and experience. No valid reason existed for him to refuse the offer of employment. We hold that claimant's stated reasons do not constitute good cause for refusal of employment. We hold that claimant's stated reasons do not constitute good cause for refusal of employment within the meaning of Section 593.2 (formerly Section 506.1) of the Labor Law. At the hearing before the Board, claimant requested the Board to issue subpoenas to compel the attendance, at a subsequent Board hearing of the Regional Director of the United States Civil Service Commission, of five other staff members of said commission, of the warrant officer acting as representative of the United States Army Port of Embarkation and of a staff member of the United States Employment service. In the exercise of its discretion, the Board denied the claimant's application. The Board is convinced that none of the requested witnesses could offer any testimony which would be helpful to a proper determination of the issue involved herein. The facts, pertinent to the issue herein, are not in dispute and are continued in the present record. The testimony which said witnesses could adduce would be merely cumulative and would serve no useful purpose.

Decision: The amended initial determination made by the local office disqualifying the claimant from receiving any benefits as of June 28, 1944 on the ground that he refused, without good cause, to accept an offer of employment is hereby sustained. The decision of the referee is reversed. (3/26/45)

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

May 20, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT

Hours – Night Work

Appeal Board Case No. 12,595-45

VOLUNTARY LEAVING – DESIRE NOT TO CONTINUE WORKING SATURDAY NIGHTS AS
SALESPERSON IN RETAIL STORE

Desire not to continue working Saturday nights in accordance with custom as a salesperson in a retail store, was not good cause for voluntary leaving employment.

Referee's Findings of Fact: Hearings were held herein at which claimant, her witness, her former employer, his accountant, and representatives of the Industrial Commissioner appeared. Testimony was taken. Claimant, a salesperson, filed a claim for benefits on January 30, 1945. The local office disqualified her for forty-two days for voluntary leaving her last employment without good cause. For four years prior to January 20, 1945 claimant was employed by a retail children's wear shop in Mount Vernon as a salesperson. She was accustomed to work on Saturdays until 10:00 p.m. Claimant gave her last employer notice prior to Christmas 1944 that after the Christmas season she would no longer work on Saturdays after 6:30 p.m. In the early part of January 1945, claimant on her own volition left the shop at 6:30 p.m. on each Saturday. The employer remonstrated with her explaining that Saturday night was his busiest time in the store and that claimant as an experienced salesperson was required to work at that time. Claimant then announced that unless she had Saturday nights off she would leave. The employer was extremely shorthanded and requested claimant to remain for at least two weeks so that he might make efforts to replace her. Although claimant agreed to this arrangement, she never returned after Saturday, January 20. At the time claimant left, she had no other prospect of employment.

Referee's Opinion and Decision: The credible evidence establishes that claimant left her last employment voluntarily and without good cause. For approximately four years she was accustomed to working Saturday nights. It is understandable that a retail children's wear shop would be busiest at that time. Claimant acted arbitrarily and unreasonably in refusing to work during those hours. The initial determination is sustained. (12/7/45)

Appealed By: Claimant

Appealed Board Opinion: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issues involved in this case.

Decision: The decision of the referee is affirmed. (3/11/46)

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

June 17, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF EMPLOYMENT

Hours – Personal Inconvenience

Appeal Board Case No. 12,848-46

REFUSAL – HOURS – PERSONAL INCONVENIENCE

Refusal of employment solely because the hours were 9:15 a.m. to 6:00 p.m. was without good cause as the work day was not much in excess of the work day in prior employment, 8:45 a.m. to 5:30 p.m., and afforded substantially the same opportunities to perform household duties.

Referee's Findings of Fact: A hearing was held at which claimant and representatives of the Industrial Commissioner and of the United States Employment Service appeared and testified. Claimant, a stenographer, filed for benefits on November 26, 1945. She was disqualified for refusal of employment by initial determination effective December 12, 1945. Claimant has worked as a stenographer and secretary since 1935. Her most recent employment, prior to filing for benefits, was as secretary to an architect from May 3, 1944 to November 21, 1945. In this employment, she worked from 8:45 a.m. to 5:30 p.m. five days a week, at a salary of \$42 per week. Claimant lives with her parents. Her father is employed and generally arrives home at about 4:30 p.m. Claimant did the shopping and prepared the meals for the household after she returned home from work. Claimant's husband was discharged from the United States Army on December 7, 1945, and both live with her parents, claimant continuing her household duties. On December 12, 1945, the Employment Service offered her a job as a stenographer at \$35 a week, the hours of work being 9:15 a.m. to 6 p.m. five days a week. The usual salary paid to stenographers is \$35 for a 40-hour week, generally five and a half days a week. Some jobs require working until 5 p.m. five days a week, but orders for such jobs are not prevalent at the Employment Service. Claimant was interviewed by the prospective employer and accepted his offer to hire her. She thereafter discussed the job with her husband. He suggested that she refuse the employment since he expected to start work shortly and his work day would end by 5 p.m. Claimant therefore refused the employment. Claimant's husband started to work about January 1st, and his working day varies from 8 a.m. to 4 or 5 p.m. He accordingly arrives home some time between 4:30 p.m. and 6 p.m.

Referee's Opinion and Decision: Claimant did not have good cause to refuse the employment offered on December 12, 1945. The work day, lasting until 6 p.m. was not much in excess of the work day in her prior employment and afforded her substantially the same opportunities to perform her household duties as existed during her prior employment. The initial determination is accordingly sustained.

Appealed By: Claimant

Appeal Board Opinion: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case.

Decision: The decision of the referee is affirmed.

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE
JUNE 17, 1946

INTERPRETATION SERVICE - BENEFIT CLAIMS
STRIKE, LOCKOUT OR OTHER INDUSTRIAL CONTROVERSY
Termination of

Appeal Board Case Number 12,851-46

LABOR DISPUTE -TERMINATION, QUESTION OF

Cessation of strike by union agreement and resumption of operation by some employers operating under contractual provision with a union did not cancel disqualification of a claimant unemployed because of strike when his employer did not agree and would not sign a new contract and work stoppage and all elements of the controversy continued notwithstanding withdrawal of pickets from employer's establishment.

Referee's Findings of Fact: A hearing was held at which the claimants and representatives of their union, of their employers, of the employers' association, and of the Industrial Commissioner appeared and testified. These cases were heard together with that of a veteran-claimant in case VU513-5020-45R, RA-U-25-46. The claimants are members of Local 2, United Association of Plumbers, A.F.L. This local has jurisdiction over plumbers who are its members and who are employed by licensed plumbers in the Boroughs of Manhattan and the Bronx. The local has approximately 350 members. The claimants all worked for employers who are members of the Association of Contracting Plumbers of the City of New York, Inc., hereafter referred to as the association. Of this association there are approximately 125 member firms, which, as of November 8, 1945, had in their employ about 600 men belonging to Local 2. The association has been chartered by the New York State Master Plumbers Association, referred to hereafter as the State Association. The association had an agreement with Local 2 under which it employed the various members of said local and under the terms of which they worked. This agreement expired December 31, 1944. Prior to its expiration and about September 1944, there were preliminary negotiations to form a new agreement. These negotiations did not come to fruition before the contract expired. Negotiations were resumed in March 1945, and were held intermittently during that calendar year. Meanwhile the State Association attempted to create a larger citywide association to embrace other groups and independent master plumbers not yet associated with it. While this new association was in process of formation, those who were not members of the association sat in with it during its negotiations for a new contract with the union. In October negotiations again broke off. At about the same time the employers who were not members of the association decided not to associate themselves with members of the association, but instead formed a group of their own which consisted of approximately 109 to 150 employing entities according to varied estimates. This new group called itself the New York City Association of Master Plumbers, Inc., and obtained a charter from the State Association. Later the name was changed to the Metropolitan Association of Master Plumbers, referred to thereafter as the new association. The association took court action to enjoin the new group from exercising its charter or doing business as an association. It failed in this attempt. On October 27, the union notified the members of the association that it would be necessary for them to sign the agreement which had been prepared by the union on or before Thursday, November 8, 1945, and that all members of the local, both journeymen and helpers, would be removed from their employ or that of any employing plumber who was not under agreement by

that date. None of the members of the association signed the agreement, as a result of which any members of Local 2 who were working for those employers on November 8, 1945, were ordered by the union not to report to them for work on November 9. The union began picketing the establishments of these employers on November 13. On November 20, members of the new association, signed agreements with the union as did numerous independent master plumbers, so that allegedly on that day, Local 2 had in its possession agreement with from 400 to 500 licensed plumbers in the two boroughs in which it had jurisdiction. Pickets were withdrawn from the establishments that had been picketed, including those of claimants, and allegedly, so far as the union was concerned, any controversy or any dispute regarding terms of employment had ended. Many of the unemployed plumbers went to work. The union representative stated that whereas 1800 to 1900 men had registered with the union for strike benefits only about 300 remained unemployed after the agreements were signed on November 20. It was conceded that these men could have had work with the members of the association, had they not been forbidden to do such work by the union. Subsequently, negotiations with the association were resumed. As of January 3, 1946, a good portion of the matters in conflict had been agreed upon. Claimants Conrad and Feldman became unemployed on November 9. Claimant Krost did not become unemployed until November 13 (he was apparently permitted to work through oversight). Claims were filed by claimant Feldman on December 4, by claimant Conrad on December 3, and by claimant Krost on November 28. The benefit rights of each of the claimants were suspended for seven weeks beginning the day after his loss of employment because of industrial controversy in the establishments which they were employed. It is contended, however, that the claimants, when they filed for benefits, were no longer unemployed as a result of the industrial controversy since an agreement had been signed on November 20 with a large portion of the employing entities in two borough of the city, and that if they were unemployed thereafter, it was because there was no work available for them in these employing entities. The claimants' representative urged that the discontinuance of picketing on November 21 was ample evidence of the cessation of any controversy. A special plea was made as regards claimant Krost, who stated that while he was not permitted by his union to work for his former employer within the confines of the city, he could have performed work for the employer in which the employer was then engaged on Long Island. The employer testified he could not employ the claimant on the Long Island job because a different local had jurisdiction there and which would not tolerate the claimant's employment.

Referee's Opinion and Decision: That the claimants lost their employment because of an industrial controversy in the establishments in which they were employed is conceded. There remains only to be considered the contention of the claimants that the industrial controversy ceased when a substantial group of the licensed plumbers in the area within which the union had jurisdiction signed an agreement with the union, following which pickets were withdrawn. I cannot accede to this contention. Industrial controversies may be terminated in many ways, by direct settlement, by the abandonment of the employer of his business (Referees Cases 520-50-39R, 530-16-39R, not appealed), by termination of the employer-employee relationship, (Unemployment Compensation Interpretation Series, Indiana 40-A198, Vol. 3, No. 10, p. 97) or "if the employer is able to achieve normal production, even if the methods of doing so are slightly abnormal, it is generally held that the stoppage no longer exists. the fact that the dispute is still being carried on is immaterial." (Social Security Year Book, 1940, pp. 65,66). This latter proposition can hold here only if we deem all the employers one entity, merely because of their association together. This is obviously not so; therefore, the controversy cannot be deemed to have terminated when piecemeal settlements were made with some employers but not with those in whose establishments the claimants were employed. It is precisely with regard to these establishments that the controversy continued. A strike has been defined as:

"The act of quitting work . . . Such an act done by mutual understanding by a body of workmen as a means of forcing compliance with demands made on their employer; a stopping of work by workmen in order to obtain or resist a change in conditions of employment. (Panzieri-Hogan Co. Inc. v. Bender, 205 App. Div. 398,401, aff'd 237 N.Y. 553)"

By the very definition cited, the industrial controversy herein continued for the purpose of obtaining "... a change in conditions of employment." The claimants were forbidden by their union to return to the establishments where they were formerly employed, although the employers had work for them and were both able and eager to hire them. Nor did the controversy terminate with the withdrawal of the pickets. It is elementary that an industrial controversy may exist without the establishment of a picket line (Appeal Board, 6, 128-41). So may a dispute continue in active progress although after a time nothing transpires between the disputants? (Unemployment Compensation Interpretation Series, Vol. 1 No. 3 p. 352) The Appeal Board passed upon a similar situation in Case 157-38, and there held:

"Claimant bases this appeal on his contention that such extended waiting period ceased to apply after he had left the picket line and abandoned the idea of returning to work for this employer.

"We do not agree with claimant's contention. The statute is specific to the effect that where an employee has lost his employment because of a strike, the ten week waiting period shall apply. Under the plain wording of the law, as long as the claimant remains continuously unemployed, he must be deemed to have lost his employment because of the strike."

In Referee Case 537-20-40R (not appealed), it was there held that even when picketing ceased after it was enjoined by the courts, the industrial controversy still continued. There are situations where industrial controversies have been held to terminate with the withdrawal of pickets, but in such instances, the withdrawal of the pickets was accompanied by a permanent cessation of all operations or a resumption of normal operations in the plants (Unemployment Compensation Interpretation Series, Vol. 1, No. 3; Case, Oregon-331 p. 342; California, Case R-675-2749 (a)-40, idem Vol. 4, No. 2 p. 45). In both cases cited, the cessation of picketing was accompanied by other acts which in themselves would have signified the end of the industrial controversy. Here we have no such circumstances. My conclusion, therefore, is that the industrial controversy did not end on November 20, with the signing of agreements with some employers, nor on November 21, when the pickets were withdrawn. The controversy continued by virtue of the facts cited. The special circumstances relied upon by claimant Krost to indicate that as to him the industrial controversy terminated are not valid. He could not be employed outside the metropolitan area because his union had no jurisdiction there. Within the metropolitan area his employer could give him no employment because of the existence of the labor dispute. The initial determinations are therefore sustained.

Appeal By: Claimant

Appeal Board Opinion: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case.

Decision: The decision of the referee is affirmed. (4/15/46)

NEW YORK STATE DEPARTMENT OF LABOR
 UNEMPLOYMENT INSURANCE DIVISION
 ADJUDICATION SERVICES OFFICE

June 17, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
 VOLUNTARY LEAVING OF EMPLOYMENT

Wages – Increase Refused

Appeal Board Case No. 12,762-46

VOLUNTARY LEAVING – FAILURE TO RECEIVE INCREASE AS DID OTHER WORKERS
 SUCH INCREASE BEING BASED ON SENIORITY

Failure to receive increase in pay, as did other employees doing same grade of work, such increase being based on seniority, was not good cause for voluntary leaving of employment, when claimant did not have necessary seniority.

Referee's Findings of Fact: A hearing was had at which the claimant and a representative of the Industrial Commissioner appeared and testimony was taken. Claimant, a packer of medical supplies, filed a claim for benefits effective November 20, 1945. She was disqualified for forty-two days commencing November 20, 1945 for voluntary leaving of employment. Claimant last worked as a packer of medical supplies. She voluntary left her employment. She was receiving sixty cents per hour. Other girls who worked with her received an additional five cents per hour. Her rate of pay was not increased. She worked from August 21, 1945 to November 9, 1945 when she quit of her own accord because she felt she had a grievance against the employer for raising the pay of other persons and not raising hers. It appeared that the employees who were receiving increases at the time were employees who were employed for a longer period than claimant and that claimant did not request an increase at the time when she left the employment. Claimant had no prospect of another job at the time of leaving her employment.

Referee's Opinion and Decision: The fact that other employees doing the same grade of work as claimant had their pay increased by reason of seniority and claimant did not, is not a sufficient justification for claimant leaving her employment. Claimant left her employment voluntarily without good cause. The initial determination is sustained. (1/30/46)

Appealed By: Claimant

Appeal Board Opinion: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case.

Decision: The decision of the referee is affirmed. (3/11/46)

NEW YORK STATE DEPARTMENT OF LABOR
 UNEMPLOYMENT INSURANCE DIVISION
 ADJUDICATION SERVICES OFFICE

July 2, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT
Distance from Employment

Appeal Board Case No. 13,033-46

VOLUNTARY LEAVING; DISTANCE – ONE AND ONE-HALF HOURS TRAVELLING TIME.

Moving to a locality which would take claimant one and one-half hours to travel to her place of employment, an increase of one-half hour over previous traveling time, was not good cause for voluntary leaving of employment.

Referee's Findings of Fact: A hearing was held at which the claimant and a representative of the Industrial Commissioner appeared and testified. Claimant a comptometrist, filed for benefits on February 19, 1946. Effective the same day, by initial determination, claimant was disqualified from receiving benefits for 42 days for voluntary leaving of employment. Claimant worked for six years as a comptometrist until January 31, 1946, at 745 5th Avenue, New York City. She left the employment because the traveling from her home was excessive. Claimant was married on October 29, 1945. Her husband is a dentist. Prior to that she lived at 1557 76th Street, Brooklyn, New York, and it took her about an hour to travel to her place of employment. After her marriage, and about the beginning of December 1945, she moved to 8895 15th Avenue, Brooklyn. Traveling from this residence required her to take a bus to the subway station. It took claimant between an hour and a quarter to an hour and a half at most, to travel from her present address to her place of employment. Claimant is still unemployed. Her health is good.

Referee's Opinion and Decision: Although the total traveling time from claimant's present residence to her place of employment is more than formerly, the total traveling time is about an hour and a half, at most. This is not an unreasonable traveling time under the circumstances. I therefore find that claimant's reason for leaving her position is not with good cause within the meaning of the Unemployment Insurance Law. The initial determination is sustained.

Appealed By: Claimant

Appeal Board Opinion: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case.

Decision: The decision of the referee is affirmed. (5/15/46)

A-750-741

Index 775.5

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE
JULY 1946

INTERPRETATION SERVICE - BENEFIT CLAIMS
AVAILABILITY AND CAPABILITY
Evidence of - Self Employment

AVAILABILITY - ATTORNEY PRACTICING PROFESSION DURING SPARE TIME

An attorney, following his pattern of the previous eight years of devoting his spare time to his law practice in an effort to supplement his income from full-time employment, as evinced by his active search for full-time employment and immediate acceptance of the first job offered, was

held available for employment, though he rented space in a law office for the practice of his profession.

A.B. 12,844-46

Referee's Decision: The initial determination of the local office which suspended claimant's benefit rights as of December 1, 1945 on the ground that he was not totally unemployed or available for employment is sustained. (2/14/46)

Appealed By: Claimant.

Findings of Fact: Claimant is an attorney. He last practiced his profession independently in 1937. Since he worked three years for the government and for four and one-half years for an aircraft manufacturer in Buffalo. He maintained space in a law office only until 1939. Thereafter, he took care of such law business as he was able to obtain in the evenings. Upon the termination of his employment in the war plant, claimant filed application for employment and unemployment insurance benefits on September 18, 1945. During November 1945 he contacted an attorney with whom he had once been associated and arranged for the rental of a room in the suite occupied by that attorney. The rent was \$30 per month. He purchased furniture in the amount of about \$150. Claimant had business cards printed and sent out several hundred announcements. Late in November his name was placed on the office door and the building register. He has no lease and can discontinue this office at any time. Claimant had no secretary or stenographer. He arranged to have a notation of telephone calls made. During the month of December he spent an hour or two a day at the office. He had no clients and earned no fees. He was at all times actively seeking full-time employment. He reported regularly as instructed to the local office and the employment service. Late in December 1945 he was offered employment as a claims examiner with the State of New York. He accepted the offer and has been working in that capacity since January 4, 1946. On December 7, 1945 the local office issued an initial determination suspending claimant's right to benefits effective October 23, 1945 on the ground that he was not totally unemployed. Claimant protested and requested a hearing. At the hearing before the referee the determination was amended so as to be made effective December, 1, 1945.

Appeal Board Opinion: The referee ruled that claimant was unavailable for employment effective December 1, 1945, stating that his establishment of an office and the expenditure in connection therewith indicated an intention to change from his previous practice of doing his legal business in the evening hours. Claimant, on the other hand, contends that his prime intention at all times was to find remunerative full-time employment and that his purpose in having space in a law office was to be able to supplement his earnings by possible legal fees earned in the evening hours. We believe that claimant's entire course of conduct has been consistent with his contention that he was at all times available for work during the usual daytime hours. It is apparent that he intended to follow his pattern of the previous eight years and devote only his spare time to his law office in an effort to supplement his income. His immediate acceptance of the first job offer made to him is further persuasive evidence in support of his contention. Under all the circumstances herein it must be held that claimant was totally unemployed and available for employment during his reporting period.

Decision: The initial determination holding claimant ineligible for benefits on the ground that he was not totally unemployed or available for employment is hereby overruled. The decision of the referee is reversed. (5/20/46)

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

July 16, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
STRIKE, LOCKOUT OR OTHER
INDUSTRIAL CONTROVERSY
Definition of

Appeal Board Case No. 12,867-46

STRIKE; IN THE ESTABLISHMENT, QUESTION OF

Where claimant, an inspector employed by W. but stationed in C's plant in which a strike occurred, lost his employment when the plant shut down, held that loss of employment was not as a result of an industrial controversy in the establishment in which he was employed within the meaning of the Law.

Referee's Decision: The initial determination of the insurance office that claimant lost his employment as a result of an industrial controversy in the establishment in which he was employed is sustained. (2/18/46)

Appealed By: Claimant

Findings of Fact: Claimant worked prior to December 17, 1945 as an inspector in the forging department of a plant operated by the firm, M.T.C., located in Norwich, New York. However, claimant was actually in the employ of the L.W. Company, which had an office in New York City. The die sinkers in the employ of M.T.C. worked in the same establishment with claimant. About December 10, 1945 the die sinkers went out on strike. Claimant continued to work in the plant for a week after the strike was called. Since it was impossible to continue operations without the die sinkers, M.T.C. closed its entire plant on December 17, 1945, with the result that claimant became unemployed. Claimant filed an application for benefits on December 18, 1945. When he filed his claim, claimant erroneously listed the firm of M.T.C. as his employer. The local office issued an initial determination that claimant lost his employment as a result of an industrial controversy. Claimant protested the determination and requested a hearing.

Appeal Board Opinion: The question to be decided is whether claimant lost his employment because of a strike or industrial controversy within the meaning of the Unemployment Insurance Law. Section 592.1 of the Unemployment Insurance Law reads as follows:

"Industrial Controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated."

Claimant was an employee of the employer, L.W. Company, which was in nowise involved in the industrial controversy in the establishment of M.T.C., another employer. It is true that the cause of claimant's separation was that there was no more work for him in the plant at which he

was stationed due to the strike. However, it cannot be said that his loss of employment was the result of an industrial controversy in the establishment in which he was employed within the meaning of the Law (Appeal Board, 274-38).

Decision: Claimant did not lose his employment as a result of an industrial controversy in the establishment in which he was employed. The initial determination of the local office is overruled. The decision of the referee is reversed. (5/20/46)

A-750-745

Index No. 1320D-3

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

July 16, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
STRIKE, LOCKOUT OR OTHER
INDUSTRIAL CONTROVERSY
Unemployment Due To

Appeal Board Case No. 12,850-46

NON-STRIKING CLAIMANT LAID OFF TO AVOID POSSIBLE HOSTILITIES BY CROSSING
PICKET LINE

Claimant, not involved or participating in a strike of other employees in the establishment, laid off by employer to avoid any hostilities which might have resulted by crossing picket line, held unable to work "because of strike" and therefore subject to statutory strike suspension.

Referee's Decision: The initial determination of the local office that claimant lost his employment as a result of an industrial controversy is sustained. (2/5/46)

Appealed By: Claimant

Findings of Fact: Claimant filed an application for benefits on November 20, 1945 following his separation from employment. The employer reported to the local office that claimant was "laid off on account of work not being available, due to the strike of the employees in other departments." On December 3, 1945 the local office issued an initial determination disqualifying claimant because he lost his employment as a result of an industrial controversy. Claimant protested and requested a hearing. Claimant worked as a pattern maker for a valve manufacturer. On November 19, 1945 the representative of the Foundry Laborers' Union held a meeting with the employer to settle its demands for higher wages for the laborers working in the establishment. On the same day negotiations were broken off by the parties because they could not adjust their differences, with the result that a strike was called on November 20, 1945. Picket lines were formed around the plant during the strike. The pattern makers did not become involved in any controversy with the employer nor did they participate in the strike. There was work available for claimant and the other pattern makers when they reported at the pattern shop of the employer's plant the morning of November 20, 1945. This group of employees worked until the afternoon of the same day, when they were laid off by the employer with instructions not to return until the strike was settled. Work was still available for the pattern makers when they left the plant. The employer's reason for laying off the pattern makers was to avoid any hostilities which might result if they crossed a picket line formed by another union.

Appeal Board Opinion: Claimant contended that he should not be subjected to the disqualification imposed by the local office because the pattern workers were not involved in an industrial controversy with the employer nor did they have any reason to participate in the strike. Section 592.1 of the Unemployment Insurance Law reads as follows:

"Industrial Controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike; lockout, or other industrial controversy was terminated."

The language used in the statute is clear and unambiguous. Under this statute it is immaterial whether claimant was an actual striker or whether he was unable to work "because of a strike." Claimant was deprived of his employment because of the strike in the establishment in which he was employed and consequently not eligible for benefits until after the lapse of the seven-week waiting period.

Decision: The initial determination of the local office that claimant lost his employment as a result of an industrial controversy is sustained. The decision of the referee is affirmed. (5/15/46)

A-750-746

Index 755 C.2

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

JULY 30, 1946

INTERPRETATION SERVICE - BENEFIT CLAIMS
AVAILABILITY AND CAPABILITY
Restrictions of Employment
Days - Hours

AVAILABILITY - RESTRICTION TO FIVE DAY EMPLOYMENT NOT OBTAINABLE WITHIN
SPECIFICATIONS

Where the evidence indicated a complete dearth of 5-day jobs within claimant's specifications, which did not include Saturday as a working day, restriction of employment, because of domestic circumstances, to work weeks which did not include Saturdays rendered claimant totally unavailable for employment and not entitled to any effective days.

With the removal of the restriction against Saturday employment, even though claimant was still willing to work only five days per week, she was held to be available and entitled to four effective days in each statutory week as there were then reasonable prospects for employment.

Where claimant has valid reasons for restricting herself to a 5-day week and there is a reasonable prospect of obtaining employment, such claimant is entitled to the full credit of four effective days in each statutory week of total unemployment.

A.B. 12,175-45

Referee's Decision: The initial determination of the local office holding that claimant was unavailable for employment is overruled. (7/10/45)

Appealed By: Industrial Commissioner.

Findings of Fact: Claimant was last employed as a stacker in a wholesale bakery from October 1942 to April 29, 1944, working from 7:00 a.m. to 4:30 p.m., six days a week. Prior thereto, she worked for several months in a war plant on a six day a week basis. Before her marriage she worked in a laundry six days a week. She left her last employment because of pregnancy and gave birth to a child in October 1944. Claimant first filed a claim for employment and unemployment insurance benefits on March 13, 1945. On March 26, 1945 she informed the interviewer at the local office that she could accept employment only on a five-day week basis, because she was unable, at that time, to make arrangements for the care of her child on Saturdays. An initial determination was thereupon issued holding claimant ineligible for benefits on the ground that she was unavailable for employment. When interviewed on March 26, claimant signed a statement to the effect that the reason she could accept employment only for a five-day week was because a schoolgirl, with whom she had made arrangements, could care for her child on only five days a week. The statement continued, "I will be unable to work Saturday or Sunday." On April 23, 1945 claimant was again interviewed at the local office. At that time she gave the following information, "I have another woman now who would care for my 7 mo. old baby while I work, but she will only do this 5 days a week. I am ready to work 5 days a week in a factory." At this time claimant was not questioned by the interviewer as to which five days in the week she would be able to work, nor was it explained to her that her ability to work on Saturdays was of significance. For the first time, at the last hearing before the Board, it was explained to the claimant that her willingness and ability to work on Saturdays had a bearing on her availability for employment under the circumstances of this case. She then testified, and we find as a fact, that the second person with whom she had made arrangements to care for her child, was willing to do so any five days, including Saturday, and that it was a matter of indifference to claimant as to which five days of the week she herself worked. Throughout the period in question, the claimant expressed her willingness to engage in any employment for which she was fitted, factory or other work, with the single exception of laundry work. Her previous work experience in a laundry had adversely affected her health. It is not contended herein, nor is there any evidence to indicate, that claimant's limitation to a five-day week was arbitrary, capricious or made in bad faith. The only competent evidence is to the effect that claimant's specification of a five-day workweek was necessitated by valid domestic circumstances, to wit, the care of her infant. With respect to five day per week employment in the Buffalo area, it was adduced at the last Board hearing that in the retail bakery line and other retail sales establishments, five-day workers were employed only on the condition that they were willing to work on Saturdays. It appears that laundries were working on a five-day basis, but claimant was unwilling to consider employment in that industry. During the period in question the Buffalo area was considered a critical labor area by the War Manpower Commission and a six-day, forty-eight hour week was in effect in all essential industries. The employment interviewer testified that such five-day work was available during that period and which was within claimant's specifications required Saturday work, and that there was no prospect of employment for claimant on the basis of a five-day week which excluded Saturday as a day of employment.

Appeal Board Opinion and Decision : Throughout these proceedings the position taken by the Industrial Commissioner's representative has been curiously inconsistent. The original initial determination made by the local office on March 29, 1945 held claimant to be unavailable for employment, and not entitled to any benefits, because of her restriction to a five-day workweek. That was the sole issue presented to the referee for decision and the referee decided the case

in favor of the claimant. On the basis of the evidence before him the referee correctly decided as follows:

"Claimant was at all times able and willing to work. The fact that she established a limitation of five days on her workweek because of her domestic circumstances is not sufficient to warrant the holding of unavailability since it appears that there were reasonable prospects of claimant securing employment on a five-day week basis and which would have met her particular circumstances."

The Industrial Commissioner thereupon appealed to this Board, urging an additional ground for claimant's disqualification as follows: "It is our contention that a claimant who restricts herself to 5-day week employment should be credited with only 3 effective days in each statutory week." After the Board hearing, and prior to the decision, the Industrial Commissioner again shifted his position as follows:

"***The Industrial Commissioner now wishes to revise his position as follows: The initial determination that claimant was unavailable because she would only work five days per week is withdrawn. The initial determination that claimant could accumulate but three effective days per week because she was unavailable on one day per week remains the sole issue in the case."

Thereupon, on December 10, 1945, the Board rendered its decision and decided this issue in favor of the claimant. On January 15, 1946 the Industrial Commissioner made application to the Board for a reopening of its decision and again shifted position as follows:

"Request is hereby made for reopening the above mentioned case for the purpose of presenting additional and new evidence as to the availability of claimant. The question involved does not pertain to the number of effective days to which a person who will accept only five days per week work is entitled to accumulate but rather the complete availability of the instant claimant."

At the Board hearing on this application (February 28, 1946), the Industrial Commissioner urged for the first time that the claimant's unwillingness to include Saturday as one of her five working days rendered her totally unavailable for employment. This was the first time that claimant was informed that her willingness to include Saturday as one of her five working days was in issue. On this score, we are satisfied that on and after April 23, 1945 the claimant, having made arrangements with another woman to care for her child and having so informed the local office, was able and willing to make arrangements to include Saturday as a working day. If the local office was unaware of this fact, such unawareness is attributable primarily to its failure to properly interview claimant. With the removal of the restriction against Saturday employment, the evidence herein convinces us that there were reasonable prospects of obtaining such employment. We accordingly believe that on and after April 23, 1945 claimant was available for employment within the meaning of the Law. Evidence of the complete dearth of any five-day jobs which did not include Saturday as a working day, was offered belatedly. Although such evidence is not entirely free from contradiction, it is the only competent evidence on the point, and we are constrained to hold that prior to April 23, 1945 claimant's restrictions to a work week which did not include Saturdays rendered her unavailable within the meaning of the Law. Although it would appear that on this present application the Industrial Commissioner has abandoned his earlier contention that the claimant could accumulate but three effective days per week, that is not entirely clear, and we hereby incorporate herein our earlier opinion and decision on that point, dated December 10, 1945, as if the same were fully set forth herein.

Decision: The application of the Industrial Commissioner requesting a reopening and reconsideration of the decision of John E. McGarry, a member of this Board, dated December 10, 1945, is granted. The above decision of John E. McGarry is modified as follows: Claimant was unavailable for employment from March 13, 1945 to April 23, 1945. She was available for employment from April 23, 1945 throughout the remainder of her reporting period. The local office determination is modified accordingly. The decision of the referee is modified in like manner. (4/8/46)

A-750-747

Index No. 840-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

July 30, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
CLAIMS, REGISTRATION, REPORTING &
CERTIFICATION

Holidays

Appeal Board Case No. 13,063-46

PREDATING – INABILITY TO FILE ON DAY PRECEDING LEGAL HOLIDAY BECAUSE
OFFICE CLOSED BY SPECIAL PROCLAMATION ISSUED BY GOVERNOR

Where claimant, being unemployed on December 24, 1946, on that day attempted to file an application with the local office but found it closed by virtue of a proclamation issued by the governor declaring the 24th to be a holiday for state employees (though not a legal holiday), hold that claimant's request to predate his application filed on December 26th to December 24th should be granted.

Referee's Decision: The initial determination of the local office which denied claimant's request to predate his application to December 24, 1945 is sustained. (4/4/46)

Appealed By: Claimant

Findings of Fact: Claimant, a carpenter, worked for a contractor on December 20, 1945. He reported for work on December 21, 1945 and was told to go home because it was too cold and there was no work for him. He was then told to report for work on Monday (December 24) if it was warmer and if it was not, there was a possibility that he would be assigned to inside work. Claimant reported to work on Monday, December 24, 1945 and was told it was too cold and there was no inside work. After failing to obtain work claimant went directly to the local office and discovered that it was closed on that day, December 24, under a proclamation issued by the Governor. Claimant filed an application for benefits on December 26, 1945, at which time he requested that it be predated to December 24, 1945. His request was based on the fact that the local office was closed on Monday by virtue of the proclamation issued by the Governor and on Tuesday, which was Christmas. The local office issued an initial determination denying claimant's request on the ground that he was not employed on December 21 or 22, and could have filed his claim on either of those days.

Appeal Board Opinion: Claimant's request to have his application predated to December 24, 1945 should be granted. The local office was closed on December 24, 1945 by virtue of a

proclamation issued by the Governor declaring this day to be a holiday for all State employees. This was not a legal holiday. The Board's decision upon which the referee relied involved the interpretation of the Industrial Commissioner's Regulation former UI 17-41, effective May 24, 1943 (Now Regulation 40e). This has no application to the instant case because December 24, 1945 was not a legal holiday. Claimant exercised due diligence in the pursuit of his benefit rights and should not be penalized because of the inaccessibility of the local office on a special holiday of which he had no knowledge.

Decision: Claimant's request to predate his application to December 24, 1945 is granted. The initial determination of the local office is overruled. The decision of the referee is reversed. (5/28/46)

A-750-753

Index No. 1210B-2

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

August 23, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF EMPLOYMENT
Offer, What Constitutes

Appeal Board Case 13,017-46

REFUSAL – FAILURE TO RETURN SEVERAL DAYS LATER UPON EMPLOYER'S REQUEST
CONCERNING POSSIBLE EMPLOYMENT

Claimant, who accepted referral and reported to an employer but was not hired as no opening existed, and at that time was requested by the employer to return several days later to ascertain whether there would then be any work, which he failed to do, did not refuse employment, as an offer, projected in the future and uncertain in character cannot be made the basis for disqualification.

Referee's Decision: The initial determination of the local office disqualifying claimant from receiving benefits for refusing employment without good cause, and charging him with an overpayment is sustained. (3/27/46)

Appealed By: Claimant

Findings of Fact: Claimant is a qualified outside machinist. On January 10, 1946 he refiled for unemployment insurance benefits and registered for employment. On February 6 and 7, 1946, the United States Employment Service received job orders for a number of outside machinists from a large shipyard in the Borough of Brooklyn. This shipyard is engaged chiefly in repair work. Its demand for labor fluctuates daily as to quantity and also with respect to the various categories of worker. On February 8, 1946, the employment service referred claimant to the shipyard for employment as an outside machinist. The hours, wage rate and other working conditions were satisfactory to claimant. He mentioned that the mode of travel from his residence to the place of employment was somewhat inconvenient. He did not seriously urge that as an objection to the prospective employment. He applied at the shipyard the same day. He was interviewed by a supervisor who inquired whether claimant could operate a lathe. Upon being informed that claimant was an outside machinist and could not operate a lathe, the

supervisor replied that outside machinists were not being hired that day. The day being Friday, claimant was advised to return the following Monday morning to ascertain whether there would be any work for outside machinists. This the claimant failed to do. The local office thereupon issued an initial determination disqualifying claimant from receiving benefits effective February 8, 1945, upon the ground that he refused employment without good cause. Claimant then requested a hearing. The referee sustained the initial determination of the local office and claimant appealed.

Appeal Board Opinion: The record herein indicates that no suitable job opening existed at the time the employment service referred claimant to the shipyard. At the hearing before the Board, the representative of the United States Employment Service testified that the prospective employer's needs fluctuated from day to day. Job orders for outside machinists had been received on successive days and had been filled prior to the time claimant was interviewed. It is significant that no order was received on the day claimant was referred to the employment. This would seem to indicate that the employer's need for outside machinists had been filled for that particular day. The employer indicated that he had an opening for a lathe operator, for which claimant was not qualified. The employment service referred claimant to the prospective employer on the basis of a job order which no longer could be considered current and valid. Although claimant was requested by the employer to return several days later, the employer gave no assurance that work for which claimant was qualified would be available. Such an offer, projected in the future and uncertain in character, cannot be made the basis for a disqualification (Appeal Board, 11,590-45). At most, if claimant had returned as requested, he would have been compelled to wait on call without a reasonable certainty of employment. We are convinced that claimant was ready and willing to work. We believe that upon all of the facts and circumstances herein, the claimant did not refuse suitable employment, without good cause.

Decision: Claimant did not refuse employment, without good cause. Claimant did not receive an overpayment. The initial determination made by the local office, disqualifying claimant from receiving benefits and charging him with an overpayment, is overruled. The decision of the referee is reversed. (June 4, 1946)

A-750-757

Index No. 1310-7

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

October 21, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
STRIKE, LOCKOUT, OR OTHER INDUSTRIAL
CONTROVERSY

Industrial Controversy
Unemployment Due to

Appeal Board Case No. 13,306-46 and 13,307-46

UNEMPLOYMENT DUE TO INDUSTRIAL CONTROVERSY, QUESTION OF; LAY-OFF
BECAUSE OF ALLEGED SLOW DOWN AFFECTING PRODUCTION

Where a group of employees were laid off because of an alleged slow down affecting production it was held that their loss of employment was due to an industrial controversy since,

whether the workers deliberately engaged in a concerted slow down in order to bring pressure on the employer to agree to a satisfactory new contract or the lay-off was an arbitrary action of the employer, it was clear, in either case, that loss of employment was a direct result of a breakdown in negotiations between claimants' union and the employer.

Referee's Decision: The initial determination of the local office that claimants lost their employment because of a strike, lockout or other industrial controversy is sustained. (5/14/46)

Appealed By: Claimants

Findings of Fact: These cases involve forty-three claimants, all of whom worked for the same employer. Upon their making applications for benefits, initial determinations were issued in each case suspending the claimants' benefits for seven weeks on the ground that they lost their employment as the result of an industrial controversy, effective April 10, 1946. The employer is a manufacturer of breakfast foods. It had a contract with Local 115 of the Food, Tobacco, Agriculture and Allied Workers of America, CIO, which expired on February 3, 1946. Thereafter, the contract was being renegotiated. The union committee and the employer's representatives had held meetings but no agreement had been reached. Several major issues such as hourly rates of pay, maintenance of union membership, reopening of wage negotiations during the life of the contract, and no strike or lockout clause, were pending. Other minor issues were also in dispute. The employer offered an additional fifteen cents per hour increase. At the time of the incidents in question the union and the employer had not met for some time and no counter proposal had been made by the union. On April 8, 1946 the foreman of the packing department informed the plant manager that a "slow down" was in operation in his department in that the muffet packers had slowed down the process of placing the biscuits in packages. It is alleged that one of the packers had informed the foreman that an agreement to that effect had been reached at a workers' meeting on the previous day. The materials to be packed are carried to the packers on a continuously moving belt and production is geared to the speed of the belt. When the packing operations was not carried on at the normal rate the usual amount of material is not packaged and the excess results in a considerable waste of wheat. The plant manager contacted the bargaining committee of the union on that day and pointed out to him that a serious loss of wheat was resulting from the alleged slow down. He demanded that the workers be instructed to continue normal operations and warned that the company would otherwise be forced to cease operations. On the afternoon of April 9 the plant manager, finding that production had been substantially reduced and believing the slow down to be still in effect, called together the workers on the first shift and instructed them that there would be no further work until affairs with the union were settled. The second shift workers were similarly notified of the company's decision upon their reporting for work. The plant manager estimated that operations in the plant had been reduced one-third due to the alleged show down. Twenty employees were advised to report for work on April 10 in order to continue maintenance and other non-productive operations in the plant. All of the other workers, including claimants, were notified not to report for work. The union advised the employer that the twenty employees requested would not be allowed to work. Picket lines were then established and a strike of the non-productive employees declared. The operations of the plant may be affected by lack of electric power or by a shortage of packers. Normal losses in the plant due to imperfect biscuits and other usual causes average between 4.5% and 5% per month. The employer's production figures show that due to the increased losses on April 8 and 9, the average loss for the month of April was 6.8%. The union contended that many factors enter into the question of losses and that it was due to the absence of five employees on April 9 that an unusual quantity of unpacked material resulted.

Appeal Board Opinion: The issue in these cases is whether or not claimants lost their employment because of a strike, lockout, or other industrial controversy in the establishment in which they were employed within the meaning of Section 592.1 of the Unemployment Insurance Law. We agree with the referee's conclusion that the claimants' loss of employment was due to an industrial controversy which existed at the employer's establishment. When the layoff occurred the parties had been re-negotiating an employment contract for some time. A number of differences had arisen relative to the terms and conditions of employment to be embodied in the new agreement, but negotiations had broken down, at least temporarily. Whether the workers deliberately engaged in a concerted slow down of production in order to bring pressure on the employer to agree to a satisfactory contract, as contended by the employer, or the layoff was an arbitrary act of the employer, as the union implies, it is clear that in either case claimants' loss of employment was a direct result of the breakdown in negotiations between the parties. This we believe constitutes an industrial controversy within the meaning of Section 592.1 of the Labor Law.

Decision: The initial determinations suspending claimants' benefit rights for seven weeks on the ground that they lost their employment because of a strike, lockout or other industrial controversy in the employer's establishment are hereby sustained. The decisions of the referee are affirmed. Separate orders are to be entered in each case. (8/27/46)

A-750-761

Index No. 1735D-1
1740B-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

December 30, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT

Reduction of Wages

Appeal Board Case No. 13,471-46

VOLUNTARY LEAVING OF EMPLOYMENT – REDUCTION OF WAGES – CHANGE IN ORIGINAL TERMS AND CONDITIONS OF EMPLOYMENT

Where the employer altered the original terms and conditions of employment whereby certain disbursements by claimant, a salesman-collector, were no longer allowed, which represented a 5% reduction in his already meager remuneration, voluntary leaving of employment was with good cause.

Referee's Decision: The initial determination of the local office which disqualifies claimant from receiving benefits for a period of forty-two consecutive days upon the ground that he voluntarily left his employment without good cause is sustained. (7/9/46)

Appealed By: Claimant

Findings of Fact: Claimant is sixty years of age. For approximately six years to April 1946, he was employed as a salesman-collector by a magazine service. Claimant's duties were to collect installments due on magazine subscriptions and to solicit new subscriptions. Claimant's compensation consisted of a stipulated commission on all monies collected by him. His

earnings averaged \$28 to \$29 per week. The claimant's assigned territory extended from 23rd Street to 125th Street and from the East River to the Hudson River in the borough of Manhattan, New York. The employer's place of business was located in Brooklyn. Claimant resided in the northern region of the Bronx. It had been customary for the claimant to report at the employer's office not more than once a week. At times he reported as infrequently as once in two or three weeks. Claimant rendered daily written reports by mail concerning collections made by him. At the same time he remitted the proceeds of such collections. These remittances represented the net amounts due the employer after deduction of commissions earned by the claimant and certain expenses and disbursements which claimant was allowed. These allowances consisted of necessary telephone calls, postage and the cost of money order fees or of checks drawn against a special checking account which claimant maintained for this specific purpose. These disbursements amounted to approximately \$1.25 to \$1.50 per week. Early in April 1946, in connection with one of such daily remittances and the report accompanying it, claimant deducted a total of fifty-eight cents for disbursements. He thereupon received a letter from the employer's branch manager informing him that in the future he would not be allowed reimbursement for such expenses. Following the receipt of such letter, claimant called at the employer's place of business and discussed the situation with said branch manager. As a result of such discussion it was mutually agreed that a claimant's employment was to terminate on April 16, 1946. He had no prospects of other employment at the time. Under the new terms imposed by the employer, claimant was given the alternative of personally bearing the expenses in connection with the rendition of the required reports and remittances, or of reporting at the office of the employer several times each week and making such reports and remittances in person. Claimant's work for the day was usually completed between 3 p.m. and 4 p.m. Thereafter he would proceed to his home where he spent approximately one hour in the preparation of his reports. Pursuant to the new arrangement proposed by the employer; claimant would be compelled to report to the employer's office and there prepare his reports if he chose this alternative. This would have entailed additional carfare for which claimant would not have been reimbursed. It also would have resulted in claimant's arriving at his home several hours later than his customary time. Claimant filed a claim for benefits on April 17, 1946. Based upon information received from the employer, the local office issued an initial determination disqualifying claimant from receiving benefits for forty-two consecutive days, effective April 17, 1946, upon the ground that he voluntarily left his employment without good cause. Claimant requested a hearing. The referee sustained the initial determination of the local office and the claimant appealed.

Appeal Board Decision: We do not agree with the conclusion of the referee that the claimant acted hastily and arbitrarily in assuming that his right to deduct disbursements had been terminated. Such assumption was confirmed by the flow of events. When claimant received the letter from his employer informing him that the terms of his employment had been altered, he called upon the employer's branch manager for the purpose of seeking an adjustment. The employer's attitude was unyielding. This led to the termination of claimant's employment. A course of conduct had been established for a period of six years. This was in accordance with the original terms of hire. Without any previous negotiations, the employer altered the terms and conditions of employment. This alteration amounted to a five percent reduction in claimant's earnings. In view of claimant's already meager remuneration, this reduction represented a substantial cut in his income. The alternative offered claimant, that of reporting in person several times a week at his own expense, was not less objectionable. Under the circumstances herein, we conclude that claimant left his employment with good cause.

Decision: The claimant voluntarily left his employment with good cause. The initial determination of the local office is overruled. The decision of the referee is reversed. (10/21/46)

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

December 30, 1946

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF EMPLOYMENT

Hours – Personal Inconvenience

Appeal Board Case No. 13,519-46

REFUSAL – EVENING HOURS – NO UNDUE HARDSHIP

Where teachers in private schools, with few exceptions, are expected to work both day and evening hours, a refusal of such employment requiring teaching two evenings per week was without good cause, since the hours of employment were prevailing in the locality for the type of work offered and the employment would not impose upon claimant any undue hardship, mere inconvenience being no ground for refusing employment which otherwise meets the tests of the statute.

Referee's Decision: The initial determinations of the local office: (1) disqualifying claimant on the ground that she was unavailable for employment and (2) holding that claimant, without good cause, refused employment for which she is reasonably fitted by training and experience, are overruled.

Appealed By: Industrial Commissioner

Findings of Fact: Claimant is a teacher of commercial subjects. From September 1939 to June 1944 she taught in a high school in the state of Pennsylvania. On or about September 1, 1944, claimant moved to this state and established her home in the City of New York. She immediately obtained employment in a private school as a teacher of stenography and typing. She was continuously so employed until November 29, 1945. Her hours of employment were from 10:00 a.m. to 4:00 p.m. daily for five days per week. Her remuneration was \$165 per month. From September 1944 to June 15, 1945, in addition to her work in day school, claimant also taught evenings in another private school. On June 26, 1945, claimant was married. Immediately following her marriage claimant discontinued her evening teaching because she intended to devote more time to her domestic responsibilities. On November 29, 1945, claimant's employment in the day school was terminated because of excessive absences. On December 11, 1945, claimant filed a claim for benefits and an application for employment. At the time of her registration she advised the United States Employment Service that she would not accept any employment that would involve evening hours. On January 12, 1946, the United States Employment Service offered claimant employment in a private school. She accepted the referral and was interviewed by the prospective employer. She was advised that she would be required to teach from 9:00 a.m. to 2:00 p.m. daily for five days and, in addition thereto, she would be expected to teach two evenings per week. Her total hours of work were not to exceed thirty-one per week. The remuneration offered was from \$160 to \$175 per month. Claimant rejected the offer of employment because of the evening work involved. The prospective employer thereupon offered the claimant twenty to twenty-five hours of day teaching at \$1.25 per hour. This claimant likewise refused because of insufficiency of remuneration. No disqualification was imposed by the local office for claimant's refusal at this time because of its

desire to afford claimant a reasonable opportunity to find employment which would meet her requirements. On April 17, 1946, having afforded claimant four months' time in which to find the employment she desired, the United States Employment service renewed the offer of employment which was made to her on January 12, 1946. Claimant again refused the offer because of her objection to evening hours. The local office thereupon made an initial determination disqualifying claimant on the ground that she was unavailable for employment. On May 7, 1946, the United States Employment Service offered claimant employment with a private school teaching during the daytime. Her hours of employment were to be from 9:15 a.m. to 1:00 p.m. for five days per week. The remuneration offered was \$25 per week. The local office then issued another initial determination holding that claimant's refusal of this employment was without good cause. Claimant contested both determinations and requested a hearing. The referee overruled the determinations and the Industrial Commissioner appealed. Claimant had no license to teach in the public schools of the City of New York. Her opportunities of employment were limited to private schools. While a few of these private schools had openings for day teaching only, these openings were the exception rather than the rule. In most private schools the teachers were expected to teach both day and evening hours.

Appeal Board Opinion: The offer of employment made to the claimant on April 17, 1946, both as to remuneration and hours of employment, was prevailing in the locality. Claimant's refusal of this offer was predicated entirely upon her desire to devote evenings to her domestic responsibilities. Claimant has no children. The record is barren of any proof, which would indicate that evening work would impose upon the claimant any undue hardship. Except for cases where such hardship is involved, claimants must be ready and willing to accept employment under conditions that normally prevail in the labor market (Appeal Board, 12,486-45). Mere inconvenience is no ground for refusing employment which otherwise meets the test of the statute. The proper disqualification upon the facts in this case is for refusal of employment rather than unavailability. This disposition makes the issue of claimant's refusal of employment on May 7, 1946 academic.

Decision: On April 17, 1946, claimant, without good cause, refused employment for which she is reasonably fitted by training and experience. The initial determination of the local office is modified accordingly. The decision of the referee is reversed. (10/14/46)

A-750-767

Index No. 1650B-3

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

January 15, 1947

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT
Wages – reduction of hours

Appeal Board Case No. 13,619-46

VOLUNTARY LEAVING; REDUCTION IN SALARY OCCASIONED BY SHORTER WORK WEEK NOT UNIFORMLY APPLIED TO ALL PERSONS EMPLOYED IN SAME CATEGORY
Claimant's leaving was with good cause where his monthly salary was reduced to correspond to a shorter work week, such reduction not being uniformly applied to all personnel in claimant's

category, as the employer in effect materially altered the terms and conditions of the contract of hire.

Referee's Decision: The initial determination of the insurance office which disqualified claimant for voluntary leaving of employment without good cause is overruled. (7/30/46)

Appeal By: Industrial Commissioner

Findings of Fact: Claimant filed a claim for benefits on May 2, 1946. The local office issued an initial determination disqualifying claimant on the ground that he voluntarily left his employment without good cause. He contested the determination and requested a hearing. Claimant was graduated from a university with the degree of Bachelor of Arts, having majored in geology. Prior to the war he worked for an advertising firm, earning a salary of \$60 a week. From 1941 to the latter part of 1944 he worked in a shipyard. With the exception of the last six months of his employment in the shipyard when he performed the duties of an instructor, he worked as a welder and shipfitter. His hourly rate of pay ranged from \$1.22 to \$1.30. Subsequently, and for a period of eight months, he worked as an inspector expeditor on a land-lease project, earning \$75 a week and expenses. This employment terminated with the cessation of hostilities in Europe. Claimant was employed from June 15, 1945 to March 19, 1946 as a junior engineer on post-war experimental work in the laboratory of a manufacturer of air products. He worked as a geologist on a research project as a member of a group of three, including a chemical engineer and civil engineer. He received a salary of \$300 a month and his work week consisted of forty-eight hours. On March 15, 1946, the employer's plant was placed on a forty-hour work week. At that time the employer reviewed the salaries of each employee in the plant on the basis of the quality and merit of his work and made adjustments accordingly. These salary adjustments fell in three categories. Some employees continued to receive the same rate of pay which prevailed prior to March 15, 1946. The salaries of other employees were adjusted at intermediate grades. The wages of another group were proportionately reduced to correspond with the shorter work week. An appraisal of the claimant's work was made by his immediate superior in consultation with the assistant superintendent of the laboratory directly responsible for the technical aspects of the investigation. The persons making the appraisal found that the quality of claimant's work was below the standards which were expected of an employee with his training, with the result that the employer reduced his monthly salary by \$50. The salaries of the two other employees who worked as a group with claimant on experiments, and other employees in the same job classification as claimant, were not reduced. Claimant expressed dissatisfaction with his salary reduction and offered to continue at the same rate which he received prior to March 15, 1946, but the employer refused to accept claimant's proposition. Claimant resigned as of March 19, 1946.

Appeal Board Opinion: The referee held that the reduction in claimant's salary justified his voluntary leaving. On this appeal the Commissioner contends that this is not a case of reduction in salary, but rather one where claimant's gross earning were reduced in proportion to the new work week. He argues further that the employer's refusal to increase claimant's wages by continuing him at his previous rate of pay did not provide claimant with good cause for leaving. We cannot agree with the position taken by the Commissioner. As the referee pointed out, the reduction of claimant's salary corresponding to the lesser hours of work was not uniformly applied to the personnel in claimant's category. In changing claimant's salary, while leaving the other employees' salaries undisturbed, the employer in effect altered the terms and conditions of the original contract of hire. A reasonable inference is that the employer, by making such a substantial change in claimant's monthly wage, in effect discharged him, or at least invited a resignation. Under all of the circumstances in the case, we believe that claimant left his employment with good cause within the meaning of the Law.

Decision: The initial determination disqualifying claimant for voluntary leaving of his employment without good cause is hereby overruled. The decision of the referee is affirmed. (11/25/46)

A-750-769

Index No. 1295-9

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

February 17, 1947

INTERPRETATION SERVICE – BENEFIT CLAIMS
REFUSAL OF EMPLOYMENT
Other reasons

Appeal Board Case No. 13,853-46

REFUSAL; INTENTION TO LEAVE JURISDICTION FOR VACATION – REFEREE'S
DECISION HOLDING UNAVAILABILITY MODIFIED TO PRIMARY ISSUE OF REFUSAL
WITHOUT GOOD CAUSE

Refusal of temporary employment in usual occupation during a slack period because of intention to leave the insurance office jurisdiction for a week's vacation was without good cause. The referee's decision was modified as he failed to pass on the primary issue of refusal but held that claimant was unavailable.

Referee's Decision: The initial determination of the local office holding that claimant was unavailable for employment is sustained (10/22/46). (The referee failed to rule on the issue of refusal).

Appealed By: Claimant

Findings of Fact: Claimant, a sewing machine operator, filed an original claim for benefits on June 29, 1946. On July 10, 1946, he was referred to temporary employment in his usual occupation in a unionized establishment. He refused the referral, stating that he intended to leave New York City on July 13, 1946 for a week's vacation. He visited the local office on July 13, at which time his request for permission to leave the city was denied. The local office issued an initial determination disqualifying claimant as of June 29, 1946 because he was unavailable for employment and also for refusal of employment, without good cause, effective July 10, 1946. Claimant left New York City on July 13, 1946, and returned to the jurisdiction on July 21, 1946. He refiled on July 22, 1946, and reported to July 29, 1946. He returned to his former employment on August 1, 1946.

Appeal Board Opinion: The referee ruled that claimant was unavailable for employment from July 10, 1946 to and including July 21, 1946. He did not pass on the initial determination disqualifying claimant for refusal of employment. We are unable to agree with the referee's disposition of the case. The primary issue before the referee was whether or not claimant's refusal of employment was with good cause. Claimant did not accept the offer of temporary employment on July 10, 1946 because he was leaving on a vacation on July 13, 1946. He was unwilling to work during the intervening period. No other reason appears for his refusal of the proffered job. We are unable to find that claimant had good cause for his refusal within the

meaning of the Law. In disqualifying claimant on the ground that he refused employment without good cause the local office made the proper determination. The referee's failure to rule on this issue was not warranted under the circumstances of this case.

Decision: The initial determination of the local office that claimant, without good cause, refused employment on July 10, 1946, is sustained. The decision of the referee is modified accordingly. (12/16/46)

A-750-771

Index No. 725.12

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

February 17, 1947

INTERPRETATION SERVICE-BENEFIT CLAIMS
AVAILABILITY AND CAPABILITY
Health

Appeal Board Case No. 13,159-46

AVAILABILITY AND CAPABILITY- WILLINGNESS AND ABILITY TO WORK DESPITE
DOCTOR'S RECOMMENDATIONS

Where claimant, a carpenter, suffered from pulmonary tuberculosis but desired light work of any kind and demonstrated his physical ability to work full time prior to and subsequent to filing for benefits, despite his physician's statement that he needed a complete rest for an indefinite period of time and suggestion that he work only three or four hours a day, (statements not quite consistent in themselves) it was concluded that he was available for and capable of employment.

Note: The doctor's statement was not an unequivocal assertion that work would be injurious to claimant's health and was nullified to some extent by the fact that the doctor himself employed the claimant after making the statement.

Referee's Decision: The initial determination of the local office which suspended claimant's benefit rights, effective December 3, 1945, on the ground that he was incapable of and unavailable for employment is sustained. (3/8/48)

Appeal by: Claimant.

Findings of Fact: Claimant is thirty-three years of age. He has over seven years experience as a carpenter and some other experience in mechanical work. In October, 1944, as a result of a medical examination, he was informed that he had pulmonary tuberculosis. Thereafter, he ran a bulldozer in a factory for a period of about four months, working from 7:00 a.m. to 5:30 p.m. daily. From April 28, 1945 to November 20, 1945 he worked as a carpenter for a construction firm. He was unable to stand the cold weather and the heavy work involved and after a short period of illness he did not return to the job. Claimant filed an application for employment and a claim for unemployment insurance benefits on December 3, 1945. He was questioned regarding his physical condition and submitted a statement from his doctor dated March 17, 1945 to the effect that claimant was suffering from active pulmonary tuberculosis and was to be transferred to a hospital for further care and treatment. Another statement was obtained by the local office on December 27, 1945 from claimant's doctor to the effect that claimant needed a

complete rest for an indefinite period of time. At an interview in the local office, claimant stated that his doctor had suggested that he work only three or four hours a day, but that he had "never worked those hours" and knew of no place that would hire him on that basis. He stated further, "I am not asking for a job that will give me those rest periods if it's a light job and outside. I could do a timekeeper's job or stock clerk or some job where there isn't any heavy lifting." An initial determination was thereupon issued disqualifying claimant from benefits, effective December 3, 1945, on the ground that he was unavailable for employment. Claimant requested a hearing, stating that he was able to work at light work of any kind. Claimant has at no time been in any hospital for treatment or care for his ailment. He continued to report regularly at the local office and at the employment service when directed until the latter part of April 1946. He last visited his doctor in the spring of this year. During his reporting period he performed various repair jobs at his doctor's residence and in his own home. In January 1946 he worked for two days repairing a room which had been burned out, for which he received the sum of \$30. He also sought to engage in business for himself as a carpenter but was unable to obtain materials. He kept himself advised as to the type of work being done by his former employer and when he learned that there was inside work available, he applied for work as a carpenter and was hired. He had been working regularly since April 29, 1946 on inside carpentry work for the same employer. His hours of work are from 8:00 a.m. to 4:30 p.m., five days a week and he earns \$56.20 per week. His work is performed in a place where he does not come into frequent contact with other persons. Claimant testified that he feels better when he is working and has not lost anytime from his work, with the exception of a few days when he had a cold.

Appeal Board Opinion: Claimant's disqualification was based upon the medical statements and the recommendations of his doctor concerning his ability to work at a full time job. It is to be noted that despite his doctor's statement of March 1945 that he should be hospitalized at that time, claimant has continued at his trade with the exception of the period of his reporting. Further, although it was suggested to him by his physician in December 1945 that he take rest periods during the day, claimant resumed full-time work at trade in April 1946 and is still so engaged. He has thus demonstrated his physical ability to work full time notwithstanding the statement submitted by his physician. This Board had opportunity to observe claimant and hear his testimony. He had stated that his physical condition has not materially changed since the date of his original claim and that he has felt no ill effects from the work which he performed since that date. We find no ground upon which we may reject his testimony. It might have been advisable that claimant follow his doctor's recommendations in the best interests of his health. However for reasons of his own he has not chosen to do so and apparently has not suffered any ill effects from adopting that course. Under the circumstances herein, we conclude that claimant was available for employment within the meaning of the Unemployment Insurance Law.

Decision: The initial determination disqualifying claimant from benefits for unavailability is hereby overruled. The decision of the referee is reversed. (11/4/46)

A-750-772

Index No. 1305A-3
1320B-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

February 27, 1947

INTERPRETATION SERVICE – BENEFIT CLAIMS
STRIKE, LOCKOUT OR OTHER
INDUSTRIAL CONTROVERSY

Unemployment due to;
Suspension period

Matter of Birkmeyer

272 App. Div. 855

Aff'g Appeal Board Case No. 13,748-46

NO DISTINCTION BETWEEN CLAIMANTS ON SICK LEAVE AT COMMENCEMENT OF
STRIKE AND THOSE BECOMING ILL THEREAFTER – SUSPENSION IN BOTH CASES
BEGINS ON DAY FOLLOWING STRIKE

Claimants, some of whom were on sick leave from their employment on the date stoppage of work occurred because of strike, and others who became ill at varying times during the strike suspension period, were deemed to have lost their employment on the date on which the strike began and were properly suspended for seven consecutive weeks beginning with the day following the day the strike began. It is immaterial whether an employee of a strike-bound establishment is available or capable of employment during the suspension period. Therefore, no distinction was made between those on sick leave when the strike commenced and those who became sick thereafter.

Referee's Decision; Appeals: These are appeals from the decisions of the referee, sustaining the initial determinations of the local office that the suspension period of seven consecutive weeks imposed against certain of the claimants following the strike in the employer's establishment was not affected by their subsequent sickness or unavailability; and overruling the initial determinations of the local office imposing the suspension period of seven consecutive weeks commencing with the day following the strike was called in the employer's establishment. The claimants and the Industrial Commissioner appeal on the ground that the initial determinations were proper. The employer appeals from that portion of the decisions which sustain the initial determinations affecting the employees who became sick after the strike was called.

Findings of Fact: These cases involve one hundred and four claimants, all of whom were employed in a plant manufacturing radiators in Lockport, New York. A strike was called in the plant on November 21, 1945 which continued to March 25, 1946. The claimants fall into two groups as follows:

GROUP I

This group of claimants was absent from their employment on sick leave on November 21, 1945, when the strike was called. Sick leave of absence is provided for in a contract between the employer corporation and the international union, of which the employees are members. Paragraph 106 of the contract provides:

"Any employee who is known to be ill, supported by satisfactory evidence, will be granted sick leave automatically for not to exceed ninety days. If the sickness continues beyond ninety days, sick leave shall be extended on the approval of the General Manager of the Division or his designated representative. Seniority of such employees shall accumulate during sick leave and shall be broken, figured

from the date the sick leave started, on the same basis as provided in Paragraph 64(c) for laid off employees breaking seniority."

Paragraph III provides:

"All of the above leaves of absence including sick leaves are granted subject to the following conditions:

"(a) Any employee on leave may return to work in line with his seniority before the expiration of his leave providing not less than seven (7) days notice is given to Management. The return within the seven-day period is at the option of Management. Any employee who fails to return to work in accordance with the notice as given shall be considered as having voluntarily quit unless he has a satisfactory reason.

"(b) Any employee who fails to report for work within three working days after the date of expiration of the leave, shall be considered as having voluntarily quit unless he has a satisfactory reason.

"(c) If upon the expiration of a leave of absence, there is no work available for the employee in line with his seniority, or if the employee would otherwise have been subject to layoff according to seniority during the period of the leave, the period which breaks seniority shall start from the date of expiration of the leave."

The company also sponsors payment of sick benefits through an insurance company. Some of the claimants absent on sick leave when the strike began were recipients of sick benefits from the company's sick benefit plan for periods prior to and after the beginning of the strike. As to all of the claimants in Group I, initial determinations were issued suspending the accumulation of their benefit rights for a period of seven consecutive weeks beginning with November 22, 1945, the day after the strike was called. As to those who filed their claims for benefits following the expiration of such seven-week period, it was determined that benefit rights accrued immediately upon such filings.

GROUP II

This group of claimants, although separated from their employment on November 21, 1945 due to the strike, became ill at varying periods within the succeeding six weeks. Those illnesses extended for varying lengths of time. As to this group of claimants, initial determinations were issued by the local office suspending the accumulation of their benefit rights for a period of seven consecutive weeks beginning November 22, 1945 and continuing to January 10, 1946. The employer contends that the seven-week period must be interrupted during the period of their unavailability or incapability for employment. On this issue the referee overruled the employer.

Appeal Board Opinion: Section 592.1 of the Unemployment Insurance Law provides as follows:

"The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit rights may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated."

Formerly this subject was governed by Section 504.2(b) of the Law, which read in part:

"2. An employee shall not be entitled to benefits except for unemployment which continues subsequent to a waiting period of ten weeks:

"(b) if he lost his employment because of a strike, lockout or other industrial controversy in the establishment in which he was employed; ..."

As the referee points out, this change in the statute was brought about largely because of administrative considerations. It was deemed advisable to eliminate the necessity of requiring the filing of applications and weekly certifications on the part of large numbers of workers involved in strikes. A new concept of "suspension period" was substituted for the former one of "waiting period," which was consistent with the State policy of "hands off" during at least the critical days of a strike. To implement this new concept, the Commissioner has established regulations dispensing with registrations and weekly certifications on the part of workers involved in strikes. All such workers have been publicly advised that they are not required to report to or file any application at a local office until the termination of the seven-week period beginning with the day after the strike.

The employer contends and the referee has held that with respect to employees who were on sick leave or otherwise unavailable or incapable of employment at the time the strike was called, the suspension period of seven weeks does not commence until the date on which such employee becomes available for and capable of employment. The Commissioner contends that this interpretation is contrary to that intended by the Legislature when it gave effect to the new concept of suspension of benefit rights during a strike. It is contended further that under the present provisions of Law it is immaterial whether an employee of a strike-bound establishment is available for or capable of employment during the seven-week period immediately following the calling of the strike, and that consequently any illness which occurs during such period does not affect in any manner said period. We believe the Commissioner's position is correct.

In our view the Legislature intended that all claimants involved in a strike or other industrial controversy should be treated alike during a single fixed period measured from the day following the strike or industrial controversy. The error in departing from this principle is, we think, illustrated in the referee's distinction between those on sick leave when the strike commenced and those who took sick immediately thereafter. Although both categories obviously merit the same treatment, opposite results were arrived at on an artificial basis.

If the strike suspension period in the Law were penal in nature, there would be justification for segregating the claimants on the basis of their employment, availability and capability. The provisions in question are not penal but rather are designed to maintain the State's policy of neutrality in an industrial controversy.

Decision: The initial determinations of the local office as to all claimants are affirmed. The decisions of the referee are modified accordingly. Separate orders to be entered in each case. (1/13/47)

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

March 11, 1947

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT
Experience and Training

Appeal Board Case No. 13,906-46

VOLUNTARY LEAVING – DESIRE FOR EMPLOYMENT AT HIGHER SKILL IN USUAL
OCCUPATION

Voluntary leaving after five weeks of employment as a biller-typist, which work was accepted by a stenographer without a promise or representation when she was employed that she would be given stenographic work, was without good cause, even though she might have had good cause for refusing such employment initially. Claimant had no prospects of employment when she left and was unemployed for three months thereafter.

Referee's Decision: The initial determination of the insurance office that claimant voluntarily left her employment without good cause is overruled. (11/1/46)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant had worked for three years as a stenographer-typist. For five weeks ending June 13, 1946, she was employed as a biller-typist. She started at \$28 a week and at the date of her separation earned \$30. She voluntarily left this employment. Claimant filed a claim for benefits on June 17, 1946. The employer certified to the local office that claimant left her employment without giving notice. When she called for her pay she informed the management that she did not care for the position. The local office issued an initial determination holding that claimant voluntarily left her employment, without good cause. Claimant states that she accepted the position as a billing-typist because she was in need of funds. Otherwise, she would not work as a biller, because her customary occupation was that of a stenographer. After claimant had worked in the employer's establishment for three weeks there was a vacancy for a stenographer, which was offered to her. She accepted the offer and after working at the new assignment for one day she was transferred back to the billing department. At that time her salary was increased \$2 a week. The management then reverted to its practice of utilizing the services of a public stenographer. Claimant was informed by her supervisor that her stenographic work was satisfactory, but that she could not be spared from her duties as a biller. The employer was engaged in a highly seasonal industry. Only one stenographer was customarily employed in the office. When claimant was given the assignment as a stenographer the busy season had already commenced. The officer and salesman of the corporation who trained the stenographer was about to embark on a long business trip. He was also burdened with so much work that he could not devote time to train claimant for her new duties.

Claimant approached her supervisor later to inquire when she would be transferred to stenographic work. She was left with the impression that it would be at some indefinite time in the future. Her reasons for her voluntary leaving were that she had "straightened out a little financially" and that she would then spare the time to look for a job as a stenographer, which was more remunerative. About September 9, 1946, claimant obtained employment as a stenographer, paying \$40 a week.

Appeal Board Opinion: The referee held that under Section 593.1(b) of the Labor Law claimant could not be disqualified for voluntary leaving, without good cause, because the circumstances would have justified her refusing the employment in the first instance. He further ruled that her leaving was justified because she was entitled to employment at her highest skill. We are unable to agree with the manner in which the referee decided the issue before him. The duties performed by claimant at the time of her leaving were identical with those assigned to her when she was originally hired. No promise or representation was then made to her that she would later be transferred to stenographic work. It does not appear that had she continued as a biller it would have in any way prejudiced her chances of being transferred back to stenographic work by the employer. Moreover, claimant had no prospects of other employment at the time of her separation and had remained unemployed for almost three months thereafter. A consideration of all the circumstances compels the conclusion that claimant voluntarily left her employment, without good cause.

Appeal Board Decision: The initial determination of the local office that claimant voluntarily left her employment, without good cause, is sustained. The decision of the referee is reversed. (1/13/47)

A-750-776

Index No. 1690-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

April 16, 1947

INTERPRETATION SERVICE – BENEFIT CLAIMS
VOLUNTARY LEAVING OF EMPLOYMENT
Personal Affairs

Appeal Board Case No. 14,016-46

VOLUNTARY LEAVING – WITHDRAWAL FROM LABOR MARKET TO AVAIL ONESELF OF PENSION RIGHTS

Leaving a position to avail oneself of pension rights with the intention of finding employment elsewhere is "without good cause." However, where such leaving of employment is with the intention of retiring from the labor market it is with good cause but under circumstances which show withdrawal from the labor market.

Referee's Decision: The local office determination holding that claimant voluntarily left his employment without good cause and withdrew from the labor market was sustained by the Referee. (11/18/46)

Appealed By: Claimant

Findings of Fact: Claimant, who is seventy years old, has been employed in the garment industry for upwards of forty-four years. On July 12, 1946, claimant voluntarily left his employment in order to retire. He availed himself of his rights under the social Security Act and also applied for a pension provided by the industry for certain types of employees. On July 15, 1946 claimant filed a claim for unemployment insurance benefits. He stated that he retired from the labor market and has no intention of accepting any employment. The local office thereupon made an initial determination disqualifying claimant for benefits for voluntarily leaving his

employment without good cause and for unavailability because of his withdrawal from the labor market. Claimant contested the determination and requested a hearing. The referee sustained the determination and claimant appealed.

Appeal Board Opinion: The record clearly sustains the referee's finding that claimant had withdrawn from the labor market and was unavailable for employment. However, we do not agree with the referee's conclusion that claimant's voluntary leaving of his employment was without good cause. We believe that a claimant who, on account of advanced age, determines to retire from the labor market and leaves his employment in order to avail himself of his pension rights, leaves such employment with good cause. Undoubtedly, had the claimant continued in the labor market but left his employment merely to avail himself of pension rights with the intention to find employment elsewhere, such voluntary leaving would not be with good cause. However, that is not the situation before us.

Appeal Board Decision: Claimant voluntarily left his employment with good cause and withdrew from the labor market. The initial determination of the local office is modified accordingly. The decision of the referee is modified in accordance with this opinion. (2/6/47)

A-750-780

Index No. 905-3

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

May 19, 1947

INTERPRETATION SERVICE – BENEFIT CLAIMS

Miscellaneous

Appeal Board Case No. 13,976-46

ASSIGNMENT OF BENEFITS – BENEFITS ACCRUED BY CLAIMANT NOT APPLIED AS AN
OFFSET TO UNPAID TAX CONTRIBUTIONS

Benefits accrued in favor of the claimant, a former sole proprietor of a business enterprise, may not be applied on account of and as an offset to unpaid tax contributions due and owing to the Unemployment Insurance Fund by the claimant. Section 595.2 of the Law acts as a bar to such action.

NOTE: The above case is to be differentiated from cases involving claimants who were active officers and substantial stockholders of corporations which were wrongfully delinquent in the payment of contributions to the Fund. In those cases, the payment of benefits to the officers, predicated on their base year earnings with the defaulting corporations were held in abeyance until full payment of the contributions due had been made, in order that such persons would not benefit from their own wrongdoing.

Referee's Decision: The initial determination of the local office holding that benefits accrued in favor of the claimant may be applied on account of and as an offset to unpaid tax contributions due and owing by the claimant to the Unemployment Insurance Fund, is sustained. (11/7/46)

Appealed By: Claimant

Findings of Fact: During 1939 and 1940 claimant was engaged in a business enterprise of which he was sole proprietor. As an employer, claimant was then subject to the Unemployment Insurance Law. He was delinquent in the payment of tax contributions due the Unemployment Insurance Fund for the first, second and third quarters of 1940. Thereafter, claimant ceased activity as an employer and entered the labor market. The indebtedness to the Unemployment Insurance Fund including penalty and interest to August 5, 1943 amounts to \$803.96. This amount due the Fund remains unpaid. In the base year 1944, claimant was employed in covered employment. On March 7, 1946, being unemployed, he filed for unemployment insurance benefits and thereafter certified to a number of weeks of total unemployment. Benefits due the claimant by reason thereof were applied by way of offset in partial liquidation of his outstanding indebtedness to the Fund. This action by the Industrial Commissioner was made the subject of an initial determination. Claimant took exception and requested a hearing. The referee sustained the initial determination. Thereupon, claimant appealed.

Appeal Board Opinion: The referee, in sustaining the initial determination, held that claimant's indebtedness to the Unemployment Insurance Fund for unpaid tax contributions was a proper offset against his benefits and that the action of the Industrial Commissioner in doing so was not barred by Section 595.2 of the Law. In arriving at this decision the referee reasoned that the protection afforded by Section 595.2 was limited to the extent of barring the collection of debts and that an unpaid tax is not a debt. We do not agree with the conclusion reached by the referee. Section 595.2 reads as follows:

"2. Assignment of benefits void. Benefits shall not be assigned, pledged, encumbered, released, or commuted and shall be exempt from all claims of creditors and from levy, execution, and attachment, or other remedy for recovery or collection of a debt. This exemption may not be waived."

Whether or not the Industrial Commissioner may legally offset unemployment insurance contributions owed by the claimant against current benefits due him depends upon an interpretation of the Section of the Law quoted. We believe the language of the Section includes a bar to an offset such as has been urged herein. Nothing contained in the statute indicates any limitation of its applicability to debts owed to individuals or to entities other than the State of New York. We perceive no distinction to be drawn from the statute between an unpaid tax and any other debt or claim. It follows, therefore, that unpaid tax contributions may not be offset by the Industrial Commissioner against currently earned unemployment insurance benefits. Section 595.2 of the Law acts as a bar to such action. This case is distinguishable from cases in which claimants have received overpayments of benefits. In such cases offsets were allowed against benefits subsequently accrued merely to balance the running benefit account with the claimant. Such offsets are merely administrative details. In the instant case there has been no overpayment of benefits. No claim has been made that claimant has received any benefits to which he is not entitled. In arriving at our conclusion we are not unmindful of the decisions rendered by us in cases where the claimants were active officers and substantial stockholders of corporations which were delinquent in the payment of contributions to the Unemployment Insurance Fund. Those cases are inapplicable to the situation herein. Benefits were withheld in those cases, not upon any theory of offset, but on the ground that the claimants should not be permitted to profit by their own wrongdoing. Unpaid contributions due and owing by the employer corporation were not offset against benefits accrued in favor of the claimants. Payment of benefits was held in abeyance until after proper and full payment of contributions had been made to the Fund. Upon all the circumstances herein, we conclude that the Industrial Commissioner is not entitled to the setoff which has been asserted against the claim for benefits.

Appeal Board Decision: The initial determination withholding the payment of benefits and applying the same on account of tax contributions due and owing the Unemployment Insurance Fund is overruled. The decision of the referee is reversed.

A-750-788

Index No. 1650C-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

July 3, 1947

INTERPRETATION SERVICE – BENEFIT CLAIMS

VOLUNTARY LEAVING OF EMPLOYMENT

Disciplinary Action

Imposition of Penalty

Appeal Board Case No. 14,659-47

VOLUNTARY LEAVING – IMPOSITION OF PENALTY RESULTING FROM SINGLE
OUTBURST OF TEMPER AFTER TEN YEARS OF UNBLEMISHED RECORD

Claimant was given permission to be absent for the morning as the result of a nervous condition from his being the cause of an accidental injury to a co-worker. After an absence of two days he was told to return at once or be discharged, whereupon he gave vent to an outburst of temper. Upon reporting for work two days thereafter and then being informed that he could return to employment but with the loss of all seniority rights and two weeks vacation then due, he voluntarily left. Held, his leaving, considering his highly nervous state at the time of his single outburst of temper, after an unblemished record of ten years, was with good cause.

Referee's Decision: The initial determination of the local office disqualifying claimant for voluntary leaving of employment without good cause, is overruled. (1/16/47)

Appealed By: Employer

Findings of Fact: We have reviewed the evidence as adduced at the hearing before the referee, and we find that such evidence supports the following findings of fact made by the referee:

"Claimant filed a claim for benefits effective June 18, 1946 and was disqualified by initial determination for 42 days for voluntary leaving of employment without good cause.

"Claimant was employed from November 6, 1936 to June 6, 1946 by a lithographing, playing card, and box company, as a quad staying machine operator. About 10 a.m. on June 6 claimant was operating a lacing machine. He became nervous and accidentally tripped the machine causing an injury to one of the mechanics. Due to this accident claimant was highly nervous and unable to continue working. He requested permission to go home. This permission was granted and he was instructed to return to work at 1 p.m. on the same day. The claimant did not report to work at 1 p.m., nor on the following day. On June 8 a representative of the employer called at claimant's home and informed him that unless he reported for work at once he would be discharged. Claimant became incensed at this ultimatum and had heated words with the employer's representative, and did not return to work.

"Claimant had contacted his physician because of his nervous condition. On June 10, 1946 he reported to the office of the factory superintendent and stated that he was ready to return to

work. He was thereupon informed by the superintendent that he could return to work but would have to start as a new employee, forfeiting all of his seniority rights. This would mean that claimant would have to work for one year before receiving any vacation, for three months before receiving pay for holidays, and for at least one year would not participate in the employer's wage dividend, and thereafter for four years would receive a lesser dividend as such dividend is based on seniority to an including five years of service. The claimant refused to return under those conditions and resigned.

"It was admitted that claimant was an excellent employee and that except for the incident in question had an exemplary work record."

In addition, we find that at the time of the incident in question claimant was entitled to two weeks vacation. When claimant reported that he was ready to return on June 10, he was advised that this vacation period had been forfeited.

Appeal Board Opinion: We agree with the conclusion reached by the referee that claimant did not voluntarily leave his employment without good cause. Consideration must be given to claimant's highly nervous state which precipitated his exchange of words with the employer's representative when he was asked to return to work on June 8. The referee had the opportunity to observe the claimant and has concluded that this single outburst after an unblemished record of ten years with the employer was "excusable due to his condition." When claimant regained his composure and reported for work at the employer's establishment, he was advised that he could return only under the condition that he forfeit all of his seniority rights as well as the two weeks vacation to which it appears he would have otherwise been immediately entitled. We do not believe that under the facts of this case it can be said that claimant's refusal to return to work under the conditions imposed by the employer was tantamount to a voluntary leaving of employment without good cause.

Appeal Board Decision: The initial determination of the local office that claimant voluntarily left his employment, without good cause, is overruled. The decision of the referee is affirmed.
(5/19/47)

A-750-789

Index No. 775.6

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICE OFFICE

July 3, 1947

INTERPRETATION SERVICE – BENEFIT CLAIMS
DETERMINATION OF BENEFITS
AVAILABILITY AND CAPABILITY
Evidence of – Self-Employment

Appeal Board Case No. 14,664-47

AVAILABILITY – SELF EMPLOYMENT – JUNK DEALER

Self-employment as a junk dealer on an average of not more than five hours, three days per week, earnings being not more than \$15 a week, did not attest to unavailability as such employment was a sideline to partially tide claimant over his period unemployment (investment nominal – no place of business, commitments of obligations) and he would have willingly

abandoned such activities for employment as evidenced by his return to regular full time employment as a lens grinder at \$50 per week. Self-employment (no contract of hire existing) is not employment under the statute.

Referee's Decision: The initial determination of the local office holding that claimant made willful misrepresentations to obtain benefits and imposing a forfeiture of 108 effective days, is sustained. (2/14/47)

Appealed By: Claimant

Findings of Fact: Claimant worked for three-and-one-half years, ending August 1945, as a lens grinder for an optical company in Rochester. He exhausted his benefit rights in the 1945-46 benefit year. He filed an additional claim on June 3, 1946 and reported to August 5, 1946. He became employed as a lens grinder on August 7, 1946. The local office obtained information that claimant obtained a license to buy and sell junk on May 23, 1946 and that he was engaged in these activities during his reporting period. On July 27, 1946 it issued an initial determination that claimant was not totally unemployed from June 3, 1946 and that he made willful misrepresentations to obtain benefits for the certified weeks ending June 16, June 23, June 30, July 7 and July 14, 1946, respectively. His future benefit rights were reduced by 108 effective days and he was charged with an overpayment of \$105. He contested and requested a hearing. Claimant is the head of a large family. His efforts to obtain private employment were unsuccessful. He decided to occupy some of his spare time buying and selling junk on a small scale. He intended to do this as a sideline until he obtained employment in his regular occupation as a lens grinder. He is afflicted with a bad back and has a hernia. He used a small pick-up truck with defective tires for his activities. This truck could not be used for loading. He devoted an average of three days a week and worked not more than five hours a day. His gross earnings during the reporting period in question did not exceed \$15 a week. Claimant states he was at all times ready, willing and able to accept full-time employment. On August 7 1946, he obtained full time employment in his regular occupation, averaging \$50 a week, and he then abandoned his sideline. Claimant attributes his statements relative to his days of total unemployment to his interpretation of the term "effective day." He was under the impression that he was eligible for benefits if he did not earn in excess of \$24 in any week.

Appeal Board Opinion: The referee ruled that claimant was not totally unemployed and that he made willful misrepresentations to obtain benefits. We do not agree with his holding. The first issue to be decided is whether or not claimant was totally unemployed. In defining the term "employment" we have held that the basic element is the existence of a contract of hire and that it does not contemplate self-employment by a claimant. Nor do the amounts earned by a claimant have any materiality on this issue if they were not in "employment." There is no basis for finding that claimant was not totally unemployed. The sole question to be decided, therefore, is whether or not claimant was available for employment. Claimant undertook the sale of junk as a sideline to partially tide him over his period of unemployment. He did not do so with the intention of establishing a permanent business or devoting all of his time to these activities as a sole means of livelihood. At his regular occupation he earned about \$50 per week, whereas in his own venture he netted not in excess of \$15 weekly. This small income was clearly insufficient to provide a livelihood for himself and his family. His investment was nominal. He had no place of business. He had not undertaken any commitments or obligations. Acceptance of a job would have entailed no loss to him. He would have willingly abandoned such activities and accepted an offer of employment for which he is fitted. This was evidenced by his return to employment on August 7, 1946. We hold that claimant was available for employment and totally unemployed within the meaning of the Unemployment Insurance Law

Appeal Board Decision: Claimant was totally unemployed and available for employment. He was not overpaid in benefits and he committed no willful misrepresentations. The initial determination of the local office is overruled. The decision of the referee is reversed. (5/19/47)

A-750-791

Index No. 715.6

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

July 23, 1947

INTERPRETATION SERVICE-BENEFIT CLAIMS
AVAILABILITY AND CAPABILITY
Domestic circumstances
Other causes

Appeal Board Case No. 14, 246-47

AVAILABILITY; LICENSED FOSTER MOTHER

A foster mother of two children, licensed under the requirement that "The applicant is not to be employed outside her home" was held to be available for employment since it is the practice of the Welfare Office, when a foster mother is found to have outside employment and arrangements have been made for the care of her foster children, to continue such arrangement until the children are transferred elsewhere.

In the instant case, claimant's availability was not affected by her duties as a foster mother; claimant secured employment and her 21 year old daughter cared for the one remaining foster child until arrangements for transfer could be made.

Referee's Decision: Claimant was unavailable for employment beginning May 1, 1946 and was overpaid \$315 in benefits. (1/7/47)

Appealed By: Claimant

Findings of Fact: Claimant, a sewing machine operator, worked in a factory in Beacon, New York for about three years to June 1945. She resides outside of the city of Newburgh with her two daughters, who are nineteen and twenty-one years of age. The older daughter stays at home and takes care of an antique shop conducted on property belonging to claimant in the vicinity of her home. Claimant filed an additional claim for benefits on March 28, 1946 and reported continuously thereafter to December 4, 1946. She certified to total unemployment and received benefit checks weekly thereafter to and including the week ending August 11, 1946. At about that time the local office learned that on May 1, 1946 claimant had become a foster mother of two children and had received a license as such under the New York State Social Welfare Law. An initial determination was issued disqualifying claimant from benefits as of May 1, 1946 on the ground that she was unavailable for employment while licensed as a foster mother, and declaring that claimant had been overpaid in the amount of \$315 in benefits since that date. The rules of the State Board of Social Welfare governing the issuance of licenses and certificates to board children provides as one requirement for such license or certificate the following:

"16. The applicant is not to be employed outside her home."

The children's worker of the Welfare Department of the City of Newburgh appeared as a witness before this Board. It is the practice of such workers to visit the home of each foster mother every three months. When it is found that a foster mother is working outside of her home and arrangements have been made to care for the foster children during the foster mother's absence, the latter is permitted to continue in her former capacity until arrangements can be made to transfer the foster children elsewhere. This may require a period of three or four months. Early in February 1947, claimant, while still acting as a foster mother, obtained full-time employment as a sewing machine operator in a factory. During her absence her twenty-one year old daughter was at home and exercised supervision over the one foster child who still remained with her. This arrangement was approved by the local Welfare Department and claimant was permitted to continue as a foster mother temporarily until arrangements could be made to transfer the child. At the time of the hearing before the Board, the arrangement had continued for a period of more than two months and was subject to further review by the Welfare authorities. A similar arrangement existed with respect to another foster mother under the jurisdiction of the same welfare office.

Appeal Board Opinion: The referee ruled claimant unavailable for employment commencing May 1, 1946 because of the obligations she had assumed as a foster mother. He rested his decision, on the authority of Appeal Board, 4406-40. Although it might not be readily apparent from a reading of the decision in that case, a careful examination of the record therein shows that the claimant was not held to be unavailable on the sole ground that she possessed a license as a foster mother. There, the claimant was the foster mother of two infant children, each less than one year old. It does not appear that she was able to make any arrangements for the care of such children in the event of her becoming employed outside her home. Moreover, claimant had previously received disability pay from her employer and her ability to work was limited. We reached the conclusion on all the facts that such claimant, was unavailable for employment by reason of her duties as a foster mother. In the instant case, claimant's availability for work is not affected by the fact that she had been licensed and was acting as a foster mother. The foster children were aged six and thirteen and did not require the same degree of care as infants. Claimant's daughter, who was at home could have attended to the children in the event claimant obtained employment. The fact that such an arrangement is in existence at the present time with the approval of the local Welfare authorities is sufficient proof of that. It must be held, therefore, that claimant was available for employment throughout her reporting period.

Appeal Board Decision: The determination of the local office disqualifying claimant from benefits for unavailability for employment is hereby overruled. The decision of the referee is reversed. (5/26/47)

A-750-793

Index No. 1330-1

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE

July 31, 1947

INTERPRETATION SERVICE – BENEFIT CLAIMS
STRIKE, LOCKOUT OR OTHER
INDUSTRIAL CONTROVERSY

Appeal Board Case No. 13,368-46

LOSS OF EMPLOYMENT AT TWO DIFFERENT TIMES ATTRIBUTABLE TO A SINGLE INDUSTRIAL CONTROVERSY – SUSPENSION LIMITED TO SEVEN WEEKS IN THE AGGREGATE

Where employees out on strike since August 20, 1945, because of failure of employer to comply with War Labor directives, returned to work in September 1945, at the suggestion of the War Labor Board, pending enforcement of a compliance with such directives, and again walked out on February 3, 1946 after negotiations between the union and the employer had broken down, it was held that loss of employment in both instances was attributable to a single industrial controversy, since identical issues were involved in both instances. The suspension period cannot exceed seven weeks of unemployment in the aggregate where the loss of employment is attributable to a single industrial controversy.

Referee Decision: Appealed By: The Industrial Commissioner and the employer appeal from the decision of the referee dated June 4, 1946, modifying the initial determination of the local office which imposed a suspension period of seven full weeks, effective February 3, 1946, against claimant for loss of employment as a result of an industrial controversy. The referee held that claimant had already served a portion of the suspension period by reason of his prior loss of employment on August 20, 1945 due to the same industrial controversy. (6/4/46)

Findings of Fact: Claimant was employed as an iron worker in the plant of a metal refining company. On August 20, 1945, the employees in the plant, including claimant, went out on strike because of a dispute between their trade union and the employer company concerning wages, retroactive pay, night shifts, differentials, paid holidays and vacation. The War Labor Board had previously issued directives on these subjects against the employer, with which it had failed to comply. The War Labor Board intervened in the controversy and at its suggestion the employees returned to work in the early part of September 1945, pending enforcement of or compliance with the War Labor Board's previous directives. The employer disputed the jurisdiction of the War Labor Board and the Board failed to effect a settlement. After attempted negotiations between the union and the company had broken down, the employees went out on strike on February 3, 1946 pursuant to a strike notice issued by the union. The same issues were in dispute as at the time of the previous walk-out and the same demands were made of the company. Claimant filed an original claim for benefits on March 19, 1946. On March 22, 1946, the local office issued an initial determination suspending the accumulation of benefit rights by the claimant for seven weeks, effective February 3, 1946, on the ground that he had lost his employment as the result of an industrial controversy. The basis of the local office determination was that the earlier strike and the suspension imposed in connection therewith had terminated when the employees returned to work in September 1945 and that claimant was subject to another suspension of seven consecutive weeks, effective February 3, 1946, because of loss of employment by reason of a new strike called on the same day. Claimant protested the determination, contending that the present strike was a continuation of the walk-out of August 20, 1945 and that the seven-week suspension period should be computed from August 21, 1945, the day following the strike.

Appeal Board Opinion: Section 592.1 of the Labor Law reads as follows:

"592. SUSPENSION OF ACCUMULATION OF BENEFIT RIGHTS.

1. Industrial Controversy. The accumulation of benefit rights by a claimant shall be suspended during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy in the establishment in which he was employed, except that benefit right may be accumulated before the expiration of such seven weeks beginning with the day after such strike, lockout, or other industrial controversy was terminated."

The Industrial Commissioner contends that the strike which began on August 20, 1945 terminated when the men returned to work in September 1945. On this point we agree with the referee's ruling to the contrary. The record establishes that the same industrial controversy was involved in the walk-out of February 3, 1946 as in the previous walk-out. The underlying dispute between the employer and the union had been in existence for some time prior to August 1945 and continued without settlement or modification throughout the intermediate return to work of the employees. Accordingly, claimant was without employment on February 3, 1946 because of the same industrial controversy which caused his loss of employment in August 1945. The remaining question is whether, under such circumstances claimant is required to undergo a full seven-week suspension period following the second walk-out, or whether he should receive credit for the period following the first walk-out on August 20, 1945 and prior to the return to work in September 1945. The statute calls for suspension of a claimant's benefit rights, ". . . during a period of seven consecutive weeks beginning with the day after he lost his employment because of a strike, lockout, or other industrial controversy. . ." We do not believe that it was intended that the suspension period should in any event exceed seven weeks of unemployment in the aggregate where the loss of employment is attributable to a single industrial controversy. Considerations of policy also lead to the same result. Under the local office theory the suspension period would be enlarged whenever there was a return to work pending peaceful negotiations of the original controversy, which negotiation subsequently proved to be fruitless. As the referee points out, the view that a return to work terminates the strike would serve to weaken the machinery for mediation of industrial disputes on a voluntary basis. This view would tend to discourage a return to work pending negotiations, which would be against the best interests of the people of the state. This conclusion is in harmony with the public policy of the state as declared in Section 750 of the Labor Law, dealing with the mediation of labor disputes, which reads as follows:

"§750. Declaration of policy. It is hereby declared as the public policy of this state that the best interests of the people of the state are served by the prevention or prompt settlement of labor disputes; that strikes and lockouts and other forms of industrial strife, regardless where the merits of the controversy lie, are forces productive ultimately of economic waste; that the interests and rights of the consumers and the people of the state, while not direct parties thereto, should always be considered, respected and protected; and that the voluntary mediation of such disputes under the guidance and supervision of a governmental agency will tend to promote permanent industrial peace and the health, welfare, comfort and safety of the people of the state."

Since it is not within the province of the administrators of unemployment insurance to inquire into or determine the merits of any industrial controversy, it seems clear that Section 592.1 is not penal in nature, but is designed to provide what the Legislature deemed a reasonable period during which the State stands aside pending the adjustment of the differences between employer and employees. Accordingly, our interpretation thereof must not be a deterrent to the prompt settlement of labor disputes. We are of the opinion that the local office should have granted claimant's request that he be credited with the period from August 21, 1945 to the date

of his resumption of work and that only the balance of the seven-week suspension period then remaining need be satisfied by him after the walk-out of February 3, 1946. The correct determination was to suspend claimant's benefit right pursuant to Section 592.1 of the Law, effective August 21, 1945, credit him with that portion of the seven-week suspension period accumulated prior to his return to employment in September 1945, and terminate the suspension after the expiration of the remaining portion of such seven-week period following his loss of employment on February 3, 1946. When claimant filed his claim for benefits on March 19, 1946 that period had already expired.

Appeal Board Decision: The initial determination of the local office imposing a suspension period against claimant of seven consecutive weeks, effective February 3, 1946, is modified in accordance with this opinion. The decision of the referee is affirmed. (3/3/47)

A-750-794

Index 795.5

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICES OFFICE
JULY 1947

INTERPRETATION SERVICE - BENEFIT CLAIMS
AVAILABILITY AND CAPABILITY

Other causes
Efforts to find work

AVAILABILITY; NO ACTIVE SEARCH; CONTINUING EMPLOYER-EMPLOYEE
RELATIONSHIP - COMPENSATION WITHOUT WORK

Claimant, employed as a fur dresser who worked with "gangs" on a rotation basis, wages being an equal share of the money value of the entire production of all the working "gangs", and who did nothing more to find employment than register at the employment office on days his "gang" did not work, was unavailable for employment since, (1) mere registration with the employment office is non conclusive of a condition of availability, (2) there was no reasonable possibility of obtaining work in any other occupation as his 32 year work history was as a fur dresser and (3) he could not accept work in his usual occupation without forfeiting his rights to share in the weekly wages.

A.B. 14,407-47

Referee's Decision: The initial determination of the local office disqualifying claimant from receiving any benefits on the ground that he was unavailable for employment, is sustained. (12/31/46)

Appealed By: Claimant.

Findings of Fact: We have reviewed the evidence adduced at the hearing before the referee and we find that such evidence supports the following findings of fact made by the referee:

Claimant filed for benefits on July 19, 1946. He was declared ineligible by initial determination, effective July 19, because he was not totally unemployed. At the hearing the Commissioner's representative moved to amend the determination to include the alternative ruling of ineligibility due to unavailability. The motion was granted.

The claimant has thirty-two years experience as a fur dresser. In the past four years, he has been working for a firm engaged in the business of dressing raw skins, located in the Bronx. Approximately twenty fur dressers are employed in the establishment. Remuneration for work performed is paid on a piecework basis at rates fixed by employer-union agreement. However, compensation is not paid on an individual basis. The amount of money due to employees based on production of the entire group of workers, is determined and each employee of the group receives the same proportionate share of the proceeds.

Because of the aforesaid agreement there is not always enough work during the slack season to keep the entire group busy on a full-time basis. Instead of dividing such work as is available equally, a system has been established whereby the workers are divided into four 'gangs'. The work is assigned to one or more 'gangs' on a rotation basis. At the end of each week the money value at piece rates of the production by the working 'gangs' was divided equally among the members of all four 'gangs'. As a consequence the claimant received wages in each week. In the week ending periods from the day he filed his claim through the week ending December 8, the claimant earned salaries ranging from \$3 to \$51 per week.

On the days when the 'gang' of which the claimant was a member did not perform work the claimant did not seek employment elsewhere, nor is he permitted to work in his usual occupation in any other fur dressing establishment. Acceptance of work in such an establishment would bar him from his right to share in the money value of the weekly production in his own shop. It is the contention of the claimant that he is entitled to accumulate effective days by reason of his unemployment in excess of three days within certain weeks. He admits that he did nothing more than register with the employment office to find employment on such days."

Appeal Board Opinion: we adopt the opinion of the referee as the opinion of this Board.

The claimant worked for an employer under an arrangement whereby he received wages each week based upon a proportionate share of the money value at piece rates of the entire production in the plant during said week, thus there existed a continuing employer-employee relationship which was not interrupted by the fact that on some days it was not his turn to perform work. Mere registration with the employment office is not conclusive of a condition of availability. The claimant admits that he could not accept work in his usual occupation without forfeiting his rights to share in the weekly wages to which the employees in his shop were entitled. There is no reasonable probability of placing the claimant in any other occupation, particularly since his entire employment background over a thirty-two year period is confined to work as a fur dresser. I hold, therefore, that the claimant is not genuinely in the labor market and does not meet the test of availability under the Unemployment Insurance Law. It becomes unnecessary to rule on the issue of total unemployment.

Appeal Board Decision: The claimant was unavailable for employment. The local office initial determination is sustained. (5/26/47)

A-750-796

Index Nos. 735B.10

NEW YORK STATE DEPARTMENT OF LABOR
UNEMPLOYMENT INSURANCE DIVISION
ADJUDICATION SERVICE OFFICE
July 31, 1947

INTERPRETATION SERVICE- BENEFIT CLAIMS
AVAILABILITY AND CAPABILITY
Employment opportunities- Removal
Of Residence
Evidence of
Pensions (Retirement)
Withdrawal from Labor market

Appeal Board Case No. 14,547-47

AVAILABILITY, QUESTION OF MANDATORILY RETIRED ON PENSION -REMOVAL OF
RESIDENCE TO SUMMER COTTAGE

Claimant, a licensed electrical engineer, mandatorily retired on pension at the age of 65, who temporarily moved to his summer cottage and filed and reported in Connecticut as instructed, was held available for employment as he was ready, willing and able to accept any suitable employment offered by the Employment Service in New York and Connecticut and he made efforts to find work (which resulted in re-employment) through Columbia University and influential friends.

Referee's Decision: The initial determination of the local office to the effect that claimant was unavailable for employment from July 1, 1946 to September 15, 1946, inclusive, is sustained. (12/31/46)

Appealed By: Claimant

Findings of Fact: Claimant was employed for a number of years by a public utility in New York City as a supervisor of heat, light and power operations. He holds an engineering degree from Columbia University, and is a licensed electrical engineer. Effective June 30, 1946 he was mandatorily retired having reached age 65, and has been receiving a pension since then. On July 1, 1946, claimant filed an application for unemployment insurance benefits. On that occasion he notified the local office of his intention to spend the summer months with his family in Pine Grove, New London, Connecticut, where he maintained a summer cottage in the interest of economy. Claimant was ready, willing and able to continue to report at his local office in Yonkers notwithstanding his temporary change of abode. However, the local office advised him to report at the nearest insurance office in Connecticut. On July 5, 1946, claimant accordingly filed an initial claim under the interstate benefit payment plan at New London, Connecticut and thereafter continued to report to that office until September 15, 1946. Upon his return to New York on September 16, 1946, claimant reappeared at the local office and continued to report until January 26, 1947, when he ceased reporting because he became re-employed. We find that during claimant's sojourn in New London, Connecticut, claimant was ready, willing and able to accept suitable employment which might have been offered to him by the employment service in New London, Connecticut or by the employment service in this state. Moreover, he made efforts to find employment through Columbia University and friends who were in a position to aid him. On October 16, 1946, the local office issued an initial determination holding that claimant was unavailable for employment from July 1, 1946 to and including September 15, 1946. Claimant duly requested a hearing before the referee which culminated in a decision sustaining the initial determination.

Appeal Board Opinion: An analysis of the record discloses that there is no evidence to sustain the finding that claimant was unavailable for employment during the period in question. On the contrary, the facts in the present case are strikingly similar to the facts to be found in Matter of Loeb, Appeal Board, 10,498-44; revd. 269 App. Div. 917, in which the claimant was held to be available for employment under comparable circumstances.

Appeal Board Decision: Claimant was available during the period in issue. The initial determination of the local office is overruled. The decision of the referee is reversed. (5/12/47)
