

# New York State Department of Labor

## A-750 900 Series

A-750-900

Index No. 780A.3

NEW YORK STATE DEPARTMENT OF LABOR  
UNEMPLOYMENT INSURANCE DIVISION  
ADJUDICATION SERVICE OFFICE  
December 14, 1949

INTERPRETATION SERVICE-BENEFIT CLAIMS  
DETERMINATION OF BENEFITS  
AVAILABILITY AND CAPABILITY  
Evidence of – Refusal of Employment  
Suspension period – Effective date

Appeal Board Case Number 20,199-49

### UNAVAILABILITY, EVIDENCE OF – EFFECTIVE AS OF FILING DATE, NOT AS OF DATE OF REFUSAL

Refusal of employment during the course of a strike, in support of which claimants were engaged as pickets and were not permitted to discontinue such picketing, was deemed to be additional evidence of not being in the labor market, and claimants because of being out of the labor market were accordingly held to be unavailable for employment after the expiration of the 49 days strike suspension. The Salavarría decision (Index 778A-1), Serial No. A-750-476) was not applicable since the refusal of employment was merely additional evidence of unavailability.

Referee's Decision: The effective dates of the initial determinations of unavailability are the dates on which there was evidence which indicated unavailability for employment (refusal of employment dates) The initial determinations, as modified, are sustained. (April 27, 1949)

Appealed By: Industrial Commissioner

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:

\* \* \* \* \*

All of the claimants herein worked in the same automobile repair shop as mechanics or helpers. All of the claimants filed original claims for benefits in April 1948. Their benefits were suspended for 49 days because of loss of employment as a result of an industrial controversy in the establishment in which they were employed. All of the claimants were members of the same union, which had called a strike against the shop in which the claimants had been employed. The claimants actively participated in the strike. Claimant D. refiled for benefits on May

6, 1948, and certified to unemployment through August 8, 1948. An initial determination was issued disqualifying him from receiving benefits effective July 21, 1948, because of his refusal of employment and withdrawal from the labor market and, in the alternative, because of his refusal of employment without good cause. He was charged with an overpayment of \$26, which resulted from the voiding of effective days, which were credited to him commencing with July 22, 1948. Claimant R. refiled for benefits on May 5, 1948. An initial determination was issued ruling him ineligible for benefits as unavailable for employment effective August 10 because he was not ready to accept immediate employment. Claimant K. refiled for benefits on May 5, 1948, and reported through August 22. Initial determinations were issued effective July 14 and July 20 disqualifying him for refusal of employment without good cause and in the alternative, ruling him ineligible because of unavailability effective July 14. He was charged with an overpayment totaling \$52 based upon the voiding of effective days credited to him commencing with July 15. Claimant C. refiled for benefits on May 5, 1948. An initial determination was issued effective July 20 disqualifying him for refusal of employment without good cause and for withdrawal from the labor market and, in the alternative, ruling him ineligible because of unavailability effective July 14. He was charged with an overpayment totaling \$52 based upon the voiding of effective days credited to him commencing with July 15. Claimant C. refiled for benefits on May 5, 1948. An initial determination was issued effective July 10 disqualifying him for refusal of employment without good cause and for withdrawal from the labor market and, in the alternative, ruling him ineligible for benefits effective July 19 because of unavailability due to his removal from the labor market. At the hearing an additional initial determination was issued which was declared to be the primary initial determination with respect to all claimants ruling them ineligible as unavailable for employment from the dates of their respective refileing for benefits, following the termination of the suspension of their benefits because of the industrial controversy, and because of their withdrawal from the labor market. Each claimant was charged with an overpayment of all benefits received subsequent to such refileings. The following facts are undisputed: During the pendency of the strike against the claimants employer, which began on March 16, 1948, and which up to the time of the hearings had not yet been settled, all of the claimants actively participated in the strike by picketing or being at hand. From the commencement of the strike through the summer of 1948 and to the latter part of August, 1948, the strike was in the active stage with picketing. During this period none of the claimants were permitted to accept employment elsewhere. To do so would have weakened the strike. Had they accepted employment they would have been subject to disciplinary action by their union with possible loss of membership in their union. Outside employment could only have been obtained with the express permission of the president of the union who also actively participated in the strike. Had permission been requested to accept outside employment, he would have denied such request during this period. On August 23, 1948, the claimants obtained their tools, which until that time had been on the employer's premises. Thereafter the strike went into an inactive status and the claimants were permitted to accept employment elsewhere. The president of the union even referred several of the claimants to jobs. Two of the claimants thereafter, namely D. and R., went to business operating an automobile repair shop. The final certification by each of the claimants herein was August 22, 1948.

\* \* \* \* \*

We make additional findings of fact as follows: On July 21, 1948, claimant D. was offered employment by the employment service. Concededly, the proffered employment was suitable in all respects. Claimant stated to the employment interviewer that he would accept the referral, but that he would inform the prospective employer that he was on strike and would return to his regular job at the termination thereof. A similar remark made to another prospective employer the previous day prevented claimant from obtaining work. The offer was thereupon withdrawn. Claimant R. reported at the employment office on August 10, 1948. During the course of an interview at that time he indicated that his tools were at his employer's place of business and that he was unable to procure their return immediately. Automobile mechanics customarily are required to furnish their own tools when working on a job. On July 20, 1948, claimant K. refused an offer of suitable employment upon the ground that he believed negotiations between his union and his former employer would soon terminate. He then expected to return to work with his former employer. Claimant C. was offered suitable work on July 20, 1948 which he refused solely because of the pendency of the strike. He was unwilling at that time to consider other employment preferring to await return to his former employer at the termination of the strike. Except when ill or when otherwise excused by the president of their union, claimants engaged in daily picketing of their employer's establishment. Their union refused to register claimants for employment while the picketing was in progress. Claimants requested a hearing before the referee. The referee held that each of the claimants except R. was unavailable for employment as of the respective date when each refused suitable work. R. was held unavailable effective the date on which he indicated inability to accept employment because of a lack of tools. The Industrial Commissioner and claimants D., K., and R. thereupon appealed to the Board. At the hearing before the Board the amount of overpayment in benefits was recomputed as follows: C. \$271, K. \$245, R. \$297 and D. \$219.

Appeal Board Opinion: Inasmuch as the referee has already issued a well-reasoned opinion in this case we adopt the following portion of the referee's opinion as the opinion of this Board:

In Appeal Board, 16,956-49, it was held that where a claimant's sole reason for refusing employment was to continue with picketing and that under no circumstances would the claimant accept employment while the strike was in progress, such a claimant was not in the labor market and, therefore, was unavailable for employment. It was held in that case that questions involving refusals of employment became academic. In the instant case, a similar conclusion is reached because the claimants herein likewise were unwilling to accept employment while the strike was in progress and because they were under prohibition against doing so and subject to union disciplinary action if they accepted employment during this period.

However, we disagree with the referee's conclusion as to the respective effective dates of claimants' unavailability. It is not disputed that the situation with respect to claimants' unwillingness to accept employment did not change materially during the entire period during which picketing activities were in progress. We do not subscribe to the referee's view that the first evidence of claimants' unavailability was when they refused suitable employment. Refusal of employment was merely additional evidence that they were unavailable for any work other than the jobs to which they had expectations of returning at the termination of the strike. Matter of Salavarría, 266 App. Div. 933, affirming Appeal Board, 7831-42, cited by the referee as precedent for his conclusion as to the effective date of unavailability, is inapplicable to the situation presented herein. It follows, therefore, that claimants were unavailable for employment throughout the reporting period now under consideration.

Appeal Board Decision: The revised initial determinations of the local office, holding claimants F.K., S.C. and W.R. ineligible for benefits, effective May 5, 1948, and the revised initial determination of the local office, holding claimant W.D. ineligible for benefits, effective May 6, 1948, upon the ground that they were unavailable for employment, are sustained. Claimants are deemed to have been overpaid in benefits accordingly. The decision of the referee is modified accordingly and, as so modified, is affirmed. Separate orders are to be entered in each case. (October 14, 1949)

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A-750-903

Index No. 760A.5 & 765.9

NEW YORK STATE DEPARTMENT OF LABOR  
UNEMPLOYMENT INSURANCE DIVISION  
ADJUDICATION SERVICE OFFICE  
January 31, 1950

INTERPRETATION SERVICE-BENEFIT CLAIMS  
DETERMINATION OF BENEFITS  
AVAILABILITY AND CAPABILITY  
Students – General  
Willingness to Work

Appeal Board Case No. 20,678-49

AVAILABILITY – STUDENT DURING EASTER RECESS

Availability of a full-time student during a 10-day recess was not proved by a statement that he conducted a search for employment but was unable to furnish the names or other identity of any prospective employers whom he contacted. Because attachment to the labor market for a possible maximum of only ten days is at best only tenuous, clear and convincing proof that he was in reality in the labor market is necessary.

Referee's Decision: The initial determination made by the local office which disqualified claimant from receiving any benefits, effective April 8, 1949, through April 17, 1949, on the ground that he was unavailable for employment during said period is overruled. (July 8, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant was last employed as an architectural draftsman up to August 26, 1948 at \$7 a day. He was unemployed from that date and was a claimant for benefits until he entered P. Institute in New York City on September 20, 1948, as a full-time student to study architecture. Claimant filed a claim for benefits and registered for employment on April 8, 1949, when the Easter recess in the institute began, and which ended on April 17, 1949. After an interview in the local office claimant was ruled unavailable for employment on the ground that he was a full-time day student during the Easter recess. Claimant protested and requested a hearing. The referee overruled the initial determination and the Industrial Commissioner appealed to the Board. Claimant contends that he contacted a number of firms in search of work as an architectural draftsman, at the rate of \$40 per week, and for a job as timekeeper or something similar. At the hearing before the referee he was unable to name any of the places he visited. He testified that he had also looked for work as a soda clerk.

Appeal Board Opinion: The purpose of the Unemployment Insurance Law is to provide the payment of benefits to qualified employees who are unemployed through no fault of their own. The record shows that claimant detached himself from the labor market on September 20, 1948 when he became a full-time day student in the P. Institute. It may not be said, then, that he was suffering involuntary unemployment on April 8, 1949. Furthermore, he had no intention of returning to the labor market, except, as he contends, for the period April 8, to April 17, 1949. Thus claimant's attachment to the labor market was extremely tenuous. We perceive a great difference between this claimant and an employee who is laid off from his job for a similar period of time. The latter is involuntarily unemployed and is an active member of the labor force for temporary or permanent employment. Since concededly claimant had withdrawn from the labor market during the period of his attendance at the institute and since he alleges a return to the labor market for the 10-day recess period only, we are unable to agree with the referee's disposition of this case. Under these circumstances we believe there must be clear and convincing proof that the claimant was actually in the labor market and was anxious and willing to work. Claimant's testimony at the hearing and his statements at the local office fall short of such proof. We reach the conclusion that claimant was unavailable for employment for the period April 8 to 17, 1949. The initial determination should have been issued on that basis alone.

Appeal Board Decision: The initial determination made by the local office is sustained, as above modified. The decision of the referee is reversed. (December 14, 1949)

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A-750-906

Index No. 730.3

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

January 31, 1950

INTERPRETATION SERVICE- BENEFIT CLAIMS  
AVAILABILITY AND CAPABILITY  
Military Service

Appeal Board Case Number 21,025-49

AVAILABILITY -UNITED STATES ARMY RESERVE OFFICER ON VOLUNTARY ACTIVE DUTY

United States Army Reserve Officer on voluntary active duty for two weeks receiving regular officer's pay was held unavailable for employment. Although claimant at his own request could be released from duty to accept employment, it was doubtful whether such application could be acted upon before expiration of his short period of service.

Referee's Decision: The initial determination of the local office that claimant was unavailable for employment from April 11, 1949 to April 25, 1949 is overruled. (August 11, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant worked as an account clerk in New York City from April 26, 1948 to February 28, 1949 when he was laid off. He filed a claim for benefits and registered for employment on March 2, 1949. Claimant is a United States Reserve Officer. He reported for active duty as a second lieutenant in the Army during the period from April 11, 1949 to April 25,

1949, earning \$180.50. This was the rate of pay received by military officers in his category. He requested this assignment because he "wanted the money". His duties consisted of clerical work in connection with "on the job training". His hours of work were from 8:00 a.m. to 5:00 p.m., five days a week. Claimant contended that if he obtained private employment he would take the necessary steps to be relieved of this assignment. Claimant at his own request could be relieved of his duties as an Army officer during his period of service. In such a case, his application would have to be submitted through the proper channels and whether or not his request to be relieved of his duties would be granted was subject to the discretion of his commanding officer. Claimant admitted that he might encounter difficulty in expediting his request for leave before his short term of service expired. In the event that his request for leave was granted his pay would be reduced accordingly. The local office issued an initial determination that claimant was unavailable for employment from April 11, 1949 to April 25, 1949. His claim was reinstated as of April 26, 1949. He contested the determination and requested a hearing.

Appeal Board Opinion: The referee overruled the initial determination of the local office, relying on Appeal Board, 2387-40. The case cited has no application to the situation in the instant case. There, the claimant, an enlisted man, was in the service of the National Guard for a period of two weeks on a compulsory basis and received only \$1 a day for incidental expenses. It was then the established policy of the National Guard to release men promptly in cases where an offer of employment was made to an enlisted man who was unemployed at the time that he entered the service. In the instant case claimant voluntarily applied for the assignment because he wanted to earn some money. He received the regular officers' pay for his services. He could not be released from duty without the approval of his commanding officer. In the event that he had applied to be relieved of his duties, it is doubtful whether, his application could be acted upon before the expiration of his short period of service. Under all the facts and circumstances, it must be held that claimant was not available for employment within the meaning of the Unemployment Insurance Law.

Appeal Board Decision: The initial determination of the local office that claimant was unavailable for employment from April 11, 1949 to April 25, 1949 is sustained. The decision of the referee is reversed. (December 30, 1949)

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A-750-909

Index No. 1325-7

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

April 9, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
STRIKE OR OTHER INDUSTRIAL  
CONTROVERSY  
Termination of

Appeal Board Case Number 20,677-49

STRIKE; TERMINATION OF – EMPLOYER'S DISCONTINUANCE OF BUSINESS

A strike suspension ends after the date on which the employer discontinues business. The strike ceases to exist as of that date.

Referee's Decision: The suspension of claimant's right to benefits imposed because of claimant's loss of employment due to industrial controversy in the establishment in which he was employed was not terminated as of April 1, 1949, the date the employer discontinued business. (July 13, 1949)

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, a sample maker of dresses, filed for benefits on April 6, 1949, and by an initial determination her benefits were suspended for seven weeks from March 23 because she lost her employment due to an industrial controversy in the establishment in which she worked.

On March 22 a representative of the union of which claimant was a member visited the premises where claimant worked, and informed the employees that a strike had been called by the union, and the claimant and the other employees ceased working. The claimant picketed the premises of the employer for several days.

Claimant went to the employer some days later to obtain her pay and she was informed by one of the proprietors that he was going out of business. . . .

\* \* \* \* \*

It was conceded on behalf of the claimant that she lost her employment because of a strike in the establishment in which she was employed, however it was contended that the suspension of benefits resulting therefrom should be terminated as of April 1, at which date the employer discontinued and liquidated his business, or as of the date that the claimant first obtained employment after the date of her suspension.

We make additional findings of fact as follows: Claimant's former employer discontinued business on April 1, 1949. Operations were terminated as of that date and liquidation of the business was started. Claimant was subsequently employed on April 19 and April 20, 1949. The local office issued an initial determination holding that claimant lost her employment as a result of a strike, lockout or other industrial controversy in the establishment in which she was employed. It was also held that claimant's subsequent employment did not terminate the suspension previously imposed because of such loss of employment. Claimant requested a hearing and the referee sustained the initial determination of the local office. Claimant appealed.

Appeal Board Opinion: We agree with the conclusion reached by the referee that claimant lost her employment as a result of a strike, lockout or other industrial controversy in the establishment in which she was employed. However, we are not in accord with the referee's determination that claimant's suspension was not terminated as of the date her former employer discontinued business. The strike ceased to exist as of the date the employer discontinued business. The employer-employee relationship ceased as of that date. Thereafter, claimant's unemployment was not attributable to the industrial controversy but to the employer's decision to go out of business. It follows, therefore, that when claimant filed for benefits

subsequent to the date on which her former employer had discontinued business, she was unemployed because of a lack of work. The suspension period should not have been imposed. Our disposition of this case renders it unnecessary to pass upon the remaining issue as to whether or not claimant's employment on April 19 and 20, 1949, broke the suspension period.

Appeal Board Decision: The initial determination of the local office, suspending claimant's right to benefits for a period of seven consecutive weeks from March 23, 1949, upon the ground that she lost her employment as a result of a strike, lockout or other industrial controversy in the establishment in which she was employed, is modified to the extent that the said suspension period is terminated as of April 1, 1949. The decision of the referee is modified accordingly. (January 27, 1950)

### COMMENTS

A strike applies until the earlier of the following:

The expiration of seven consecutive weeks beginning with the day after claimant lost his employment because of the strike.

The date after termination of the strike.

The termination of a strike is usually achieved through a settlement of the dispute, accompanied by resumption of work by the striking employees. However, as is shown in the above case, a strike, and similarly a lockout or other industrial controversy, may also terminate in another manner.

Whatever form the termination takes, the effect under the Unemployment Insurance Law is the same: The suspension no longer applies "beginning with the day after such strike, lockout, or other industrial controversy has terminated" (Section 592 subd. 1).

The language in the Appeal Board's decision to the effect that the "employer-employee relationship ceased as of that date" and that "claimant's unemployment was not attributable to the industrial controversy but to the employer's decision to go out of business" does not add essential considerations. The definite statutory clause, quoted in the foregoing paragraph, specifies that the suspension ends with the termination of the strike; nothing further is needed.

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A-750-911

Index No. 1215A-3

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

April 3, 1950

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

Appeal Board Case Number 21,049-49

OFFER – WHAT CONSTITUTES; REQUEST TO VISIT EMPLOYER TO BARGAIN FOR  
HIGHER SALARY DENIED

Unwillingness to accept referral to a job at a wage rate fixed by the employer in his job order constitutes refusal of employment even though claimant requests permission to contact the employer in order to bargain for a higher salary, such request being denied in accordance with

established policy. The refusal was held to be without good cause; the offered wages were at the prevailing rate.

Referee's Decision: The initial determination of the local office that claimant refused employment without good cause is overruled. (August 19, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant last worked from 1938 to February 28, 1949 as a secretary to the manager of a corporation in New York City. She started at \$45 a week and her terminal pay was \$60 a week. She was laid off due to business conditions. Claimant filed a claim for benefits on March 1, 1949. She was classified as a secretary. On April 26, 1949 she was referred to a job as secretary to the vice president of a corporation, paying \$55 for a five-day week. The wages offered were at prevailing rate. Claimant stated that she would not accept less than \$60 a week and requested permission of the employment interviewer to contact the prospective employer in order to bargain for a higher salary. According to her signed statement of May 4, 1949, if the employer offered her \$55 to start with an increase to \$60 a week after a few months, she would have accepted the job. In accordance with the policies of the placement service, claimant's request was denied. The local office issued an initial determination holding that claimant refused employment on April 26, 1949 without good cause. At the hearing claimant denied that she refused the referral in question. She testified that she expressed a preference for \$60 a week in view of her previous experience as a secretary and her short period of unemployment at the time of the referral.

Appeal Board Opinion: The referee overruled the determination on the premise that claimant's request for an opportunity to contact the employer in order to discuss the salary question did not constitute a refusal of the offer. He pointed out that claimant's stipulation of a salary of \$60 a week was merely an expression of the evaluation of her services and further, since she was inexperienced, she did not know that she would be required to accept employment at the prevailing rate. Appeal Board, 16,131-47, on which the referee relied, is not decisive of the issue herein. The job to which claimant was referred was in her occupation classification and the wages offered were not substantially less favorable to her than those prevailing for similar work in the locality. Whether or not claimant was advised that her refusal to accept employment at the prevailing rate would result in her disqualification is not material to the issue (Matter of Turitz, 267 App. Div. 846, reversing Appeal Board 9183-43). A consideration of all circumstances compels the conclusion that claimant was properly disqualified for refusal of employment without good cause.

Appeal Board Decision: The initial determination of the local office that claimant refused employment without good cause is sustained. The decision of the referee is reversed. (January 13, 1950)

### COMMENTS

Two Appeal Board decisions with somewhat similar facts but opposite results were previously reported. They are Case #14,994-47 Case #16,131-47. There are, however, significant differences from the case here reported.

The employer's job order in Case #14,994-47 was for "\$35. Up per week;" the claimant was only told that the wage offered was \$35. Denial of referral for the purpose of bargaining for wages better than \$35 was construed by the Appeal Board as constituting withdrawal of the offer under the circumstances of the case. It could also be reasoned that the claimant did not

refuse the true offer (which was for \$35 up) because it was never made; that, in effect, merely a non-existing offer was "refused;" and that, as a consequence, there was no refusal within the meaning of the statute.

The offer in case (#16,131-47) was at the rate of \$35 to \$40." The claimant asked for permission to negotiate for \$40. The Appeal Board found that the prevailing wage were above \$40. Therefore, to the extent that a refusal is involved, it was with good cause.

Another instance, where the claimant, in a manner similar to that of the case here reported, attempted to modify a definite and specific offer by a request for permission to negotiate for more convenient hours of work, is Case #14,920-47. Claimant's action constituted a refusal within the meaning of the statute. This refusal was held to be without good cause under the circumstances of the case.

This comparison shows, first of all, that there is a refusal when a claimant seeks modification of fixed and definite terms of an offer. Whether such refusal is with or without good cause will depend on the circumstances of the case. It shows further regarding job offers at a range of wages or other terms that, even though there may be a refusal involved, there is not a refusal without good cause when a claimant insists on a specific minimum level within the range if the terms which the claimant is not willing to accept are below the prevailing" standard.

The comparison also points to the advantage of distinguishing among the several elements involved in a refusal disqualification.

There must be a bona fide job offer  
Such offer must be refused.

This refusal must have been without good cause.

All three of these conditions must be met in order that a disqualification may apply. If any of the conditions is not met, no disqualification can be imposed and it is therefore not necessary to establish whether any of the additional two conditions also exists.

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A-750-914

Index No. 855-3

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

April 28, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
CLAIMS, REPORTING, CERTIFICATION  
Ineligibility – disqualification

Appeal Board Case Number 20,495-49

FAILURE TO REPORT EXCUSED WHEN UNCONTESTED DISQUALIFICATION  
DETERMINATION WAS WITHDRAWN

Failure to report is excused if such failure occurs during a disqualification period which is subsequently cancelled by the local office on its own initiative without the claimant having requested a hearing.

Referee's Decision: The initial determination of the local office disqualifying claimant from May 5, 1949 through May 16, 1949 for failure to report at the insurance office is overruled. (June 24,

1949)

Appealed By: Industrial Commissioner

Findings of Fact: A hearing was held at which claimant and a representative of the Industrial Commissioner appeared and testified. Claimant, a clerical work, filed a claim for benefits on April 5, 1949. By initial determination, she was ruled ineligible from May 5 through May 16, because of a failure to report to the insurance office. When claimant filed her claim on April 5, she was told to report again on April 28 at the insurance office. She did so and on that day she was interviewed with respect to the termination of her prior employment. After the conclusion of the interview, an initial determination dated April 28, was issued by mail disqualifying claimant for 42 days effective April 5 because of voluntary leaving of employment without good cause. The last paragraph of the termination reads as follows:

"If you disagree with this initial determination and remain unemployed, you must continue to report to your insurance office as well as to the employment office as directed for the period for which you are claiming benefits or allowances even though the assigned dates for so reporting fall within the period for which you are disqualified for benefits."

When claimant received the determination, she believed it to be correct and decided neither to contest it nor to report during the disqualification termination of that period. The facts were then reviewed by the insurance office and the initial determination was withdrawn. Claimant then requested credit for the period from May 5 (her due date at the insurance office after her appearance there on April 28) through May 16. The initial determination under review denied that request. Claimant's lack of total unemployment and her availability for employment were not disputed.

Appeal Board Opinion and Decision: Although claimant received instructions in her reporting booklet that she was to report each week to the insurance office, claimant was led to reasonably believe that those instructions were superseded by the initial determination. The determination informed her that she was to continue to report to the insurance office if she disagreed with the determination. Claimant, however, agreed with the determination and accordingly did not report at the insurance office until after the period of disqualification. In these circumstances, claimant's failure to report should have been excused. The initial determination is overruled.

### COMMENTS

Instructions given to a claimant when a disqualification is imposed specify that he must continue to report if he contests the disqualification.

This requirement cannot apply if the claimant did not contest the determination. It would be illogical to expect the claimant to report if he believes the disqualification to be correct. It follows that in such cases the technical failure to report should be waived if the local office thereafter establishes on its own motion that an error has been committed and that no disqualifying conditions exist in fact.

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

March 7, 1951

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

Appellate Division Decision

Matter of Machcinski, Bashar,

Brandt and Muir

277 App. Div. 634

INDUSTRIAL CONTROVERSY – "IN THE ESTABLISHMENT," QUESTION OF

Workers who lost their employment as a result of a strike in another plant of the employer situated in a distant locality because production schedules of the plants involved were synchronized, were held not to have lost their employment "because of a strike \* \* in the establishment" in which they were employed. The Court held that the strike did not occur in the same establishment."

Referee's Decision: The initial determination of the local office suspending claimant pursuant to Section 592.1 of the Unemployment Insurance Law, from the accumulation of benefit rights during a period of seven consecutive weeks, on the ground that he lost his employment because of a strike, lockout or other industrial controversy in the establishment in which he was employed, is sustained.

Appeal Board Decision: The initial determination of the local office that claimant lost his employment as a result of a strike in the establishment in which he was employed is overruled. The decision of the referee is reversed.

Appellants: Industrial Commissioner and Ford Motor Company.

Appellate Division Opinion and Decision: These two cases present the same question of law, were argued together and will be decided simultaneously. The facts are not in dispute. The Ford Motor Company (hereinafter referred to as the "company") is a Delaware corporation engaged in the business of manufacturing and selling automobiles, trucks and replacement parts. The company's executive offices and principal plants are located in the State of Michigan. In the operation of its business the company maintains a number of offices, factories, foundries, forges, mills and assembly plants at various places in different states of the United States and abroad. Although many of its plants and offices are spread over a large geographical area, internally the numerous and various operational units are organized to function in seven groups denominated as divisions, designated as "operations" on the company's chart of organization. The divisions are responsible to the vice president in charge of manufacturing, whose own staff is one of seven units comprising the company's entire staff responsible to the executive vice president.

Two divisions primarily assemble automobiles. One division is a depot for parts and accessories for automobiles. Another division is devoted to the company's business in foreign countries. The remaining three divisions fabricate, manufacture, supply and ship to the company's assembly plants manufactured parts and fabricated materials essential to the

production of its automobiles and trucks. Each division is in charge of a general manager. The two assembly divisions each have their own staffs and plants. The Lincoln-Mercury division consists of a staff and four plants, none of which is located in New York State. The company assembly operations division, in addition to its staff, consists of fifteen plants located in a number of states. In the State of New York one of these plants is located at Buffalo and is designated as the Buffalo assembly plant. This is the plant in which the claimants, Machcinski, et al, were employed. Another plant is located at Green Island at which the company manufactures radiators and springs for Ford cars. It makes approximately 2,800 radiators and 3,500 springs per day. These parts are sent to 17 assembly plants and 10 parts depots. The number of radiators and springs to be manufactured at Green Island depends upon the production schedules received from the office of the vice-president in charge of manufacturing in Michigan. This is the plant at which the claimant, Muir, was employed.

These are test cases, the decision of which, pursuant to stipulations, will determine the rights of approximately 1,200 employees at the Buffalo plant and of approximately 375 employees at the Green Island plant. The company's employees in the River Rouge plants, and more particularly in the Dearborn assembly plant, where the controversy arose, are members of a local union, affiliated with the same international union to which the employees of the Buffalo and Green Island plants belong. All of the company's maintenance and production workers in all of its operations generally work under a master contract between the company and this international union. Provision is made for handling local issues between the company and its employees initially on a local basis by the local union and plant manager. If grievances are not settled after passing through two stages at the local level in the grievance procedure, the local union may appeal to the international union for assistance. If the international union is unsuccessful in reaching an agreement in the matter at issue, the dispute is returned to the members of the local union to decide whether or not strike action should be taken. If the membership of the local union votes for a strike, the results of the vote are certified to the international union for its approval before the strike may officially be called by the local union. The company's employees in the Dearborn plant, early in 1949, became dissatisfied with the standards of production which the company had the right to establish for all its assembly plants. The local union having jurisdiction in the River Rouge plant is Local 600, 4,000 of whose members were employed in what is known as the "B" building. It formally took the necessary steps under the established grievance procedures. The grievance not being settled at the local level, the services of the international union were enlisted. When the international union failed in its attempt to adjust the grievance in a satisfactory manner, the membership of Local 600 voted in favor of a strike. This action was approved by the International union. On May 5, 1949, Local 600 consisting of 65,000 men at the River Rouge plants struck, thereby causing a complete stoppage of work there. Pickets were at the gates of the River Rouge plants. No general strike was authorized and none occurred. The strike was settled on May 29, 1949. The employees of the Buffalo and Green Island plants took no part in the strike. The agreement, pursuant to which the employees returned to work in Michigan, was neither submitted to nor concurred in by the membership of the union at the Buffalo or Green Island plants. The claimants and their fellow employees at the Buffalo and Green Island plants were at all times between May 5 and May 28, 1949, the period of the strike, ready and willing to continue to work at the plants.

When the claimants in these cases filed their claims for unemployment insurance benefits in May 1949, the Industrial Commissioner issued initial determinations suspending their rights to benefits for a period of seven consecutive weeks or until the industrial controversy was settled, whichever occurred first, pursuant to Unemployment Insurance Law, Section 592, subdivision 1. Claimants requested hearings before referees and in each case a decision was rendered sustaining the initial determinations of the Commissioner. Claimants then requested a hearing

before an Appeal Board, which consolidated all the cases and rendered one decision involving the claim of Machcinski. The other two claimants, as well as all other claimants at the Buffalo factory, similarly situated, stipulated to be bound by the decision of the Board in the Machcinski case. The referee in the Muir case likewise sustained the decision of the Industrial Commissioner and he also requested a hearing before the Appeal Board. The Appeal Board reversed all the decisions and held that the suspension provision did not apply since the River Rouge plants and the Buffalo and Green Island plants did not constitute one "establishment" as that term is used in the statute.

The following provision of the Unemployment Insurance Law is applicable to these appeals:

"Sec. 492. 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 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 sole issue involved in these cases is whether the assembly plants of the Ford Motor Company located at Buffalo and Green Island, New York, are a part of the same "establishment" as used in the section of the statute above quoted, as the plants of this employer located in the River Rouge, Michigan area, at which a strike concededly took place in May 1949, causing a shut-down of the Buffalo and Green Island plants.

Under Section 592, subdivision 1 of the Unemployment Insurance Law, two elements are necessary before the suspension provision may be invoked:

- "(1) The claimant must have lost his employment 'because of a strike, lockout or other industrial controversy,' and
- (2) Such strike, lockout or other industrial controversy must have occurred 'in the establishment in which he was employed.'"

There is no issue in these cases with respect to requirement (1). The only question, therefore, to be determined by this court is with respect to requirement (2), viz. Whether the Buffalo and Green Island plants and the River Rouge plants are parts of the same establishment.

The progenitor of unemployment insurance statutes in English-speaking countries is the British Unemployment Insurance Act (1 & 2 Geo. V, c. 55-1911). This statute was passed twenty-four years prior to the enactment of the New York Unemployment Insurance Law (Laws of 1935, Chapter 468). The suspension provision in the British statute relating to work stoppages is quite different from our own. That statute provides that where separate branches of work which are commonly carried on as separate businesses in separate premises are in any case carried on in separate departments on the same premises, each of those departments shall be deemed a separate factory or work shop, as the case may be. Unlike the British statute, our statute never has used the words, "factory work shop or other premises," but merely uses the word "establishment." The British statute also contains escape provisions to the effect that the suspension shall not apply if the claimant is not participating in or financing or directly interested in the trade dispute which caused the work stoppage, and does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage is taking place, any of whom are

participating in or financing or directly interested in the dispute. Our statute contains no such provisions.

Most of the sister states enacted unemployment insurance statutes shortly after 1935. They were encouraged and assisted by the Federal government in the preparation and enactment of these laws. As a guide in their preparation, the Federal Social Security Board in 1936, prepared for the use of the various states a "draft bill" modeled generally after the British statute. Many of the states incorporated this provision in their statutes almost verbatim. We never adopted that statute. Under our law there is no requirement or participation, financial aid or interest, nor is there any provision which deems separate branches of work as separate factories, workshops or premises.

Unemployment compensation statutes were enacted in various states during a period of distress and were designed to relieve the hardship caused by unemployment due to no fault of the employee. The legislative purpose behind the enactment of our act is to be found in the legislative declaration of public policy in Section 501. There, the legislature stated that in its considered judgment the public good and the well being of the wage earners of this state require the enactment of this measure for the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own. This is a remedial statute, a humanitarian statute, and should be construed accordingly. It is the general rule that a liberal construction is accorded statutes which are regarded by courts as humanitarian or which are grounded on a humane public policy. In the two cases that we are considering the unemployment was involuntary. These employees had nothing to do with the stoppage of work in the Detroit plant. They were not consulted about the work stoppage or with the prosecution of the strike and clearly they had nothing to do with the settlement. They are the innocent victims of a situation wholly beyond their control. The question which we have to decide is whether these claimants lost their employment because of a strike in the establishment in which they were employed within the meaning of Section 592, subdivision 1 of the Unemployment Insurance Law.

Claimants contend that the word, "establishment" should be construed to apply only to the plant in which they were engaged in the particular assembly operation and that consequently they did not lose their employment because of a strike in the establishment in which they were employed. Appellants contend that the employer's organization for the production of motor vehicles is the "establishment" within the meaning of the statute and, therefore, claimants did lose their employment because of the strike in the establishment in which they were employed.

The pioneer court decision in this country on the question before us is Spiehlmann v. Industrial Commission, 236 Misc. 240. In that case the employer, Nash Kelvinator Corporation, manufactured Nash Automobiles. Its body plant was at Milwaukee, Wisconsin, and it had an assembly plant at Kenosha, Wisconsin, forty miles distant. The operations were highly synchronized and centrally controlled. A strike was called at the Kenosha plant, which forced the closing of the Milwaukee plant. The Supreme Court of Wisconsin held that the employees of the Milwaukee plant were subject to the suspension because the strike was in the "establishment" in which they were employed. The provision of the Wisconsin Unemployment Reserves and Compensation Act, reads as follows:

"An employee who has left (or partially or totally lost) his employment with an employer because of a strike or other bona fide labor dispute shall not be eligible for benefits from such (or any previous) employer's account for any week in which such strike or other bona fide labor dispute is in active progress in the establishment in which he is or was employed."

In 1941 a case, similar to the Spielmann case, arose in the State of Michigan (Chrysler Corp. v. Smith, 297 Mich. 438).

That case also involved an automobile manufacturer whose plants were closely integrated and dependent one upon the other. There were nine coordinated plants in the Detroit area. The strike took place in one of the key plants which supplied parts to the other plants. The strike caused a closing down of the plants to which the parts were supplied. The Michigan unemployment insurance statute contained a provision which required that the dispute be in the "establishment" in which the claimant was employed. The Supreme Court of Michigan held that all the employees of all the plants were ineligible for benefits because such plants constituted one establishment. In its decision the court also quoted from the Spielmann case. These are the two cases upon which the appellants rely for reversal.

The Alabama Unemployment Compensation Law contains a provision disqualifying claimants for benefits "for any week in which his total or partial unemployment is directly due to a labor dispute still in active progress in the establishment in which he is or was last employed."

In Tennessee Coal, Iron and R. Co. V. Martin, 33 Ala. App. 502,aff'd 251 Ala. 153, the courts were called upon to apply this statute. In an opinion by the Alabama Court of Appeals, which was approved by the Alabama Supreme Court, recognition was afforded the validity of the tests of "unity of management and integrality of function." In applying those tests to that case, it was found that employees in coal mines were not employees of a single establishment comprising the employer's railroads, steel mills or mines and coal mines, even though there was some degree of integration. The Court of Appeals distinguished the Spielmann and Chrysler cases, supra, on the ground that the "degree of coordination or integration" in those cases was "vastly different from the integration and coordination present in the instant case." It was there pointed out that the integration was between entirely different kinds of manufacturing enterprises, which were commonly conducted as separate businesses, and that "there is a significant difference of degree between an assembly line integration of finished products, such as was present in the Spielmann case, supra, and an integration of entirely different types of raw material production and processing plants as exist in this case."

The Minnesota Employment and Security Law contains disqualification clauses relating to labor disputes in the "establishment." Cases involving Ford Motor Company employees employed at plants in that state, who became unemployed as the result of the strike at the River Rouge plants, have been held not to be subject to the disqualification provision (Nordling v. Ford Motor Company, 42 N.W. (2d) 576). The opinion in that case states that the word "establishment" was never meant or intended to mean an active organization but a separate unit. In discussing the Spielmann and Chrysler cases, supra, the Minnesota court had this to say:

"Rather than distinguish the cases on differing facts, we prefer to place decision on the broader ground that we believe that the test of functional integrality, general unity, and physical proximity should not be adopted as an absolute test in all cases of this type. No doubt, these factors are elements that should be taken into consideration in determining the ultimate question of whether a factory, plant, or unit of a larger industry is a separate establishment within the meaning of our employment and security law.

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"We believe the better rule to be that these factors, together with other facts must be taken into consideration in determining whether the unit under consideration is

in fact a separate establishment from the standpoint of employment."

The Superior Court of New Jersey, Appellate Division, in Ford Motor Company v. New Jersey Department of Labor and Industry, 7 NJ Super. 30, subsequently affirmed by the Supreme Court of New Jersey, \_\_\_ NJ \_\_\_, rendered a decision construing and applying the disqualification provision contained in the New Jersey Unemployment Compensation Law which uses the words "factory, establishment or other premises at which he is or was last employed." One of the claimants there was an employee of Ford Motor Company at its assembly plant at Edgewater, New Jersey, and the other was an employee of that company at its assembly plant at Metuchen, New Jersey. They were laid off because of lack of materials as a result of the May 1949, strike at the Ford plants in Michigan, the same strike which is involved in these proceedings. These employees filed for benefits and the question presented was whether they had been employed at the "factory, establishment or other premises" at which the stoppage of work occurred. The New Jersey courts apparently refused to follow the Spielmann and Chrysler cases, supra.

In Tucker v. Atlantic Smelting and Refining Co., 55 Atl. 2d 692, a strike in the employer's Utah Smelter had resulted in a shutdown of a refinery owned and operated by the same employer in Maryland. The Maryland Court of Appeals, upholding the Maryland claimants' right to unemployment benefits, reviewed the facts of the Spielmann case and held it not applicable, primarily because of the lack of physical proximity such as there had been in the Wisconsin situation. In like manner, the Chrysler decision was also rejected. The Maryland Court said

"It would be futile to attempt to fix a precise limit (whether 2,000 miles more or less) of 'physical proximity'. It is sufficient that in the ordinary use of words, a plant at Farfield (Utah) and one at Baltimore would not be called one 'establishment'."

Holdings similar to the Tucker decision are to be found in Walgreen Co. v. Murphy, 386 Ill. 32. In that case the Illinois Supreme Court said:

"The words 'establishment' and 'premises' \* \* \* are so commonly understood as units of place that further definition is superfluous \* \* \* Complete geographic isolation \* \* \* is sufficient to justify classification of the warehouse as an establishment."

In Phillips, Inc. v. Walling, 325 U.S. 490, the United States Supreme Court in interpreting the phrase "in the establishment" as found in the Fair Labor Standards Act, held that it was used in that act as "normally used in business and in government – as meaning a distinct physical place of business."

The question involved here has never been passed upon by the courts of this state. We have examined all the decisions on the subject called to our attention by the attorneys for the respective parties. The authorities in other jurisdictions are helpful to us in arriving at a proper decision only to the extent that they are well reasoned and the grounds upon which they are presented appear to us to be sound. After all, however, we must construe our own law and apply the facts as shown by the record to the laws thus construed.

In our opinion we believe the word "establishment" as used in the statute means the place where the employee was last employed. Obviously, the legislature never intended by the use of the word "establishment" to include all the plants of the Ford Motor Company, situate as they are in so many states of the union and in foreign countries. To adopt the appellant's contention would require us to hold that a few employees in any of the employer's plants, in any part of

this country, can prevent the workers in the Buffalo and Green Island plants from earning a livelihood or, in lieu thereof, from getting the insignificant amount of unemployment insurance that is available to them under the statute.

We are convinced that the solution of the problem before us is to be found in determining from all the facts available whether the Buffalo and Green Island plants under consideration are separate establishments from the standpoint of employment and not whether they are to be regarded as separate enterprises from the standpoint of management or for the more efficient production of manufactured products. In construing the statute before us we approach the subject from the standpoint of employment rather than management in so doing we have no hesitancy in concluding that the findings of the Unemployment Board are amply sustained by the evidence.

In our opinion we think the Unemployment Insurance Appeal Board properly rejected the contention of the appellants. The conclusion which the Board reached is a just and an equitable one. It is our solemn duty to give this statute a liberal and a humanitarian interpretation.

The decisions appealed from are hereby affirmed with costs to respondents. (1/10/51)

### COMMENTS

Workers employed at the employer's plant in New York lost their employment as a result of an industrial controversy in the employer's plant in Michigan. The Appellate Division held, in part, that "the legislature never intended by the use of the word 'establishment' to include all the plants of the Ford Motor Company, situate as they are in so many states of the union and in foreign countries." The Court concluded that the Michigan plant and plants in New York were separate establishments. Claimants employed in Buffalo and Green Island therefore did not lose their employment because of industrial controversy in the establishment in which they were employed.

The reasoning of the Court in this case was based on the specific facts and circumstances surrounding the Ford Strike in Michigan and its relation to the employer's plants in New York. The language of the Court does not appear to warrant a broad use of the principles enunciated to all instances involving separate premises of the same employer.

The salient part of the Court Decision is probably this: "\* \* \* The solution of the problem \* \* \* is to be found in determining from all the facts available whether the plants under consideration are separate establishments from the standpoint of employment and not whether they are to be regarded as separate enterprises from the standpoint of management or for the more efficient production of manufactured products."  
(Underscoring supplied)

This can be taken to mean that a common sense evaluation will furnish the answer. If under such evaluation the operations, although conducted on separate premises, "belong together," there is a single establishment. Expressed otherwise, there is a single establishment from the standpoint of employment, if the employment is so interrelated that the "man on the street" would recognize the several units as being part and parcel of one place of employment. Thus, a factory in Brooklyn and its management offices in Manhattan, or retail stores in the Metropolitan Areas of New York City and a warehouse across the river in New Jersey would represent a single establishment. (See Appeal Board Cases Nos. 18,161-48 and 18,361-48; and Appeal Board Case No. 14,888-47).

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

May 26, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
INDUSTRIAL CONTROVERSY

Question of

Appeal Board Case Number 20,237-49LOCKOUT BY EMPLOYER – INDUSTRIAL CONTROVERSY DISQUALIFICATION,  
QUESTION OF

The contract between members of an employer's association and a Union have expired, negotiations for a new contract having reached an impasse, and a strike having been called by the Union against one of the employers, the other employers ceased operations in view of that strike. Employees of such other employers becoming unemployed as a result of the cessation of operations were held to be subject to a suspension for loss of employment "because of strike, lockout or industrial controversy in the establishment" of each of the employers.

Referee's Decision and Appellants: Claimant appealed from the decisions of the referee sustaining the initial determinations of the local office suspending the right of claimants to accumulate benefit rights for a period of seven consecutive weeks beginning with the day after they lost their employment because of a strike, lockout or other industrial controversy in the establishment in which employed. The employers appealed from those portions of the decisions of the referee which characterized the dispute as a "lockout."

Referee's Findings of Fact: Combined hearings were held at which appeared the claimants, their attorneys, the employers, their attorney, and a representative of the Industrial Commissioner. Testimony was taken. The parties stipulated that the case of the claimant, James Kenney, be regarded as typical of the cases involving production workers in the employers' establishments and that the case of the claimant, Hyman Goldstein, be regarded as typical of the cases involving the drivers. It was further stipulated that the cases of all employees of the six employers involved whether included in the present omnibus proceedings or not, be decided on the basis of this decision without separate hearings in each case and the claimants through their attorney waived the statutory notice of hearing in each case. Six employers are involved. These are Continental Baking Company, Ward Baking Company, Purity Bakeries Corporation, Grennan Bakeries, Inc., Drake Bakeries, Inc. and General Baking Company. All manufacture bread and cake in separate establishments located in New York City. All six, together with other bakeries, participate in an employers' organization known as the New York City Bakery Employer Labor Council. The inside production workers of the employers are members of Local 50 of the Bakery and Confectionery Workers Union. The drivers are members of Local 550, Bakery Drivers Local Union of the International Brotherhood of Teamsters and Chauffeurs. All the claimants filed claims for benefits at various insurance offices throughout the city on the last day of February or in the early days of March 1949. By initial determinations effective on different dates, in or about the period mentioned, their benefits were suspended for seven weeks for loss of employment due to a strike, lockout or other industrial controversy in the establishments in which they were employed. The employers reported to the respective insurance offices that all the claimants had lost their employment due to a strike. Both unions were represented by the same attorney. The employers through the

Council had negotiated master contracts with both unions. The contract with Local 550 covering drivers expired on January 31, 1949 and the contract with Local 50 covering production workers expired on May 1, 1949. These master contracts were supplemented by individual contracts with each of the bakeries. Prior to the expiration of the Local 550 contract, negotiations were conducted between the Council and the union for an extension thereof. Demands were made by the union affecting working hours, wages, a welfare and pension plan and vacations. The employers through the council made counter-offers which were rejected by the union. The contract was extended orally in the course of continued negotiations. Since the employers supplied a substantial percentage of bread consumed in the metropolitan area, appointed a citizens' committee to aid in the negotiations. The negotiations continued until about February 24, when, the employers contended, the president of Local 550 gave oral notice to the employers' representatives that all six establishments would be struck. This was denied by the union, which insisted that only Continental was given a strike notice. On February 25, Local 550 gave notice by telegram to Continental that a strike by this local would commence on February 28, at 12:01 a.m. On the same day Local 550 gave similar notice to the Council that a strike had been called against Continental, that the Local was advising its members to continue working for the other employers until further notice and that the union was prepared to continue negotiations on call. On February 27, the Council sent a telegram to Local 550 acknowledging receipt of its strike notice against Continental. The telegram stated that in view of this action and the confusion and uncertainty in connection therewith, in the event Continental or any of the other companies which are members of the council were struck by the union, such other companies would cease operations. On February 26 each of the five employers other than Continental, sent telegrams to all of its workers, including both production workers and drivers, advising them that because of the strike by Local 550, deliveries could not be made commencing Monday, February 28, and therefore the employees were not to report for duty until further notice. On the same day the five employers notified Local 550 of this action. In all of the establishments except that of Drake, the last day on which work was done was Saturday, February 26. In the Drake bakery, the drivers were permitted to make deliveries only on Monday, February 28. Otherwise, all six plants ceased operation and remained closed to the date of hearing. Prior to the cessation of operations, Local 550 posted a bulletin dated February 25, in all of the bakeries, given the status of the negotiations and referring to the strike notice against Continental, effective February 28. All members of Local 550 employed by other employers were advised to continue working until further notice unless locked out. The six bakeries operate on a seven day a week basis. When the production workers and drivers other than those of Continental and Drake reported for work on February 27 or 28 in accordance with their work schedule, they found each bakery closed and no employees at work except maintenance workers, who although members of Local 50, were permitted by the unions to work. At Drake's the shut down came on March 1. At Continental, the drivers immediately began picketing at the time set for the strike and soon thereafter the production workers joined the picket lines there. Shortly after February 28, pickets appeared at the other five establishments and while the evidence is not clear as to whether or not the production workers joined with the drivers immediately in picketing these five establishments, it is conceded that some production workers were on the picket lines at all six bakeries. The picket signs at all six bakeries were the same and bore the legend that the workers had been locked out. At all six bakeries there were materials on hand sufficient to operate the plants on February 28 and for a substantial period thereafter.

Referee's Opinion and Decision: The employers contend that the employees at all six bakeries lost their employment because of a strike. The Commissioner's representative maintains that regardless of whether or not the cause was a strike or lockout, the suspensions were correctly issued. The attorney for both unions concedes that all of the workers at Continental involved in

these proceedings lost their employment due to a strike and no contention is made that the imposition of the seven weeks' suspension against the Continental employees was incorrect. The union attorney, however, maintains that the employees of the other employers are entitled to credit for benefits immediately upon their respective filings. The attorney for the union contends that the action taken by the five employers other than Continental amounted to a "sympathetic lockout," which condition was not defined by or referred to by the Legislature in enacting Section 592.1 of the Unemployment Insurance Law and therefore the statute does not apply. This contention is of no avail. The Appeal board in 12,521-45 ruled in effect that the label placed upon particular facts is not controlling but that the Legislature intended to cover every type of industrial controversy causing loss of employment. Rather than restricting the definition of the action giving rise to suspension, the statute broadens it by the words "or other industrial controversy." The section above referred to provides for a benefit suspension in the event of loss of employment "due to a strike, lockout or other industrial controversy." It plainly refers to a situation such as the one involved here. After February 24, 25, negotiations had reached an impasse. A strike had already been called against one of the employers and the others not unreasonably anticipated that similar action would be taken against them and one by one. Their cessation of operations was, under the circumstances, a unified exhibition of economic power to offset the strike, to enable the Council to enter later negotiations with increased bargaining power. The loss of employment at the five employers' establishments as well as at Continental was the result of the same industrial controversy. (cf. Fierst and Spector, Unemployment Compensation in Labor Disputes, 49 Yale L.J. 461, 473.) In such cases, the statute requires the suspension in order to effectuate a policy of neutrality in industrial controversies; "The provisions of (the statute) are in the nature of an assurance to the people of the state that the state will not participate, insofar as the provisions of this Act may apply, during the first . . . (seven weeks) thereof." (Appeal Board, 907-39.) It was contended by the union that a true lockout exists only to enforce employer demands and that in respect of the claimants not employed by Continental absent any demands by the employers, there was only a "sympathetic lockout" which, it was said, does not warrant a suspension of benefits. Neither of these contentions is sound. There can be a strike unaccompanied by prior demands by the workers (Panzieri-Hogan Co. v. Bender, 205 App. Div. 398, affd 237 N.Y. 553; Hawkhurst S.S. Co. v. Keyser, 34 F. 693, affd. 87 F. 1005; Williams Bros. V. W.H. Berghuys Kolonhandel, [K.B. 1915] 86 L.J.K.B. 334. By like reasoning, there can be a lockout without prior demands by the employers. Strikes and lockouts are parallel if not similar instruments of economic power "usually for the purpose of adjusting an existing dispute over the terms of a labor contract." (Encyclopedia of the Social Sciences, Vol. 14, p. 419.) Thus, in Atchison, T.S.F.R. Co. v. Gee, (140 F. 153), it was stated: "In May 1904 there was what is called a 'lockout' at the shops of the railway company at Ft. Madison, Iowa. This 'lockout' was ordered because the employees were just about to enter upon a strike and the company ordered the machinists discharged, or what is commonly called a 'lockout' before the men could strike." A lockout has been defined as "a temporary withholding or shutting down of work by an employer, in protest against employee actions or to coerce them into accepting his terms." (underscoring supplied) (Peterson, American Labor Unions, p. 260.) In Revere Sugar Refinery v. Marshall, (CCH Unemployment Insurance Service, Mass., Par. 8130, (not officially reported), sometime prior to April 4, 1947, a union gave notice to the employer that a s strike had been authorized and that such stoppage might occur at or after 12:01 on Saturday, April 6. The employer requested that if a strike were called, sufficient men would be left on the job to complete the work then in production. The union refused to give such assurance and on the employer's orders 15 to 20 men were laid off on April 4. On April 5, between 180 and 200 men were laid off. The actual strike was voted on April 9 and went into effect on April 13. The Court held that the workers became unemployed because of a lockout. In Appeal Board, 822-39, a union and an employer had an agreement expiring March 31, 1939. In the latter part of March, negotiations were under

way for a renewal and in the employer's opinion the differences between the parties were irreconcilable. The employer, in order not to have unfinished goods on hand on March 31, suspended operations and laid off some of the workers on March 27. A strike was called on March 31. It was held that "the act of the employer in denying work to the claimant and other employees must be deemed the commencement of a lockout." See also appeal Board, 6,128-41 wherein the factual background is similar. There a contract was made between an employer's association and a union. Negotiations for the renewal of the contract were had prior to its expiration date. The negotiations were not consummated by the expiration date. The union thereupon forbade its members to work for the employers and simultaneously the employers suspended operations. The Appeal Board ruled that there was loss of employment due to an industrial controversy even though no picket line was established. Claimants emphasized that negotiations between the Council and the union had not broken down (except as to Continental) and that what followed, cannot be the basis of the benefit suspension. That negotiations may have continued after February 25, however, is not decisive (Unemployment Compensation Commission v. Aragon, 329 U.S. 143); there were serious points of difference which had already led to a strike against one member of the Council. The retaliatory action of the other employers was a lockout requiring the application of Section 592.1. In Selected Decisions of British Umpire (BU-487, Case No. 437, decided May 29, 1921), it appeared that some quarrymen employed elsewhere struck to secure a wage increase. On orders from the employers' Association, all its members locked out their employees until the strike was settled. Claimant was so locked out and contended in support of his benefit application that he had no dispute with his employers. It was held that "the action of the applicant's employers in locking him out in order to support employers in another district extended the trade dispute to the premises at which the applicant was employed." The applicant's disqualification was sustained. The employers contend that they deemed the strike against Continental a strike against all employer members of the Council. That the union was advised of this position, and that accordingly what ensued was a strike, first against Continental, then against the others. A short answer to this contention is that a lockout is not converted into a strike where an employer shuts its plant following a strike against another employer and with the announcement that the strike is now against the former. To quote the Massachusetts Court in the Revere case, supra,

"Nor is there any significance to the insistence of the employer that his action in laying off the men did not constitute a lockout. The court in applying the Law is governed by the actual facts and not by what the parties called them. In substance the action of the employer constituted a lockout. . ."

I reach a like conclusion. The production workers are subject to the same suspensions as are the drivers even though they were not directly involved at first in the industrial dispute. See Appeal Board, 13,587-46, where the benefits of bakers and packers in a bakery were suspended because they were deprived of employment due to a strike of the drivers in the establishment. See also Matter of Sadowski, 257 App. Div. 529, A-750-43, affirming Appeal Board, 229-38. I find that the last day of work in all of the bakeries except that of Drake was Saturday, February 26, 1949 and that the last day of work at Drake was February 28. Accordingly, the initial determinations are sustained or modified, as the case may be, to be effective February 27, 1949 as to the employees in the five bakeries other than Drake and effective March 1, 1949 as to the employees at Drake.

Appeal Board Findings of Fact: We have reviewed the evidence adduced at the hearings before the referee and we find that such evidence supports the findings of fact made by the referee in the decision rendered by him on June 6, 1949. The Board makes these additional findings of fact: It was stipulated at the hearing before the Board, by and between the representatives of the respective parties herein, that the last day of work at the D.B. Inc. plant was Saturday,

February 26, 1949 and not February 28, 1949 as found by the referee. It was further stipulated that those claimants employed by D.B. Inc. prior to the above dates and involved in this appeal did not work after February 26, 1949, with the exception of two claimants of Local 550, B.D. Union, who are designated as follows: A.D. and H.G. It was also stipulated that the above last mentioned claimants made deliveries in the eastern part of Long Island on February 28, 1949. We find as a fact that an industrial controversy existed in the respective establishments of each of the employers involved herein and that such industrial controversy commenced as of the close of business operations on February 26, 1949. The referee's decision dated June 16, 1949 (Charles Guthbert, et al) incorporated by reference all findings of fact and the opinion as set forth in his decision dated June 6, 1949.

Appeal Board Opinion and Decision: Inasmuch as the referee has already rendered well-reasoned opinions in the decisions rendered by him on June 6 and 16, 1949, we adopt such opinions as the opinion of this Board. Consistent with the Board's finding that an industrial controversy existed at the respective establishments of each of the employers involved herein, and in conformity with Appeal Board and other precedents in situations involving similar circumstances, precise characterization of the dispute is immaterial and unnecessary. It is sufficient for the purposes of the provisions of Section 592.1 of the Law that an industrial controversy existed in the establishment at which each of the claimants was employed. We are persuaded that such was the fact under the circumstances presented in this case. Pertaining to the employers' appeal, we are of the opinion that they were in no wise prejudiced by the decision of the referee insofar as applicable to this proceeding. It does not appear that the employers were aggrieved by the referee's characterization of the dispute. Consequently, they have presented no appealable issue (Appeal board, 19,265-49). The respective individual initial determinations of the various local offices, suspending the accumulation of benefit rights of the claimants herein for a period of seven consecutive weeks upon the ground that said claimants lost their employment because of a strike, lockout or other industrial controversy in the establishment in which each was employed, are sustained except as to the claimants employed by D.B. Inc. The respective individual initial determinations of the various local offices affecting claimants employed by D.B. Inc. are modified by making February 27, 1949, the effective date of each, and as so modified, are sustained. The initial determinations affecting claimants A.D. and H.G. should be made effective as of March 1, 1949. The appeal of the employers is dismissed. The decisions of the referee are modified accordingly and, as so modified, are affirmed. A separate order is to be entered in each case. (February 10, 1950)

#### COMMENT

The Appeal Board refrained from a characterization of the industrial controversy. The referee held that there was a lockout. The employers contended that there was a strike.

Whether there is a "strike" or "lockout" is immaterial under the New York State Unemployment Insurance Law. The consequences are the same. The situation is different under the laws of some other States because different results obtained depending on the nature of the industrial controversy.

Even though there are ample facts in this case to justify the Referee's conclusion that there was a lockout, Local Offices need not reach any conclusion in this respect. Not doing so may be advisable whenever there are sharp contradictory contentions on that point or if the specific facts cannot be ascertained with ease.

The Referee's "Opinion and Decision" is recommended for close study because it discusses several other decisions rendered within and without New York, dealing with problems of strike

and lockout. Several Appeal Board decisions are analyzed.

A-750-917

Index No. 1305A-4  
1305A-5

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

May 26, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
INDUSTRIAL CONTROVERSY

Suspension Period – Effective Date

Appeal Board Case Number 21,135-49

EFFECTIVE DATE OF SUSPENSION – RECEIPT OF ANNUAL LEAVE PAY AND "STAND BY"  
SALARY SUBSEQUENT TO STRIKE

Clerical employees who did not perform actual services after a strike of production workers had commenced, but were given first "advanced" annual paid vacation and then for several weeks their customary salary for "standing by," were held to have continued in employment during the period covered by such payment and to have lost their employment because of the strike as of the end of that period. The suspension of seven weeks began to run thereafter.

Maintenance employees who were terminated at the time the strike commenced without continuation of wage payments, were held to have lost their employment because of a strike as of the date the strike commenced. "Vacation pay" received by them covering a week falling in the middle of the strike period was of no consequence in relation to their benefit rights and to the running of the suspension period.

Referee's Decision and Appellants: The Industrial Commissioner appeals from those portions of the decisions of the referee dated August 16, 1949, August 18, 1949 and three separate decisions dated August 25, 1949, modifying the individual initial determination of the local office in each case to the extent of making the effective date of suspension of each claimant's right to receive benefits the day following cessation of services due to a strike, lockout or other industrial controversy in the establishment in which they were employed. Cross appeals were filed by claimants P.F. (Local Office 411) and F.E.W. respectively, from decisions of the referee dated August 18, 1949 and August 25, 1949, sustaining as modified, the initial determinations of the respective local offices suspending said claimants' right to receive benefits upon the ground that they lost their employment as a result of a strike, lockout or other industrial controversy in the establishment in which they were employed.

Findings of Fact: The employer operates a brewery in the Borough of Manhattan, City of New York. It also maintains several distributing bases throughout the metropolitan area. On April 1, 1949 at 2 a.m., a strike of the production workers and delivery personnel commenced at the employer's establishment. Claimants were not involved in nor did they participate in the strike in any manner. The present claimants are employees who were engaged as salesperson, clerks, maintenance personnel and in other administrative capacities. Except as hereinafter set forth they were not members of any labor union. Claimant O.H., employed as a carpenter, was a member of the labor union having jurisdiction over his occupation. Claimants F.R.L. and P.F. (Local Office 524) were employed as plumbers engaged in the maintenance of beer taps and beer dispensing equipment. They were members of the labor union exercising jurisdiction over their craft. None of these three claimants was involved in the dispute at the employer's

establishment. However, they respected the picket line established at the employer's plant by the striking union and refused to report to work so long as the picket line was maintained. Except for the payment of vacation pay covering the period from April 11 through April 22, 1949, these particular claimants received no remuneration whatsoever until they resumed work at the termination of the strike on June 21, 1949. The remainder of the present claimants continued to receive their regular semi-monthly salaries on the first and fifteenth days of each month until May 15, 1949, when the employer discontinued such payments. Some of the claimants, notably clerks, were continuously occupied at their respective jobs from the commencement of the strike through May 15, 1949, except for brief vacations.

Claimants P.F. (Local Office 511) and R.E.W. were among those workers so occupied. Their services were dispensed with after May 15, 1949 due to a lack of work occasioned by the continuation of the controversy in the employer's establishment. The other claimants were maintained on a stand-by basis, subject to call at the employer's option upon 24 hours notice. The latter did not render any services from April 8, 1949 until after the termination of the strike. The employer had an established policy of awarding one day of paid vacation to every employee for each month of employment for the first year in which a person was employed. Thereafter an employee received two weeks vacation with pay annually. Pursuant to this policy, the annual paid vacation period was advanced to coincide with the period in which claimants received their regular salaries during the course of the strike. The same vacation policy was applied to the three maintenance employees who refused to cross the picket line and who were deemed ineligible by the employer to receive their regular semi-monthly salaries. The regular and vacation payments made during the period ending May 15, 1949 were treated as salaries by the employer for all purposes including unemployment insurance contributions, social security and withholding taxes, workmen's compensation and corporate income taxes. Based upon information received from the employer, the various local offices issued individual initial determinations suspending the right of each claimant to receive benefits for a period of 49 consecutive days upon the ground that claimants lost their employment because of a strike, lockout or other industrial controversy in the establishment in which they were employed. Each of the claimants requested a hearing and the referee modified the initial determination in each case by fixing the effective date thereof as April 9, 1949 for all claimants except claimant H.G., in whose case the effective date was fixed as April 8, 1949; the claimant D.H., in whose case the effective date was fixed as April 16, 1949; the claimants P.B., P.D.P., E.C., H.H.T., W.J.D. and L.J., in whose cases the effective date was fixed as April 23, 1949 and the case of claimant P.F. (Local Office 511), in whose case the effective date of suspension was fixed as May 16, 1949. In the case of claimant F.E.W. the referee modified the initial determination of the local office by fixing the date of suspension of benefit rights as May 14, 1949. With respect to claimants O.H., F.R.L. and P.F. (Local Office 524), the referee modified the respective initial determinations of the local offices in each case by fixing the effective date of suspension of benefit rights of said claimants as April 2, 1949. The Industrial Commissioner and claimants P.F. (Local Office 511) and F.E.W. thereupon appealed to this Board.

Appeal Board Opinion: The referee, in modifying the individual initial determinations of the respective local offices, based his conclusion upon the premise that claimants lost their employment as a result of a strike, lockout or other industrial controversy in the establishment in which they were employed, on the day following which they rendered no services to the employer. We do not subscribe to this view except with respect to the cases of the three employees who were terminated from the payroll because of their refusal to cross the picket line. We are not in accord with the referee's conclusion that to all intents and purposes claimants, with the exceptions noted, were laid off for an indefinite period starting April 8, 1949. The fact that they rendered no services to the employer and were not called upon to do so, is

not decisive of the issue herein. They were at the employer's beck and call at all times during the period for which they were paid their customary salaries. The remuneration paid them was deemed salary for all purposes. Consequently, it cannot be said that such payment amounted to a gratuitous act on the part of the employer. The annual vacation period was advanced by the employer for its convenience in order to take advantage of the temporary lull in productivity due to the industrial controversy existing in the establishment. Significantly, claimants were not given additional vacations during the customary annual vacation period. We are convinced that these claimants were not totally unemployed during the period for which they received their regular salaries or paid vacations even though the employer temporarily waived rendition of services. So long as claimants continued to draw salaries regularly, they were not totally unemployed. When their pay was discontinued on May 15, 1949, claimants' lack of employment thereafter was directly attributable to the strike in the establishment. With respect to those claimants who actually rendered services while being paid, clearly, they were not totally unemployed during the entire period in which they were actively engaged. Their subsequent layoff starting May 16, 1949, during the pendency of the controversy, was likewise directly attributable to the existence of the dispute. Consequently, their loss of employment was due to a strike, lockout or other industrial controversy in the establishment in which they were employed. With respect to claimants O.H., F.R.L and P.F (Local Office 524), there appears to be no dispute that their employment terminated on April 1, 1949 because of the existence of an industrial controversy in the establishment in which they were employed. The vacation pay, which they received during the period of their layoff is inconsequential in that their benefit rights had been suspended at the time and in no event were they entitled to benefits for that period. Moreover, their layoff was for the duration of the strike, an indefinite period. When these claimants received their vacation pay the date of their return to employment was indefinite. We therefore agree with the referee's disposition herein insofar as applicable to these three claimants. The contention of claimants F.E.W. and P.F. (Local Office 511) that their loss of employment was not due to a strike, lockout or other industrial controversy in the establishment in which they were employed, is untenable. Their unemployment was due solely to the existence of the industrial controversy in the establishment in which they were employed and their benefit rights were properly suspended on May 15, 1949.

Appeal Board Decision: The claimants herein with the exception of claimants O.H., F.R.L. and P.F. (Local Office 524) were not totally unemployed for the period April 8, 1949 through May 15, 1949. The respective individual initial determination of the various local offices, except in the cases of claimants O.H., F.R.L. and P.F. (Local Office 524), suspending the accumulation of benefit rights of the claimants herein for a period of seven consecutive weeks upon the ground that said claimants lost their employment because of a strike, lockout or other industrial controversy in the establishment in which they were employed, are sustained or modified, as the case may be, to the extent of making the effective date of such suspension in each case May 16, 1949, and as so modified, are sustained. The respective individual initial determinations of the local offices in the cases of claimants O.H., F.R.L. and P.F. (Local Office 524) are modified to the extent of making the effective date of each thereof April 2, 1949, and as so modified, are sustained. The decisions of the referee are affirmed or modified, as the case may be, in accordance with the foregoing opinion and, as so modified, are affirmed. A separate order is to be entered in each case. (March 24, 1950)

#### COMMENT

The difference between the clerical employees and the maintenance employees is the circumstance that the former were continued in employment for several weeks, whereas the latter were separated upon the commencement and for the duration of the strike. The principles involved are not novel.

Continuation of the employment relationship does not require the performance of work. The relationship is now broken merely because the employer dispenses with rendering of actual services for reasons of his own or because of given circumstances. Paid vacations or other paid leave are illustrations.

If, as the result of a strike, employment is terminated some time after the strike has commenced, the suspension becomes effective as of the date following such termination. If, on the other hand, employment is terminated upon the occurrence of a strike, it is not revived because certain payments, equivalent to wages for specified days or weeks, become due later in view of the provisions of a Union contract.

A-750-919

Index 755 D.2

NEW YORK STATE DEPARTMENT OF LABOR  
UNEMPLOYMENT INSURANCE DIVISION  
ADJUDICATION SERVICES OFFICE  
JUNE 12, 1950

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

AVAILABILITY - "SHORT-TIME WORKER," QUESTION OF

A claimant who for health reasons performed part-time work for approximately six months prior to the filing for benefits was held to be a "short-time worker" as defined in Section 596.3 of the Law and was not held to be unavailable solely because of a restriction to part-time employment.

A.B. 20,457-49

Referee's Decision: The initial determination of the local office was modified to hold claimant ineligible for benefits effective April 29, 1949, instead of March 30, 1949, upon the ground that she was unavailable for employment. (June 14, 1949)

Appealed By: Industrial Commissioner.

Findings of Fact: Claimant, a stenographer and typist, was employed on a fulltime basis from July 1947 to September 1948. Upon the advice of her physician she left this employment because it produced an adverse effect upon her health. Thereafter, for a period of approximately six months claimant was engaged in part-time work. This employment consisted of typing performed at her home for several employers. It was customary for claimant to pick up and deliver work thus assigned to her. Claimant was compelled to discontinue such employment because of inability to travel to and from her home to the establishments maintained by such employers. Claimant filed for benefits on March 30, 1949, at which time she was seeking part-time employment. She was unwilling to accept a full-time job because of her physician's admonition against acceptance of such work. On April 29, 1949, in an interview at the local office, claimant signed a statement disclosing this information. She had worked full-time on April 27, 1949, at her customary occupation. Claimant was compelled to discontinue such work after one day because of the harmful effect upon her physical condition. Commencing June 16, 1949, claimant became re-employed at her customary occupation on a part-time basis. The duration of such employment was several weeks. For a period of three weeks starting July 8, 1949, claimant was employed on a full-time basis. Based upon the interview she had at the local office on April 29, 1949, an initial determination was issued,

effective March 30, 1949, holding claimant ineligible for benefits upon the ground that she was unavailable due to her inability to accept full-time employment. Claimant requested a hearing and the referee modified the initial determination of the local office to the extent of making the effective date there of April 29, 1949. The Industrial Commissioner appealed to this Board.

Appeal Board Opinion: The referee, in modifying the initial determination of the local office fixed the effective date of claimant's disqualification as April 29, 1949, reasoning that that was the first day on which there was any evidence of unavailability. We do not subscribe to this view. The initial determination of unavailability admittedly was based upon claimant's presumed ability to accept part-time employment only. It was alleged that she had been a full-time worker. Claimant's unavailability was improperly based upon this ground. The record indicates that for at least six months prior to filing for benefits, claimant worked on a part-time basis. In our opinion this satisfactorily established a pattern of part-time employment under the circumstances herein. However, it appears that at the time claimant filed for benefits she was physically incapable of performing any of the duties of her customary occupation. Consequently, she was unavailable for employment. This view is buttressed by her subsequent inability to work after but one day of such employment during the period in question due to physical causes. It appears however that starting June 16, 1949 claimant was again able to resume her former occupation on a part-time basis. Commencing with that date she again became available for and capable of employment.

Decision: The initial determination of the local office, holding claimant ineligible for benefits, effective March 3, 1949, upon the ground that she was unavailable for employment, is sustained. As of June 16, 1949, claimant was available for employment and eligible for benefits subject to local office reporting records. The decision of the referee is modified accordingly. (April 14, 1950)

### COMMENTS

Section 595.3 of the Law defines a "short-time worker," in part, as one who for reasons personal to himself "customarily works less than the full-time prevailing in his place of employment." The Appeal Board had previously held that a person who will accept part-time work only, does not meet the statutory requirement of availability unless his previous work history establishes him as a part-time worker (see Interpretation Index 755 D.10) The law does not specify the length of part-time employment required by a claimant to fall within this definition. The following will serve as a guide in determining whether a claimant may be considered a "short-time worker."

The decision in the instant case holds that six months employment as a part-time worker prior to filing for benefits satisfactorily establishes a pattern of part-time employment. The same principle was stated by the Board in A.B. 15,257-47 wherein claimant, for personal reasons, worked ten hours each day on Thursday and Friday for approximately seven consecutive months immediately prior to filing for benefits. The Board stated that such employment established a part-time pattern. The claimant was not held to be unavailable because of a restriction to part-time work of four hours per day, five days each week.

In contrast to the above decisions, the Board in A.B. 17,42648 held that a claimant with a history of part-time employment for slightly over three months immediately prior to filing for benefits, did not establish her status as a short-time worker. In a similar case, A.B. 15,554-47, where a claimant had a history as a full-time worker except for a period of slightly less than four months prior to his filing, the issue of availability was also resolved adversely to the claimant. In the light of these two groups of decisions it appears that a claimant with a history of about at least six months part-time employment immediately prior to the termination of his last

employment falls within the definition of a "short-time worker," but that a shorter period of such employment would probably be insufficient.

As a further guide, the Board in A.B. 17,775-48 ruled that a prior history of simultaneous full-time and part-time work did not affect claimant's status as a full-time worker, and that restriction to part-time employment indicated unavailability.

It should be noted that a claimant can only be considered a short-time worker if he "customarily works less than the full-time prevailing in his place of employment." For instance, an attendant at a drive-in theatre employed evenings during the hours of 7 p.m. to twelve midnight would not be considered a short-time worker since such part-time hours are the customary hours of work in such an establishment.

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A-750-922

Index No. 1730-5

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

June 19, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
VOLUNTARY LEAVING OF EMPLOYMENT

Other personal affairs – vacation

Appeal Board Case Number 21,840-49

VOLUNTARY LEAVING – TO VISIT RELATIVES IN EUROPE

Claimant who previous to his hiring had purchased a ticket and obtained passage to sail to Europe to visit members of his family and advised his employer on accepting employment of this circumstance, and that he could only work for three weeks, held to have voluntarily left his employment without good cause, since at the time of leaving the employer had work for him and such leaving was purely personal not of such a character as to constitute good cause.

Referee's Decision: The initial determination of the local office disqualifying claimant from benefit for 42 days for voluntary leaving of employment without good cause is overruled. (November 14, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant was employed as a carpenter in New York City. In the fall of 1948 he decided to take a trip to Sweden to visit his brothers and sisters whom he had not seen in 28 years. He obtained a passport on January 27, 1949. Because of a large waiting list he was not able to arrange passage to Sweden immediately and early in 1949 he purchased a ticket for April 15, 1949. He continued to work at his job until February 20, 1949, when he was laid off. Claimant filed a claim for benefits on February 21, 1949 and reported to March 20, 1949. On March 21 he obtained another job. He advised the foreman on that job that he could work for only three weeks as he was leaving for Sweden. He worked until April 8. Work was available for him at the date he left his employment. One week later he left on his trip. Upon his return from Sweden, claimant filed a claim for benefits on August 24, 1949. By initial determination dated September 12, 1949 claimant was disqualified from benefits for six weeks to October 4, 1949 for voluntary leaving of employment without good cause. On September 12, 1949 claimant became re-employed as a carpenter.

Appeal Board Opinion: The referee overruled the initial determination of voluntary leaving and held that claimant's desire to visit his family after a lapse of many years and the difficulties of obtaining transportation justified his leaving the work, which he had accepted on a temporary basis while awaiting his previously arranged trip to Sweden. He stated further that, in effect, claimant withdrew from the labor market for the purpose of making this trip. The Commissioner argues on this appeal that the leaving for the purpose of a visit was for such a purely personal reason as not to constitute good cause for the quit. We believe the Commissioner's position in this matter must prevail. When claimant left his employment on April 8, 1949, the employer had work for him. The fact that he accepted the job for three weeks does not alter the effect of his leaving, so far as his right to unemployment insurance is concerned. The reasons advanced by claimant for quitting his temporary job were purely personal and were not of such a character as to constitute good cause for voluntary leaving of employment within the meaning of the Law.

Appeal Board Decision: The initial determination holding that claimant voluntarily left his employment without good cause is sustained. The decision of the referee is reversed. (Dated April 14, 1950; Mailed May 4, 1950)

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A-750-926

Index No. 740.1

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

June 26, 1950

INTERPRETATION SERVICE-BENEFIT CLAIMS  
DETERMINATION OF BENEFITS  
AVAILABILITY AND CAPABILITY  
Pension – Retirement

Appeal Board Case Number 21,966-49

WITHDRAWAL FROM THE LABOR MARKET, QUESTION OF; VOLUNTARY ELECTION TO RETIRE

Claimant who, due to advanced age, elected to retire although light work was available or him at a lower rate had he chosen to request a transfer, and who received a pension from his employer in addition to Federal Old Age Insurance Benefits, held to have withdrawn from the labor market despite his contention of availability for light work.

(See Comment after Decision)

Referee's Decision: The initial determination of the local office that claimant voluntarily left his employment without good cause and that he withdrew from the labor market is overruled. (November 17, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant is 67 years of age. He last worked for 34 years ending June 10, 1949 as a sole leather roller in a shoe factory in Endicott, New York, earning \$1.39 an hour. He was laid off on June 10, 1949 due to lack of work and he was to return to work on July 12, 1949, which he failed to do. Claimant elected to retire effective June 30, 1949 and applied to the employer for his pension, which was granted in the sum of \$62.86 per month. He also

collected social security benefits in the sum of \$37 a month. Claimant filed a claim for benefits on June 13, 1949. The local office issued initial determination, effective July 1, 1949, that he was unavailable for employment. The basis for the determination was that claimant voluntarily retired, indicating withdrawal from the labor market. At the hearing the Industrial Commissioner issued an alternate determination that claimant voluntarily left his employment without good cause. Claimant left his employment because the work was of a strenuous nature and due to his advanced age he was not physically fit to continue it. He expressed a willingness to do light work. This was available in the employer's establishment at 99 cents an hour and the employer was "willing to transfer him to such light work had he requested it. However, claimant's reason for not requesting the transfer was that the employer's rate of pay for light work was too low. Claimant stated that he was available for work such as a watchman with other employers. He admitted that he would lose his pension if he returned to work for his former employer. He applied for work at two other firms.

Appeal Board Opinion: We agree with the referee's conclusions that claimant voluntarily left his employment with good cause. However, we are unable to agree with the referee's ruling that claimant was available for employment during his reporting period. Claimant, due to his advanced age, elected to retire. In addition to his pension from the employer, he received old age retirement benefits. Although light work was available in the employer's plant, he chose not to request a transfer to another department because the rate paid for the type of work which he was capable of doing was inadequate. Considering claimant's age, the circumstances under which he left his employment, it must be held that the initial determination holding that claimant withdrew from the labor market was proper.

Appeal Board Decision: The initial determination of the local office that claimant voluntarily left his employment without good cause is overruled. The initial determination that he was unavailable for employment, effective July 1, 1949, is sustained. The decision of the referee is modified accordingly. (Dated May 12, 1950, Mailed May 24, 1950)

### COMMENTS

In addition to having withdrawn from the labor market claimant was held to have voluntarily left his employment with good cause. Such finding is in accord with A.B. #14,016-46, as follows, appearing at Index 1680-1:

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. (14,016-46; A.-750-776)

The decision deserves close study. It is the second case of voluntary retirement reported in the Interpretation Service. In two of the three other previously reported cases (See Index No.725F-2 and 3), involving mandatory retirement, sufficient evidence of availability and capability was found. In the third of those cases the claimant was held to be available since he was unwilling to accept employment at prevailing wages (Index No. 725F-I).

It is probably true that there is a greater likelihood of unavailability in cases of voluntary retirement than in cases of mandatory retirement. As a matter of fact, when an employee, who could continue to work for the employer, decides to retire, it will be rather unusual for him to

seek other work. There may, of course, be exceptional circumstances such as physical limitations in the performance of the customary work and no possibility of assignment to "lighter" work. Most careful scrutiny is required. This is particularly true if the worker's income upon retirement from employer's pension, Old Age Insurance Benefits, etc., is substantial. Even though mandatory retirement may be a somewhat less pronounced indicator of unavailability than voluntary retirement, common experience shows that most retired workers would not meet the availability or capability requirements of the statute. The observations made above apply to them with practically equal force.

Particular attention should be given to cases in which the retired worker would forfeit rights to retirement pensions, etc., upon the acceptance of work. It is reasonable to assume that he would weigh the moneys he is receiving without work against the wages he can expect. The aforementioned case, reported under Index No. 725F-1, is an illustration.

It will sometimes be important to establish whether or not the retirement was in fact "voluntary" in order to obtain the proper lead, complete reliance cannot always be placed on information originally forthcoming, including that received from an employer. Inconclusive or even misleading information may initially confront Local Offices, particularly if the employee was "induced" or "encouraged" to retire before reaching the compulsory retirement age, or had to choose between "retiring" or being discharged. There is often in such cases no voluntary retirement in the true sense, and to the extent that, technically, a voluntary leaving might be involved, it would be with good cause.

The fact of "retirement" will, in such event, be no stronger indicator of unavailability or incapability than would exist in the event of a mandatory retirement at the compulsory retirement age. As a matter of fact, if the worker's age at the time of such retirement is appreciably below the usual retirement age, any such "retirement" would, in itself, not furnish any indications of unavailability or incapability.

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A-750-928

Index No. 1290B-9

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

June 26, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
REFUSAL OF EMPLOYMENT  
Wages less than customary

Appeal Board Case Number 21,397-49

REFUSAL; PREVAILING WAGES IN SUBURBAN AREA WHERE RESIDING LESS THAN  
FORMER WAGES IN N.Y. WHERE AVAILABILITY IS ALLEGED

Claimant who had moved from NYC to a suburban locality and refused employment in her usual occupation in that locality because of a desire for higher wages, held to have refused employment without good cause since the employment offered was at the prevailing rate in the locality of her residence in which the opening existed. Her sporadic efforts to obtain employment in NYC where salaries for her occupation were higher were held insufficient to support her contention of availability in that area.

Referee's Decision: The initial determination of the local office disqualifying claimant from receiving benefits upon the ground that she refused employment without good cause is overruled. (September 16, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant, a full-charge bookkeeper, was employed with a firm in the City of New York for approximately five years ending October 8, 1948. She voluntarily left her employment on that date due to pregnancy. Claimant's final salary was \$350 per month. On April 5, 1949, after the birth of her child, claimant filed an original claim for benefits. Concededly, she was unavailable for employment and did not report at the local office again until May 2, 1949, when she refiled. On April 29, 1949, claimant changed her residence from New York City to West Hempstead, Long Island, a community located outside the territorial limits of the City of New York. Claimant's mother-in-law took up residence with her at West Hempstead and was available for the care of claimant's infant child in the event claimant became employed. On July 19, 1949, claimant was offered employment in her customary occupation at \$40 per week in a locality near the town in which she had her residence. Claimant refused the proffered employment solely upon the ground that she deemed the salary insufficient. She demanded a minimum of \$55 a week. Evidence before the Board indicates that the prevailing rate for claimant's occupation, in the locality of the job offer, was approximately \$40 weekly. Claimant expressed a willingness to accept employment in New York City where salaries for her occupation were somewhat higher. During the period of her unemployment, claimant contacted her former employer on one occasion in search of employment. She also visited the New York office of the state employment service on two occasions, the last of which was in June 1949. Claimant's other efforts to obtain employment were confined to the locality in which she resides. A communication received from claimant, dated March 25, 1950, indicates that she had been continuously unemployed as of that date. Based upon claimant's refusal of employment, the local office made an initial determination disqualifying her from receiving benefits upon the ground that such refusal was without good cause. Claimant requested a hearing and the referee overruled the initial determination of the local office. The Industrial Commissioner appealed.

Appeal Board Opinion: The referee, in overruling the initial determination, concluded that claimant was justified in refusing the proffered employment because the salary offered was substantially less favorable to her than the rate prevailing for similar work in the New York Labor market. We do not concur in the conclusion reached by the referee. The employment in question offered remuneration in line with the prevailing wage in the locality in which the job opening existed. Claimant's contention that she was available for employment in New York City is not borne out by the record. Her efforts to find employment were sporadic and insufficient to support the referee's conclusion that claimant continued to be an active member of the New York labor market. Claimant's efforts to obtain employment appear to have been mainly confined to the locality in which she had her residence. Since the job offer did not involve a salary substantially less favorable to claimant than the rate prevailing for her occupation in that area, it follows that her refusal of the employment was without good cause.

Appeal Board Decision: The initial determination of the local office disqualifying claimant from receiving benefits upon the ground that she refused employment without good cause is sustained. The decision of the referee is reversed. (Dated April 14, 1950; Mailed May 3, 1950)

#### COMMENTS

This decision is of interest primarily to local offices in the suburban areas surrounding New York City in view of the present trend of rapid development and immigration of city population into suburban areas. However, similar conditions may now, or at a later date, exist elsewhere in the State.

The decision does not necessarily mean that a refusal of employment meeting statutory requirements as to training and prevailing wages is without good cause in all cases where the employment is located in the locality of claimant's residence. It will be reasonable under proper circumstances to allow a claimant an opportunity to obtain work in the area of his former employment. However, the decision indicates that, in order to demonstrate availability in such cases, sincere and individual efforts to obtain such work must be shown and reasonable opportunities for such employment must exist.

A-750-929

Index No. 1605F-2

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

June 26, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
VOLUNTARY LEAVING OF EMPLOYMENT  
Voluntary Leaving or Refusal

Appeal Board Case Number 21,654-49

VOLUNTARY LEAVING OR REFUSAL; RECALL TO FORMER EMPLOYER

Where claimant refuses to return to former employment after layoff where no definite date is set to return, the proper issue is refusal of employment; however, if a definite date is set to return, the issue is one of voluntary leaving.

Referee's Decision: Claimant voluntarily left her employment without good cause. (November 1, 1949)

Appealed By: Claimant

Referee's Findings of Fact: A hearing was held at which claimant and representatives of the Industrial Commissioner appeared and testified. Claimant filed for benefits on June 6, 1949. By initial determination, she was disqualified for a refusal of employment without good cause effective August 8. She was also declared ineligible because of unavailability for employment effective August 8. At the hearing, an additional determination was introduced, disqualifying claimant for voluntary leaving of employment without good cause for 42 days effective August 9. Claimant is a Tuesday reporter, and reported to the insurance office on Tuesday, August 9. Claimant is a sewing machine operator. She has experience on coats, dresses and blouses. She was last employed for nine months in a blouse factory until June 1949, when she was laid off because of lack of work. On August 8, she had an opportunity to return to her former establishment as production had started again. She refused, however, to return because she would have been compelled to join a union. Claimant's objection to joining the union was that she would have had to pay an initiation fee of \$18 and would have been compelled to attend meetings occasionally. Claimant customarily earned \$55 to \$60 a week when she was last employed. She is ready, willing and able to work and is prepared to accept even less than she formerly earned. Claimant has also reconsidered her former opposition to joining a union and would accept employment even if she was required to join such organization.

Referee's Opinion and Decision: In appeal Board, Case 19,644-49, there was a similar situation. In that case, a claimant had been laid off and when he was called back, refused to return. The Appeal Board said:

"The referee ruled that claimant's reason for refusing to return to her former employment was not a meritorious one and he sustained the initial determination of refusal. While we accept the Referee's ruling as to claimant's lack of justification for not returning to work, it is clear that the initial determination of refusal is erroneous and that the proper ruling is voluntary leaving of employment without good cause."

Based upon this precedent, it must be held in this case that the proper ruling is that claimant voluntarily left her last employment without good cause. Claimant did not refuse an offer of employment with another employer. She had an opportunity to return to her former job where the employment relationship had never been severed, but merely suspended. She rejected this opportunity because she did not wish to join a union. That reason was not sufficient under the Unemployment Insurance Law, and, accordingly, claimant must be disqualified for 42 days effective August 9. There is no evidence of unavailability for employment after this period of disqualification. Claimant appears to be ready, willing and able to work and has removed all restrictions as to joining a union. The initial determinations of refusal and unavailability are overruled. The initial determination of voluntary leaving is sustained.

Appeal Board Findings of Fact: After a careful review of the record, testimony and evidence adduced before the referee, and due deliberation having been had thereon, and having found that the referee's findings of fact are fully supported by the evidence in this case, and that no errors of fact appear to have been made, the Board adopts the findings of fact made by the referee as the findings of fact of this Board.

Appeal Board Opinion and Decision: Although we have adopted the findings of fact of the referee we do not concur in the conclusion reached by him. This case is distinguishable from appeal Board, 19,644-49, cited by the referee. In that case the layoff was for a definite period and the employment did not terminate until the claimant, upon her return to work, advised the employer that she was leaving his employ. In the instant case the layoff was absolute and the relationship of employer and employee was terminated at the time the layoff commenced. The claimant at that time was removed from the employer's payroll. Claimant actually refused employment with her former employer at the time that the offer of employment was made. This was a new contract of employment and had no bearing upon her former status with the employer. In view of this, the Board concludes that the claimant, without good cause, refused employment for which she was reasonably fitted by training and experience. The initial determination disqualifying claimant for refusal of employment is sustained. The initial determination of voluntary leaving is overruled. The initial determination of unavailability is academic in view of this decision. The decision of the referee is reversed. (Dated February 24, Mailed March 13, 1950)

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A-750-933

Index No. 1655-6

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

July 12, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
VOLUNTARY LEAVING OF EMPLOYMENT  
Health

VOLUNTARY LEAVING OF EMPLOYMENT – FAILURE TO REQUEST "TRIP OFF" BY  
SEAMAN WHILE ILL

Failure to apply for a "trip off" by a seaman who left his employment at the end of the voyage because of illness, held to constitute a voluntary leaving without good cause.

Referee's Decision: The initial determination of the local office disqualifying claimant for 42 days effective March 29, 1949 upon the ground that claimant voluntarily left his employment without good cause is sustained. (August 24, 1949)

Appealed By: Claimant

Findings of Fact: A hearing was held at which representatives of the employer and of the Industrial Commissioner appeared and testified. Claimant, a refrigeration engineer, refiled a claim for benefits on March 29, 1949. By an initial determination effective that day, claimant was disqualified for 42 days because it was ruled that he voluntarily left his employment without good cause. Claimant was employed for approximately eight and a half months, to March 14, 1949, when he signed off the SS Argentina in New York. A hearing was held on May 23, 1949, at which the employer failed to appear. By decision dated June 7, the initial determination was overruled because upon the evidence submitted at the hearing it was found that the claimant did not sign on again because of the continuing effect of a back injury which he sustained during the course of his employment. The employer applied for re-opening of the case because it had not received the notice of hearing. At the hearing, the employer and the insurance representative consented to have the record in Case 532-420-49R made part of the record of this case since the claimant had in that case testified in regard to his reasons for the termination of his employment. The employer, by the terms of its contract, is required to allow a seaman to take a "trip off" upon an application being made by the seaman for such privilege. It is the employer's contention that the claimant knew, or should have known, of this procedure, and that if he was physically unable to go to work on March 18 when the vessel sailed from New York, that he should have made such application and his job would have been kept open for him when the vessel returned to New York. The vessel sailed on March 18. The round trip takes 38 days. Claimant, when interviewed in the insurance office, stated that he was not able to work from March 14 for a period of two weeks, and that he was able to work at the time he refiled his claim on March 29. He further stated that he did not ask for "relief trip" because he did not know how long his back would bother him.

Referee's Opinion and Decision: The employer's application to reopen Case 532-420-49R is granted. I am accepting the claimant's statement made in the insurance office at the hearing previously held that he was not able to work on March 14 due to a physical condition, and that he was able to work on March 29, when he refiled his claim. Under such circumstances, the claimant should have requested the employer to be permitted to remain off the vessel for its ensuing trip, which application would have been granted. The claimant's failure to make such application because he did not know how long his back would ache does not present a reasonable explanation for failing to make an effort to preserve his job if, he was able to work when the vessel returned to New York. According to the claimant, had he made such application he would have had his job back in 38 days, since he was able to work within two weeks. Under the circumstances, the claimant did not act reasonably. The initial determination is accordingly sustained.

Appealed By: Claimant

Appeal Board Opinion and Decision: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case. The decision of the referee is affirmed. (Dated March 31, Mailed April 20, 1950)

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A-750-934

Index No. 740.3

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

July 12, 1950

INTERPRETATION SERVICE-BENEFIT CLAIMS  
DETERMINATION OF BENEFITS  
AVAILABILITY AND CAPABILITY  
Pension – Retirement

Appeal Board Case Number 22,279-49

AVAILABILITY, QUESTION OF; ELECTION TO RETIRE

Where claimant elected to retire, receiving a substantial pension in addition to Old Age Insurance Benefits, although entitled to apply for deferments on a year-to-year basis until he reached the age of 70, he was held not be in the labor market and unavailable for employment. His alleged willingness to accept employment in another occupation was discounted because of his conduct, particularly in view of his insistence on a salary which he had no reasonable prospect of obtaining since he had no work experience other than that from which he had retired.

Referee's Decision: The initial determination of the local office that claimant was unavailable for employment is overruled. (December 21, 1949)

Appealed By: Industrial Commissioner

Findings of Fact. Claimant is 66 years of age. For 31 years ending July 30, 1948 he had worked as an agent for a large life insurance company. He was retired on the latter date. Under the provisions of the company's insurance and retirement program the normal retirement age for its male employees is 65 years. However, if an contributor requests, and the company approves such request, the contributor may be permitted to continue as an active agent for an additional period of one year. The contributor may also request further extensions on a year-to-year basis until he reaches he 70 birthday. Claimant filed a claim for benefits on September 9, 1949. The local office obtained information from the employer that claimant did not request an extension of his retirement. Claimant's reason for not requesting such an extension was that allegedly he heard the superintendent of the company state at a meeting in his office that such an application would not be granted to any employee reaching the normal retirement age. The local office issued an initial determination that claimant was unavailable for employment effective September 9, 1949. The determination was based on information received from the employer that claimant did not request an extension of his retirement. Claimant was retired at a pension of \$122 per month. In addition, he collected \$42 per month in old age retirement benefits under the Federal Social Security Act. Claimant is in good health and declared his willingness to accept a selling job in a retail business or trade paying at least \$60 a week. Claimant testified that his efforts to obtain employment were unsuccessful.

Appeal Board Opinion: The sole issue on this appeal is whether or not claimant was available for employment. Claimant's work experience is limited to the solicitation of life insurance. Although he had an opportunity to continue in the employment to which his experience was limited, he failed to take advantage of such opportunity. He accepted retirement although he was entitled to apply for a deferment of his retirement on a year-to-year basis until he reached the age of 70. In the light of this conduct, claimant's alleged willingness to accept employment in the selling field, becomes highly doubtful. This particularly so in view of his insistence on a salary of \$60 per week which he has no reasonable prospect of obtaining in view of his lack of experience in any other field except in the sale of life insurance. We are convinced that claimant is not in the labor market at least as of the date of his filing for benefits on September 9, 1949.

Appeal Board Decision: Claimant was unavailable for employment as of September 9, 1949. The initial determination of the local office is sustained. The decision of the referee is reversed. (Dated May 26, 1950; Mailed June 9, 1950)

### COMMENT

This decision should be reviewed in connection with release Serial No. A-750-926, Index 725F-4 (A.B. 21,966-49) dated June 26, 1950.

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A-750-935

Index No. 1650B-7

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

July 12, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
VOLUNTARY LEAVING OF EMPLOYMENT  
Grievances, Miscellaneous

Appeal Board Case Number 22,402-50

### VOLUNTARY LEAVING – DISAPPOINTMENT IN NOT RECEIVING PROMOTION TO HIGHER POSITION

Where claimant voluntarily left her employment because she felt disappointed and aggrieved in not being promoted to a higher position for which she felt better qualified than the incumbent who was younger and had less formal education and seniority, such leaving was held to be without good cause since it was within the employer's province to fix qualifications and to make promotions in the organization.

Referee's Decision: The initial determination of the local office that claimant voluntarily left her employment without good cause is overruled. (December 29, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant filed a claim for benefits on September 13, 1949, in connection with her claim she stated as the reason for her voluntary leaving as follows: "lack of opportunity – boss was prejudiced." The employer reported to the local office that she left because she was

"not satisfied with rate of progress." The local office issued an initial determination that claimant voluntarily left her employment without good cause. Claimant is 22 years of age and was graduated from college in August 1947. In connection with her course she studied commercial subjects and social sciences. She worked from May 1948 to September 2, 1949 in the billing department of a fabric manufacturer. She started as a billing clerk at a salary of \$37.50 a week. Effective December 1, 1948 her salary was increased to \$40 a week. In April 1949 she was assigned the duties of an IBM electromatic operator. No definite promise of promotion or increase in salary was made to claimant at the time she was hired. It was customary for the firm to review the service record of each employee each six months and to grant periodic raises if warranted by the work record of the employee. In July 1949 the employer made some changes in the personnel of the billing department. A male employee occupying the position of Grade II Clerk in the billing department was discharged. The employer appointed another employee who had previously occupied the position of Grade I Clerk to fill the vacancy. This person was a male employee, 19 years of age, who had some high school training and had entered the employ of the company sometime after claimant. Claimant at that time performed the duties of an IBM machine operator and occupied a position which was in the intermediate grade between Grade II and Grade I. The employer considered claimant a capable employee. However, she was not promoted to the higher job because management believed that she lacked sufficient initiative, "drive" and interest, which were required to perform the job properly. Claimant voluntarily left her employment on September 2, 1949 because she felt aggrieved that another person who was younger, who had less formal education and seniority was promoted to the higher job.

Appeal Board Opinion: The referee ruled that although it is the employer's prerogative to effect promotions within the organization, nevertheless, in view of the comparative periods of service and educational background between claimant and the person promoted to the job, that she was justified in leaving her position. We are unable to agree with his conclusion. Claimant's primary reason for leaving her employment was that she was disappointed in not being promoted to the higher position for which she felt she was better qualified than the incumbent. It was within the employer's province to fix the qualifications for the job in question and to make promotions in the organization. It is not contended that claimant was promised the promotion in question. While we are sympathetic to her desire to obtain a promotion, her reasons for leaving did not constitute good cause within the meaning of the Unemployment Insurance Law (Appeal Board 16,328-47)

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.  
(Dated May 26, 1950; Mailed June 9, 1950)

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A-750-937

Index No. 1720-1

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

July 12, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
VOLUNTARY LEAVING OF EMPLOYMENT  
Self-Employment

Appeal Board Case Number 17,480-48

## VOLUNTARY LEAVING OF EMPLOYMENT TO ENTER SELF-EMPLOYMENT

Leaving employment to enter self-employment may constitute good cause for voluntary leaving.

Referee's Decision: Claimant voluntarily left his employment without good cause. (April 2, 1948)

Appealed By: Claimant

Findings of Fact: Claimant was employed from June 1946 to October 31, 1947 by an office machine manufacturer as a flattener. He voluntarily quit his job on the latter date to enter into business with a partner in the operation of a gasoline service station. After three months, he was forced to give up the business because his physical condition prevented him from performing the arduous duties required at the service station. Claimant re-entered the labor market and filed a claim for benefits on January 29, 1948. The local office issued an initial determination that claimant was entitled to benefits, notice of which was sent to his former employer. The latter protested the determination on the ground that claimant should have been disqualified for voluntary leaving of his employment without good cause.

Appeal Board Opinion: Claimant quit his job with the employer to enter into self-employment. Due to his physical incapacity to perform the work in connection with his business, he was forced to sever his connections with it and to re-enter the labor market. The question presented is whether or not under such circumstances, claimant left his last employment without good cause within the meaning of the law. A careful consideration of the issue herein leads us to the conclusion that claimant had good cause for leaving. His motives in establishing himself in business in order to better his status have not been questioned. Under our free economic system, encouragement should be lent to the enterprising, who seek in this way to better themselves. This we believe to be socially beneficial and hence to constitute good cause within the law. A similar view is taken in other jurisdictions. The New Jersey Board of Review in discussing this question stated:

"It is a basic principle of our free enterprise system that a man can quit whenever he wants to do so if he thinks he can better himself. Quitting to better one's self is definitely not a bad cause. The New Jersey Legislature by specifically excluding the words 'connected with his work' from the voluntary leaving provision, intended a claimant to be relieved from disqualification if he quit for any good cause regardless of whether or not such cause is connected with his work. Any cause which is socially beneficial is a good cause. And since leaving a job to go into self employment is socially beneficial, it is, therefore, a good cause for leaving." (12137-N.J.R. rep. U.C.I.S. Vol. 11, No. 1.)

To the same effect are 4039-Mich. (U.C.I.S. Vol. 3, No. 7); 4061-Ohio (U.C.I.S. Vol. 3, No. 7); and 3325-Tex. (U.C.I.S. Vol. 3, No. 4.)

It is pointed out that the Industrial Commissioner of this State in Claims Bureau Interpretation Service under the subject heading Voluntary Leaving for Personal Reasons has enunciated the policy that good cause may exist where a claimant leaves his employment to go into business for himself. We are aware of the Pennsylvania court decision expressing the opposite view, which was followed by the referee, but we believe that the New Jersey rule is more in accord with the spirit and purpose of the Unemployment Insurance Law and the policy of this State.

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 reversed. (Dated June 30, 1948)

COMMENT

Although this decision was rendered two years ago, it is being released at this time for emphasis and to clarify some points on which misunderstanding seem to prevail.

In order that an intention of entering self-employment constitute good cause for voluntary leaving employment, an individual must have a definite prospect of self-employment. Leaving employment to seek self-employment or to investigate a business proposition is not good cause.

If a claimant seeks benefits, after having engaged in self-employment, his "last employment" is not the self-employment but the employment under an employee relationship with his last employer prior to the self-employment. Required notices should, therefore, be sent to such last employer. The reasons for separation from employment with that employer should be established and their effect on claimant's benefit rights considered in determining his claim.

A-750-938

Index No. 1010-2

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

July 12, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
HEARINGS AND APPEALS

Hearing, Right to

Appeal Board Case Number 21,562-49

HEARING, RIGHT TO; CONTINUING UNAVAILABILITY DETERMINATION

A claimant who did not request a hearing from a written determination of unavailability within the statutory appeal period but continued to certify to unemployment thereafter, may be heard on the question of availability for the period 20 days prior to the date on which a request for a hearing is filed.

Referee's Decision: The initial determination of the Out-of-State Resident Unit disqualifying claimant from benefits effective March 14, 1949 because she was unavailable for employment and holding that she made a timely request for a hearing is overruled. (October 11, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant filed an interstate claim for benefits against the State of New York in Danville, Virginia on September 2, 1948. She had last worked as a sewing machine operator in New York, which job she left to return with her husband to her former home in Danville. By initial determination she was disqualified for voluntary leaving of employment and withdrawal from the labor market. She did not contest this determination. Claimant refiled in Danville on December 9, 1948 and on such filing it was determined that she had returned to the labor market. After the expiration of the six-week penalty period for voluntary leaving, claimant received four benefit payments to sometime in March 1949. On April 7, 1949 the Out-of-State Resident Union issued another initial determination disqualifying claimant from benefits effective March 14, 1949 on the basis of a letter from her that she lived "in the country" and "didn't have the money to look for a job." Copy of the determination was mailed to claimant. On May 20, 1949 claimant by letter protested the determination, stating that she was available for work. Claimant resides two blocks outside of the city limits of Danville on a business line running to the city at about 15 minute intervals. It takes her about 20 to 25 minutes to reach the center of the city. Claimant

reported weekly at the local employment office. She at no time imposed any restrictions as to the type of work she would accept. She applied for work at a department store as a maid. She sought work at a local tobacco factory and at a large cotton mill and also in a restaurant. No employment was offered her by the local employment service until August 25, 1949 when, according to a report from that office, claimant refused a referral to a domestic service job.

During the period of claimant's reporting prior to the taking of testimony in Virginia on August 23, 1949 there was a large surplus of female workers in the locality and a lack of job openings for her.

Appeal Board Opinion: The first question to be decided on this appeal is whether claimant made a timely request for a hearing. The initial determination was issued on April 7, 1949. Concededly, claimant made no protest of the determination to any person in authority, either in person or by written communication, until May 20, 1949, when she wrote to Albany. Therefore, claimant is not entitled to a hearing as to her alleged availability prior to May 1, 1949. The Industrial Commissioner concedes that claimant has a right to be heard only on the question of her continuing availability from May 1, 1949, which is 20 days prior to her request for a hearing. However, we find no basis for disturbing the referee's decision on the merits of the issue of claimant's availability with respect to the period commencing May 1, 1949 and continuing until August 25, 1949. As the referee pointed out, claimant was willing to accept any employment without restriction, she made diligent efforts to find work and her continued unemployment was due to a lack of work in the area for her. The original initial determination of April 7, 1949 was based on the apparent misconception that claimant was residing in an area inaccessible to any employment and that claimant had made no effort to seek work. The record is sufficiently clear that this was not in accordance with the true facts. As to the period commencing August 25, 1949, doubt exists as to claimant's eligibility for benefits in view of the report that she refused a referral of employment as a domestic on that day. This case is therefore sent back to the Out-of-State Resident for further inquiry and a new initial determination on the issue of claimant's eligibility for benefits on an after August 25, 1949.

Appeal Board Decision: Claimant is not entitled to a hearing on the issue of her availability for employment prior to May 1, 1949 because she did not request a hearing within the statutory period. Claimant was available for employment from May 1, 1949 to and including August 24, 1949. This case is returned to the Out-of-State Resident Unit for further initial determination in accordance with the above opinion. The initial determinations of the Out-of-State Resident Unit are modified accordingly. The decision of the referee is modified accordingly. (Dated May 26, 1950; Mailed June 8, 1950)

#### COMMENT

Determinations for indefinite periods, such as unavailability and incapability determinations, have continuing effect and must be considered as being reiterated for each subsequent day while the claimant continues to claim benefits although no further written determinations are made. An appeal taken more than 20 days after the written determination was issued and which is, therefore, untimely with respect to that determination is considered timely and confers jurisdiction on the Referee to consider the issue regarding the claimant's qualification within the appeal period, i.e., 20 days (the statutory period under our Law) prior to the date such appeal was filed.

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

August 18, 1950

INTERPRETATION SERVICE-BENEFIT CLAIMS  
AVAILABILITY AND CAPABILITY

Domestic Circumstances

Willingness to and efforts to find work

Appeal Board Case Number 21,794-49

QUESTION OF AVAILABILITY AFTER BIRTH OF CHILD

Claimant who filed for benefits after childbirth and alleged that her mother would care for her baby if she accepted employment, was held to be unavailable. It was found that her mother was unable to do so because of her age and physical condition and in view of the distance of her home from claimant's residence. (see comments after Decision)

Referee's Decision: The initial determination of the local office holding claimant ineligible for benefits upon the ground that she was unavailable for employment is overruled.(November 4, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant's work history consists solely of approximately two years employment in a bank. Initially she was engaged in the capacity of receptionist; later she worked as file clerk. Claimant voluntarily terminated such employment in October 1948 because of pregnancy. On August 18, 1949, after the birth of her child, claimant reentered the labor market and filed for benefits. She did not seek re-employment with her former employer because she was unwilling to do filing. Claimant desired employment as a receptionist only. In October 1949, she concluded that it would be difficult for her to obtain such employment since those jobs generally require experience operating a switchboard. Claimant was not qualified for such work. Thereafter, she was willing to accept, employment as a retail sales clerk. Claimant and her husband maintain their residence in the Borough of Brooklyn, City of New York. He is gainfully employed. Claimant's mother, age 62, resides on Staten Island, New York. The mother suffers from arthritis, requiring frequent treatment for that condition. Claimant maintained that her infant child was in the care of her mother while she, claimant, searched for employment. She stated that the same arrangement was possible if she succeeded in obtaining a job. From September 10 through September 18, 1949, claimant personally looked after her child because the baby was ill during that period. The local office made an initial determination holding claimant ineligible for benefits, effective the date of filing, upon the ground that she unavailable for employment. Claimant requested a hearing and the referee overruled the initial determination of the local office. The Industrial Commissioner appealed to this Board.

Appeal Board Opinion: The referee, in overruling the initial determination of the local office, concluded that claimant's domestic responsibilities did not prevent or interfere with her seeking or holding employment. We are not in accord with this view. Claimant's infant child is of tender age requiring considerable parental care. During some portion of claimant's reporting period the child was ill, requiring the personal ministrations of its mother. Concededly, during, this period, claimant was unavailable for employment. We reject claimant's contention that her mother was in a position to care for the child. The mother's age and physical condition render this

contention of claimant tenable. Moreover, it would appear that the distance separating claimant's residence from her mother's home would pose definite obstacles to such an arrangement. We are unimpressed with claimant's alleged efforts to obtain employment. Our conclusion in this respect is bolstered by her failure to seek reemployment with her former employer. The sole reason advanced by claimant for her action was that she found the duties of her last position obnoxious. In the single instance in which claimant was able to furnish any information regarding her effort in search of employment, the information was found to be unreliable upon being checked by the local office. Claimant's original restriction to receptionist work, was a barrier to employment due to her lack of required qualifications. She allegedly sought employment in another field when she awakened to this realization. Claimant's efforts in this direction were sporadic only. She evinced no genuine desire for work. Upon all the facts and circumstances herein, we are persuaded that claimant was unavailable for employment.

Appeal Board Decision: The initial determination of the local office, holding claimant ineligible for benefits upon the ground that she was unavailable for employment, is sustained. The decision of the referee is reversed. (Dated June 16, 1950, mailed July 6, 1950)

#### COMMENTS

This decision stresses the importance of careful examinations and investigations in cases of claimants with children, if any doubt regarding availability exists. Face value acceptance of information furnished by claimants in such cases would often result in erroneous determinations. Alleged willingness and ability of relatives, neighbors, or other persons to take care of claimants' children while working should be verified and the true facts ascertained.

Proof, through sources other than claimant's statement, should be sought, preferably by interviewing the person who will supposedly take care of the children. Factors of significance include the age and physical ability of such person, his or her own working conditions, that is, whether such person is also seeking employment, the distance of such persons residence from claimant's home, any other obligations of such person which would interfere with his or her ability to care for claimant's children, and the nature of the arrangement between the claimant and such person. A thorough investigation of the facts is of particular importance if a claim is filed after childbirth and when there is no evidence of previous employment, concurrent with claimant's responsibilities for the care of her child.

Similar action is indicated if a claimant is responsible for an old or invalid relative requiring care.

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A-750-946

Index No. 1235-2

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

August 18, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
REFUSAL OF EMPLOYMENT  
Temporary Work  
Union Relations

Referee Case Number 526-109-50R

REFUSAL OF ONE DAYS EMPLOYMENT UPON ADVICE OF UNION

Refusal of employment for one day by a recalled employee, the employment being offered as emergency re-employment without regard to seniority but in accordance with the terms of a union agreement, was held to be without good cause, even though the union had advised its members only to accept such employment for a minimum of three days and no disciplinary action by the union flowed from the disregard of such advice.

Initial Determination: Claimant was disqualified effective January 26, 1950 for refusal of employment without good cause; a further determination was made that claimant was overpaid \$52 in benefits.

Request for Hearing by: Claimant

Findings of Fact: A hearing was held at which claimant, his witness, his union attorney, a representative of and a witness for the employer, and a representative of the Industrial Commissioner appeared. Testimony was taken. Claimant refiled for benefits on December 26, 1949. An initial determination was issued disqualifying him as of January 26, 1950 for refusal of employment without good cause. It was further determined, in consequence, that he was overpaid \$52 in benefits. Claimant worked as a lugger for a parcel delivery service in New York City. He was a member of a teamsters' union which was in contractual relationship with his employer. The employer employed about 2100 persons who were members of the union, of which approximately 84 were subject to emergency recall. Article VII Paragraph 5 of the contract between the employer and the union provided as follows:

"In case of emergency re-employment, the Company will call the top two men on the seniority list and if unsuccessful in obtaining either of them for the emergency job, the Company may call in any Local 804 man on the appropriate seniority list without regard to seniority and use such man up to a limit of three days, until a more senior man requests and makes himself available for the work."

Claimant worked for the employer at various times between November 15, 1947 and January 17, 1950. His employment on August 12 and September 12, 1949, was emergency re-employment of one day's duration. On January 25, 1950, he was contacted by the employer for work the following day. He refused to accept one day of employment, contending that under the union agreement he was entitled to a minimum of three days' employment. His refusal resulted in the issuance of the initial determination. At the hearing, claimant's union attorney and an official of the union contended and testified that early in 1948 the union had posted notices on bulletin boards where its members worked for the employer, telling them in substance that the employer was not entitled to recall them for less than three days of employment. With the consent of all parties herein, a copy of said notice was submitted for the Referee's consideration subsequent to the hearing. The notice read as follows:

"TO ALL SHOP STEWARDS: Kindly be advised that the contract between ourselves and United Parcel Service provides that you do not lose your seniority unless you are offered regular employment. In the future, in order to gain regular employment, we advise that you do not report for work unless you are guaranteed three (3) days in any calendar week."

The employer's representative conceded that the notice had been posted, but stated that the employer never ratified it or consented to its contents. The testimony of the employer's representatives indicated that it chose not to create any issue with the union concerning the notice. As explained by them, it was not a matter of great importance to the employer if a particular employee refused to respond to an emergency recall of less than three days'

duration, since if he did not do so, the employer would merely go down the list and eventually another employee would respond. The evidence indicated that in many instances employees were recalled for less than three days of work. The union attorney and its witness contended that under its contract with the employer the minimum period of recall was three days. They declared that the union never took disciplinary action against any member who was recalled and worked for less than three days, explaining that no complaints concerning such brief employment had been made to the union and, therefore, it had no official knowledge thereof. It was admitted by the employer that claimant's refusal to work on January 26, did not jeopardize his status as an employee and union member subject to recall.

Referee's Opinion and Decision: There is no question but that employment on January 26, 1950, was offered to claimant and was refused by him. It was his regular line of work. There is nothing in this record to indicate that he had good cause under the Unemployment Insurance Law to refuse the offer. The evidence established that the employer was empowered to recall claimant to work, and that it did so pursuant to the terms of Article VII, Paragraph 5, of its agreement with the union, quoted above. The contractual provision was not altered or annulled by the notice posted by the union. The union's notice merely constituted advice by the union to its members. There is no evidence that any union member who disregarded the advice would thereby have jeopardized his membership in his union. It is to be noted that during the period that the notice was posted, claimant was recalled on two separate occasions for only one day of work. Despite the union's disclaimer of "official knowledge" of acceptance by its members of work of less than three days duration, I am satisfied it was aware of the fact that the employer operated in accordance with the contractual provision quoted above. I am satisfied, also, that the union did not regard the acceptance of such short-term employment as warranting disciplinary action against any of its members. In conclusion, it may also be observed that the instant proceeding is not concerned with the efforts of the union to secure better terms of employment for its members, either within or de hors the framework of its contract with the employer, but solely with the correctness of the initial determination under the Law. The initial determinations are sustained. Claimant was overpaid \$52 in benefits.

### COMMENTS

There is a reference in the referee's Opinion and Decision to the effect that the union did not consider the acceptance of employment of one day "as warranting disciplinary action against any of its members." The Referee further emphasized the following: "There is no evidence that any union member who disregarded the advice (of accepting only three days employment) would thereby have jeopardized his membership in his union."

Mention is made of these points because of a recent trend, also extending to Appeal Board decisions, of discounting unsubstantiated information received from unions purporting that accepting the employment (or retaining it) would have violated union requirements. Such allegations must be supported by union rules, regulations or by-laws which must have been introduced as evidence in the adjudication proceedings in order that weight be given to them. It also appears that proof is required demonstrating that an alleged violation would result in sanctions imposed by the union against its members.

Careful scrutiny and the obtaining of conclusive information is, therefore, indicated before consideration should be given to a contention that accepting or retaining employment would have been in violation of union requirements.

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

April 24, 1951

INTERPRETATION SERVICE – BENEFIT CLAIMS  
VOLUNTARY LEAVING OF EMPLOYMENT

Desire for Different Work  
Higher Skill

Appellate Division Decision

Matter of Pillersdorf

278 App. Div. 59

VOLUNTARY LEAVING EMPLOYMENT; DESIRE FOR EMPLOYMENT COMMENSURATE  
WITH NEWLY ACQUIRED TRAINING

A claimant who was employed for several years as a retail salesman and, upon graduation from law school and admission to the bar, voluntarily left that employment to seek employment with law firms, was held to have left employment without good cause.

Referee's Decision: The initial determination of the local office holding that claimant left his last employment voluntarily without good cause is overruled. (December 30, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: We have reviewed the evidence adduced before the referee and find that the following findings of fact made by the referee are amply supported by evidence and we therefore adopt the same as the findings of fact of this Board:

Claimant filed for benefits on September 6, 1949. An initial determination was issued disqualifying him for 42 consecutive days commencing with his date of filing for voluntary leaving of employment without good cause.

Prior to September 6 claimant worked for 6½ years for a haberdashery concern as a salesman. He worked full time, six days a week. While he was employed he attended a law school at night and was duly graduated and was admitted to the Bar of the State of New York in June 1946. Claimant is 30 years of age, married and has a 2½ year old son. After admission to the Bar he endeavored to secure a position with a law firm. He found that it was practically impossible to do so since such positions can usually only be secured through personal interviews and his working hours as a haberdashery salesman prevented him from calling upon attorneys. Under the circumstances, he finally felt impelled to leave his position in order to facilitate his chances of securing employment with a law firm. Claimant testified that he would not have left his job if his hours had not been such as to preclude the possibility of contacting law firms during the day. He subsequently obtained another position as a haberdashery salesman with working hours of from about 3 p.m. until 11 p.m., five days a week and was so employed at the date of the hearing.

We make the additional findings of fact that subsequent to the decision of the referee, claimant became connected with a law firm and is now engaged in the practice of law.

Appeal Board Opinion and Decision: The issue on this appeal is whether or not claimant's voluntary leaving of employment as a salesman under the circumstances of this case was with good cause. Subsequently, had claimant been offered a job as a salesman when unemployed, after his admission to the Bar, he would have had good cause for refusing such employment since he would not be fitted by training and experience for such a job offer. However, claimant received his training and education as an attorney while employed as a salesman. These circumstances developed while he was employed. Section 593.1(b) of the Law provides that under such circumstances claimant's leaving of employment is with good cause. Claimant's voluntary leaving of his employment was with good cause. The initial determination of the local office is overruled. The decision of the referee is affirmed.

Appealed By: Industrial Commissioner

Appellate Division Opinion and Decision: This is an appeal by the Industrial Commissioner from a decision of the Unemployment Insurance Appeal Board which affirmed a decision of an unemployment insurance referee overruling the initial determination of the Industrial Commissioner which disqualified claimant for unemployment insurance benefits for 42 consecutive calendar days commencing September 6, 1949. There is no dispute in the facts. Claimant is 30 years of age, married, and has a child 2½ years old. Prior to September 6, 1949, he was employed by John Forsythe Co., Inc., of New York City as a haberdashery salesman and had been so employed for 6½ years. This was full-time employment, six days a week. While so employed he attended law school at night, was graduated and was admitted to the Bar of this State in June 1946. After his admission to the Bar he endeavored to secure a position with a law firm but found that impossible, due to some extent because his working hours were such that he was unable to make personal calls upon attorneys. For that reason he left his position as a salesman. He testified that he would not have left that position if his hours of employment had not been such as to preclude the possibility of contacting law firms during the day. Subsequently, and on September 27, 1949, he obtained another position as a haberdashery salesman with Hobbs-Troff Company where his working hours were from 3 p.m. to 11 p.m., five days a week and he was so employed at the time of the hearing before the referee.

The Board found that at the time of the hearing before the Board and subsequently to the decision of the referee, claimant became connected with a law firm and is now engaged in the practice of law. He filed for benefits on September 6, 1949. With these facts in mind the Industrial Commissioner issued an initial determination disqualifying claimant for benefits upon the ground that he voluntarily left his employment with John Forsythe Co., Inc., without good cause. Singularly enough the Board based its decision of the ground that "had claimant been offered a job as a salesman when unemployed, after his admission to the Bar, he would have had good cause for refusing such employment since he would not be fitted by training and experience for such a job offer." There is no basis in the record for the quoted statement of the Board. The only employment which claimant ever had at the time he voluntarily left it was as a salesman with a haberdashery concern. Had he been discharged from that employment and consequently involuntarily unemployed, and had the employment service offered him another job in that industry, he would have to take it or suffer the loss of his benefits. That was the employment in which he had worked for 6½ years and was the only employment in which he ever had any experience. The decisions of the Appeal Board and that of the unemployment insurance referee should be reversed on the law and the initial determination of the Industrial Commissioner reinstated without costs. (March 14, 1951)

COMMENT

This decision is in accord with the general principle that a person who leaves employment, in order to seek other work or for the purpose of bettering himself, and does not have a definite job prospect, leaves his employment without good cause. However, more important, it stresses the fact that a person who acquires additional training while employed or subsequent to his last employment, for instance a law degree as here, does not have good cause within the meaning of the law to leave his employment or to refuse employment in his usual occupation. This fact is further stressed by another Appellate Division decision which released under Serial No. [A-750-1011](#), Matter of Gilbert. That decision, and the "Rule" and the "Comments" accompanying it, should be reviewed in conjunction with a review of the decision here reported.

The Appeal Board had found that the claimant had good cause to leave his employment under reference to the provision of Section 593, subdivision 1(b) of the Unemployment Insurance Law which leads to such conclusion if "circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instant." The Board's construction seems, therefore, such that the word "circumstances" takes on a connotation not confined to circumstances arising in the course of and connected with the employment, but including circumstances not so connected and arising in the private life of the claimant. This interpretation is subject to doubt. It does not suffice, under the language of the law, that the "circumstances" develop while the claimant was employed. They must have developed "in the course of such employment." This, it is felt, refers to circumstances related to the employment and not to circumstances arising in the private life of the claimant which are not so related.

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A-750-950

Index No. 770.3

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

September 18, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
DETERMINATION OF BENEFITS  
AVAILABILITY AND CAPABILITY

Work History – Seasonal  
Willingness and Efforts to Find Work

Referee's Case Number 14-66-50R

AVAILABILITY, QUESTION OF  
DURING OFF SEASONS

Claimant whose employment in past years was confined to limited seasonal periods must, in order to be available for employment within the meaning of the Unemployment Insurance Law outside such season, demonstrate attachment to the labor market by bona fide, diligent and sincere efforts to obtain employment in keeping with his employment history, his training and experience and the labor market in which he resides.

(See Comments after Decision)

Initial Determination: Claimant was ruled ineligible because of unavailability in that she failed to establish a genuine attachment to the labor market.

Request for Hearing by: Claimant

Findings of Fact: A hearing was held at which the claimant and representatives of her employer and of the Industrial Commissioner appeared and testified. Claimant, a hotel office manager, filed for benefits on October 4, 1949. She received 22 benefit payments at the \$26 rate. In the prior benefit year she had exhausted her benefits. By initial determination effective April 17, 1950, claimant was ruled ineligible because of unavailability in that she failed to establish a genuine attachment to the labor market. Claimant has lived almost all her life in the Catskill Mountain resort area. Her family has operated a summer resort hotel for many years. Claimant was married in October 1931, and has two children, ages 13 and 8½. From the date of her marriage to 1944, claimant had no employment. Her husband is superintendent of schools in Fallsburg at a substantial salary. Since returning to the labor market in 1944, claimant's only employment has been during the summer resort seasons. In 1944, when there was a shortage of manpower, claimant was asked to manage the office of a well-known hotel in the area. She was employed by another hotel at South Fallsburg and was paid \$185 a week to work as office manager. In 1948, she worked seasonally for the same hotel at \$100 a week. In 1949, she received \$75 per week during the season from the same employer. Her services were engaged again for the current season at \$100 a week. With this employer she received in addition to her cash wages, two meals per day. She resides at home with her husband and two children in an apartment at So. Fallsburg. Her mother resides with her. Claimant's duties as office manager include the handling of correspondence in the making of reservations, the assignment of accommodations, the computation of bills, etc. She states that she is not related to the proprietors of either hotel at which she has worked, and that she has no financial interest therein. Claimant was required by the insurance office to complete forms indicating her job efforts. On November 30, 1948, claimant indicated no employer contacts and that she was looking for an employer willing to take a hotel office manager's job. On January 4, 1949, she made a similar certification. On February 25, 1949, she indicated one employer contact and that was at the hotel at which she is currently employed. On January 26, 1950, she indicated that on January 23 and January 24 she made contact with three hotels in the area, one of which is not open during the winter. She concedes that these are the only efforts she made to obtain employment in the last two years and further admits that she made no independent efforts to obtain employment during the winter months until she was interviewed at the insurance office and advised that she was expected to seek employment in order to establish her benefit eligibility. At the hearing, she testified at first that she had no transportation to surrounding areas where hotels are open in the winter. Later, she asserted that she could arrange transportation through the use of her husband's car. She also changed her position as to the remuneration she sought for winter employment. At first she indicated the minimum to be between \$75 and \$100 per week, then later stated that she would accept \$50 if transportation were furnished. When interviewed at the insurance office, claimant stated that she had not worked winters because the type of work she does is not obtainable during that time and the hotels that remain open usually have the same staff all year round. She further asserted that she has never refused employment at any time during the period when she collected benefits. It appears that there are at least five hotels in the area which remain open all year and that from 1200 to 1300 workers are employed during the winter season with high turnover in staff. It also appears that during the winter months there are occasional opportunities in the area in selling and clerical work. Claimant studied stenography and typing at high school but has never done such work. Prior to her marriage, she was employed in New York City as a general office clerk for a short period of time. Claimant will not accept any kind of work if it is not within her actual experience. She is not interested in any other type of work than as an office manager of a hotel.

Referee's Opinion and Decision: While claimant insists that she has been available for employment at all times during which she certified for benefits and emphasizes that the employment office never offered her employment, the merit of her protestations must be judged

against the background of her work history, her domestic situation and the labor market of the area in which she makes her permanent home. Availability is primarily a subjective criterion measured by the expressions and acts of a claimant that throw light on his readiness and willingness to be employed (Appeal Board, 10,479-44). It does not lend itself to measurement with precision and legal certainty. The economic atmosphere of the situation and the credibility and good faith of the claimant may well be the determinative factors. The claimant is the wife of a public official with substantial earnings. She is the mother of two young children. Her normal domestic responsibilities during the winter season are such as would engross her to the extent of excluding full time employment unless economic necessity compelled her to genuinely seek work and make other arrangements in her home. Claimant's family has been in the hotel business for many years. During the war period with a manpower shortage, especially in the non-essential industries, it was natural that claimant was sought out to render services to a hotel during the summer season. She has had substantial wages in such work. She has found this arrangement desirable and has continued such seasonal employment from 1944 to date. However, this rendition of services solely in the summer season does not necessarily make claimant a member of the labor market during the balance of the year. The salient facts are that from 1931 through 1943, claimant was not a member of the labor force at all and that since the latter date, she has worked during the summer seasons only. She worked as a clerk before her marriage. She studied shorthand and typing at high school. She knows the hotel business well. Despite these facts, she maintains that she was interested only in an office manager's job during the winter months. She made no efforts to seek employment until she was interviewed and learned that some initiative on her part was expected to establish her attachment to the labor market. It is significant that on November 30, 1948, and January 4, 1949, she certified that she had made no employer contacts; that on February 25, 1949, she listed only her summer employer. Her credibility is seriously affected by this, since she knew full well in February 1949, that her summer employer was not open for business except during the summer season. On January 26, 1950, she listed three employers to whom she allegedly applied on January 23 and 24. One of these three is not open in the winter. Although claimant could qualify for work in a hotel other than as an office manager or as a salesperson or as a clerk and could revive her skills in shorthand and typing, she indicated definitely that she was not interested in any kind of work in which she did not have actual experience. That indication is understandable in a fluid labor market, but becomes an unreasonable restriction in a limited labor market in a resort area. Claimant is fitted by training and experience for work other than the specific job of office manager of a hotel. Yet she insists solely on that employment in a locality where such opportunities are constricted in the winter season. The conclusion is inescapable that claimant has made only token efforts to inquire about employment and only when she was put on notice that her availability was questioned. Claimant placed upon the employment service the burden of obtaining employment which meets her restrictions, meanwhile exhausting her benefits each year. Although at first, claimant raised barriers as to transportation to other parts of the resort area and also as to the minimum wage she would consider acceptable, as the hearing progressed, she modified her position and stated she could arrange transportation and substantially reduced her salary demands. This change of mind is not impressive. A Referee need not believe everything and anything that is uncontradicted, especially when it is in the subjective realm. I find upon all the credible evidence that claimant withdrew from the labor market upon the conclusion of the summer season and had no intention of seeking employment or doing anything which would expose her to possible job opportunities. Further, I am of the opinion that claimant's attitude towards unemployment insurance benefits is one of personal aggrandizement rather than to regard them as stop-gap financial supplementation in periods of unemployment caused through no fault of the work who is out of a job. This claimant's unemployment was not wholly involuntary during the winter

months. The Appeal Board has considered the matter of availability affecting summer resort workers in several cases. In 6257-41, it said:

"The question in this case is whether claimant was available for employment during the period in question, within the meaning of the Unemployment Insurance Law. Claimant contends that, irrespective of the previous period in 1941, during which she did not care to work, she must be considered available for employment at the time of her filing because she was ready and able to accept employment at that time. The position of the local office is that claimant's past record and her failure to actively seek employment negates her alleged availability. It is further argued that her expressed willingness to work springs solely from her desire to collect unemployment insurance benefits and the fact that she must fulfill that requirement of the Law in order to be eligible."

"The referee, in overruling the initial determination, proceeded on the theory that the record failed to show that claimant would not have been able to go to work if employment had been offered to her. We cannot agree that the question is so easily resolved."

"The peculiar coincidence of claimant's having had earnings during two successive base years in only two calendar quarters and in amounts but slightly over the minimum required to qualify for benefits, gives added strength to the local office position. Especially is this fact significant in view of the close relationship between claimant and the employer, which would indicate that her periods of work and of benefits were purely matters of choice on her part."

In 10,224-44 the Appeal Board said:

"Ordinarily, where a claimant has had no work during off seasons, it is not sufficient of itself to support a determination of unavailability (Appeal Board, 9155-43). However, the record herein discloses that the claimant considered herself a 'summer season worker' and admittedly never did work during any other season of the year. Her registration with the private employment agency was restricted to summer job offers; her refusal of the agency's offer of winter employment as a cook and her lack of any employment during the greater part of each year for twenty years is indicative of her lack of desire for work after each summer season. Claimant's entire course of conduct leads to the conclusion, that she had limited her periods of availability for employment to the summer months with no intention to work at any other time of the year."

In 10,389-44 the Appeal Board said:

"The evidence discloses that for at least twelve years claimant's employment as a kosher chef was limited to the summer seasons exclusively. Claimant's entire course of conduct indicates that he did not make a bona fide effort to obtain employment in his trade after the summer season. This is evidenced by the fact that the only employment agencies to which he applied for work were those specializing in placing chefs at summer hotels."

In 10,786-44 the Board said:

"The primary issue to be decided is whether claimant was available for employment. Claimant has had no other employment since her marriage with the

exception of her work in the hotel during the summer season for the last five years. The record is devoid of evidence indicating any sincere or genuine effort on her part to obtain employment during other periods when the hotel was not open for business. We have defined availability as the readiness and willingness of a person to work. Here claimant has demonstrated a lack of readiness and willingness to work except in her husband's enterprise during the summer season."

"Considering the nature and extent of claimant's past work history and her domestic circumstances, we hold that claimant was not genuinely in the labor market."

In the Matter of Leshner, 286 App. Div. 582, the Court in affirming the decision of the Appeal Board (9802-43) made observations and rulings which are appropriate standards of the bona fides of claimant's eligibility for benefits. The Court said:

"While there is no express requirement in the statute of a dependence upon wages of employment as a condition for the receipt of unemployment benefits, it is significant that 'economic insecurity' is mentioned as the sine qua non for its enactment. Therein the declaration of public policy pronounces that it was 'involuntary unemployment,' which, having become a subject of general interest and concern, called the statute forth in order 'to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family' and that, it was considered that the statutory plan of compulsory unemployment insurance could better solve the problem than as 'now handled by the barren actualities of poor relief assistance backed by compulsory contribution through taxation.' To attain this end 'for the public good and the well-being of the wage earners' the statutory machinery was set up 'for the compulsory setting aside of financial reserves for the benefit of persons unemployed through no fault of their own.'" (Labor Law, formerly Sec. 500, now 501)

"From that is shown as to claimant's ownership, influence in, and connection with his aforesaid corporate enterprises, during the past 13 years, it is at least fairly inferable that such was the cause of his seasonable employment. Thus there is an element of voluntariness on his part in the precipitation of the predicament of his unemployed periods. This element produces a reaction which seems beyond the intended reach of the statute in the light of the evidence presented, or at least it was within the province of the Board to so conclude. From all that appears it is also inferable that his remuneration is, to some extent at least, referable to some supervisory, managerial or caretaking service throughout the part of the year the hotel is closed. Up to five years ago claimant resided in New York City while the hotel was closed and there he obtained some work. Since 1938, when unemployment insurance benefits first became payable, he and his family have dwelt in Monticello and during the vacant hotel period has done no other work. During these periods the evidence indicates that his efforts to obtain work in the city were desultory and seemingly half hearted. To qualify as one whom the act was designed to assist, in countering the public evil of economic insecurity, it was incumbent upon claimant to show that, for the period he claims the benefits, he was totally unemployed in that he had met with a total lack of any employment, including that not subject to the statute, and that all this came upon him through no fault or intended act of his own and that it was in truth and in fact the result of his inability to obtain any appropriate employment notwithstanding that he was

capable and available therefor. (Labor Law, formerly Sec 502, subd. 10, new Sec. 522) The Board has found upon all the evidence that claimant has failed to establish these qualifications; that during the periods for which he has filed for benefits he was 'not genuinely in the labor market'." "Substantial evidence supports the finding, and the decision appealed from should be affirmed, with costs to the Industrial Commissioner."

Consideration of the foregoing authorities and the facts as found herein lead to the conclusion that where a claimant has a consistent history of employment which is limited to the summer seasons and his training, experience, skills and competence which can be utilized by employers in the area, even though to a limited degree, it is incumbent upon such claimant to manifest a continued attachment to the labor market. This must be demonstrated by bona fide, diligent and sincere efforts after the summer season to obtain employment in keeping with the claimant's employment history, his training and experience and the labor market in which he resides. By these tests, claimant fails to meet the standards of availability under the Unemployment Insurance Law. The initial determination is sustained.

### COMMENTS

This decision needs hardly any comments. It speaks for itself and should be closely studied. The reasoning is cogent and shows the value of resourceful fact-finding, keen analyses of the circumstances, straightforward evaluation, and thorough appreciation of precedent decisions.

It is noteworthy that the Appeal Board and Court decisions, quoted by the Referee, were rendered many years ago. They reflect, therefore, well-established principles of long standing. Yet, in rendering initial determinations, there is sometimes a hesitancy in resorting to a reasoning which is not based on concrete readily available facts, but which requires inferences or the drawing of conclusions from surrounding circumstances. Many cases cannot satisfactorily be resolved without such reasoning. It is true, of course, that it is more difficult to reach sound conclusions when secondary factors must be evaluated than to arrive at determinations on the basis of clear and precise facts. However, "availability" is an outstanding example of issues which in many instances cannot be decided otherwise.

The reason is the fact that willingness to work, one of the elements of availability, is a state of mind which can often only be assessed in the light of surrounding, ascertainable, circumstances. These circumstances are, generally, the acts and actions of the claimant, his behavior, and the attitudes demonstrated by him.

(This decision has been appealed to the Appeal Board by claimant – A.B. #24-518-50.)

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A-750-951

Index No. 760A.1

NEW YORK STATE DEPARTMENT OF LABOR  
UNEMPLOYMENT INSURANCE DIVISION  
ADJUDICATION SERVICE OFFICE  
November 6, 1950

INTERPRETATION SERVICE-BENEFIT CLAIMS  
DETERMINATION OF BENEFITS

Appeal Board Case No. 24,046-50

AVAILABILITY, QUESTION OF – ATTENDING TRAINING COURSE IN BARBER SCHOOL

Attendance at a trade school during customary working hours does not render a claimant unavailable for employment, if the school hours can be adjusted to working hours or if claimant would discontinue his course if compelled to do so in order to obtain employment, and if claimant's conduct indicates genuine desire to work.

(See Comments after Decision)

Referee's Decision: The initial determination of the Out-of-State Resident Unit ruling him unavailable for employment effective November 16, 1949 is sustained. (June 8, 1950)

Appealed By: Claimant

Findings of Fact: Claimant was employed for about 12 years as a foreman for a packing company in Brooklyn, New York at a salary of \$84 per week. After being laid off in January 1949 because of a reduction in supervisory personnel, he sought work in New York, but could not find any. He returned with his family to his former home in Glen Lyon, Pennsylvania, on February 8, 1949 and re-established his permanent residence there. Claimant filed an inter-state claim for benefits in Pennsylvania and registered at the local State employment office on February 9, 1949. On March 23, 1949 he obtained employment in a factory in a nearby town of Berick, Pennsylvania, as a shear helper at the rate of \$80 per week. He was laid off from this job for lack of work on June 21, 1949. Thereafter, he filed an additional claim in Pennsylvania and continued to seek work in the area. On November 14, 1949 claimant started a course of training in a barber school in Wilkes Barre, Pennsylvania under the G.I. Bill of Rights and applied for and received subsistence allowances. He attended the school during the hours 3 p.m. to 10 p.m. on five days a week. Claimant certified that he was looking for work while attending school and could change his school hours so as not to interfere with work and, if necessary, would leave school to accept work. The Pennsylvania office certified that claimant could attend school from 8 a.m. to 3 p.m. or from 3 p.m. to 10 p.m., that he was willing to leave school or change classes to accept temporary or permanent employment, that he had personally applied for work, including that of a laborer, in several local establishments and filed applications for any type of work available. An initial determination was issued on January 13, 1950 disqualifying claimant from benefits effective November 16, 1949 for unavailability for employment for the reason that "no credence can be placed in your statement that your hours can be changed to permit your accepting employment during normal daytime working hours." Claimant protested and requested a hearing. He continued to report to January 2, 1950 and sought employment. On February 6, 1950 he found work at a colliery in Wilkes Barre, where he is still employed. His hours of work are 2 p.m. to 9:30 p.m. His school hours were always flexible and were changed to 8 a.m. to 1 p.m.

Appeal Board Opinion: The referee held claimant to be unavailable for employment because he failed to exercise due diligence in seeking work and was attending school during the regular business hours. We are unable to agree with the referee's conclusion. At no time in this proceeding was it contended or questioned that claimant was not diligently seeking work and was period involved. The ground for disqualification was that claimant was attending school during normal working hours and that no credence could be placed in his statement that his school hours could be changed to permit him to accept employment. The best proof of the

credibility of such statement is that claimant did obtain full-time employment in February 1950 and was permitted to change his school hours so as not to interfere with such employment. Moreover, claimant consistently maintained that he would leave school, if necessary, in order to accept employment. Claimant placed on restrictions on his employability, either as to the location of the work, the type of work or the rate of wage. There is no reason to doubt claimant's statement that in view of his obligation to support his family he would discontinue his attendance at the trade school if he obtained work which would have compelled him to do so. Under all the circumstances herein, we hold that claimant has demonstrated by his course of conduct that he was available for employment during the period in question.

Appeal Board Decision: The initial determination of the Out-of-State Resident Unit disqualifying claimant for unavailability is hereby overruled. The decision of the referee is reversed. (Dated August 23, 1950)

### Comments

The significance of his decision is the fact that attendance at a trade or other school in itself does not necessarily reflect unavailability even if the current hours of attendance are in conflict with the customary working hours.

Whenever such a situation presents itself, it is, of course, necessary to probe closely into the facts. School attendance during customary working hours is strong evidence of unavailability. To overcome such evidence, it must be shown and verified that the school hours can be adjusted or that the claimant would be willing to abandon school attendance. In addition, consideration should be given to the general conduct of the claimant and his attitude and efforts. Independent diligent search for work, absence of undue restrictions, reasonable opportunities to secure employment and other factors showing that the claimant subordinates school attendance to employment, are elements which will tend to overcome such evidence of claimant's unavailability. On the other hand, there are factors which would strengthen that evidence. Among them are these: Claimant paid a substantial tuition fee, particularly if the fee would be forfeited. Long and intensive courses of study, leading to a degree, license, etc., are involved which make it unlikely that claimant would be willing to forego completion of his studies.

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A-750-953

Index No. 1205E-6

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

November 6, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
REFUSAL OF EMPLOYMENT

Disqualification – During Period of Disqualification  
Or "Inactive Status"

Appeal Board Case Number 22,287-50

DISQUALIFICATION, QUESTION OF – DURING CLAIM LAPSE BECAUSE OF NON-  
REPORTING WHEN REINSTATED

Lapse of claim because of non-reporting does not prevent a disqualification for refusal of employment occurring during the lapse, if the claimant is reinstated and the reinstatement covers the date on which the employment was refused.

Referee's Decision: The initial determination of the local office disqualifying claimant from benefits effective September 6, 1949 for refusal of employment without good cause on the ground that claimant was not in benefits on the said date is overruled. (December 16, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant, an examiner of dresses, filed an original claim for benefits on June 2, 1949. She reported regularly until August 23. She was due to report at the placement office on August 29 and at the insurance office on August 30, but failed to do so because she had left New York City on August 25 or 26 for a week's vacation. She returned to New York on Friday, September 2. On Tuesday, September 6 claimant reported at the employment office. On that day she was referred to employment in her line with a union establishment at the prevailing wage rate for her occupation. She failed to report to the employer. On September 7, 1949 claimant reported at the local office and was interviewed. Claimant requested credit for the period during which she failed to report. A notation was made on the claimant's record to the effect that her failure to report on August 30 was not excused and her benefit rights were suspended effective August 25 on the ground that she was out of town. Some discussion followed as to her right to have her claim of September 7 predated, as a result of which her claim was reinstated effective September 6, 1949, the date on which she reported to the employment office. Notice of claimant's failure to report to the prospective employer on September 6 was received by the local office on September 8. On September 13 an initial determination was issued disqualifying claimant effective September 6, 1949 for refusal of employment without good cause.

Appeal Board Opinion: The referee found that claimant refused an offer of suitable employment on September 6, 1949. He ruled, however, that since she was not "in benefits" on the date, the local office could not impose the disqualification against her for her refusal of employment, and he accordingly overruled the initial determination. It was argued before him on behalf of claimant that the predating of her claim for September 7 to September 6 so as to support the initial determination effective September 6 was contrary to procedure and to specific instructions contained in the information booklet issued to all claimants. Passing on that phase of the case, the referee said that the insurance office had the power to excuse a claimant's failure to report but in the instant case did not do so; that when claimant failed to report on August 30 she became ineligible until she next reported to the insurance office and refiled her claim. He stated further; "She could not satisfy the requirements of reporting to the insurance office by reporting to the employment office (Matter of McGowan, 226 App. Div. 933, reversing Appeal Board, 8850-43.) If the insurance office excused claimant's failure to report it would have to be retroactive to the date of her failure to report. It may not be done for only part of the period. Accordingly, I find that the insurance office was without power to predate claimant's refile to September 6 and it should have been effective September 7." The Industrial Commissioner points out that although the booklets furnished to claimants set forth that reporting at the employment office does not satisfy the requirement to report to the insurance office, nevertheless a failure to file a claim may be excused by the Commissioner upon the claimant's presentation of reasons deemed by him to be good cause. It is urged that the local office in passing on claimant's request for credit for the period from August 25 to September 7, determined in its discretion that claimant was entitled to a refile as of the date she reported at the placement office. The official records of the local office bear this out. The question presented to us, therefore, is whether or not the claimant may successfully challenge the

determination of the local office predating her claim from September 7 to September 6. We cannot say that such predating was allowed on September 7 for the specific purpose of enabling the local office to disqualify claimant as of September 6. The record shows that notice of the refusal was not received in the local office until September 8. We cannot agree with the referee that the local office was without the power to excuse claimant's failure to report for only part of the period in question and predate the refiling to September 6, as it did. Nor can we agree that such action was arbitrary or an abuse of its discretion. We believe that the Commissioner or his agents are vested with wide powers to excuse the failure to comply with its registration and reporting regulations and we have consistently refrained from disturbing such acts when a reasonable basis exists therefor.

Appeal Board Decision: The initial determination made by the local office disqualifying claimant from receiving any benefits, effective September 6, 1949, on the ground that, without good cause, she refused to accept an offer of employment for which she is reasonably fitted by training and experience is sustained. The decision of the referee is reversed. (Dated September 8, 1950)

### COMMENTS

The decision shows that a refusal disqualification may be imposed even if it relates to an occurrence which takes place at a time when the claim, from a strict point of view, is not "active" provided retroactive effect is given to a later filing.

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A-750-959

Index No. 775.7

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

December 13, 1950

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

Appeal Board Case Number 23,493-50

### AVAILABILITY, QUESTION OF – FULL-TIME SELF-EMPLOYMENT

A claimant, while devoting himself to remunerative self-employment, is held not to meet the test of availability, and therefore not eligible for benefits, even though he was ready, willing and able to abandon such self-employment and accept work as an employee.

(See Comments after Decision)

Referee's Decision: The initial determination of the local office that claimant was unavailable for employment from November 9, 1949 to January 1, 1950 and that he was overpaid \$156 in benefits is overruled. (April 14, 1950)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant filed a claim for benefits on November 9, 1949. The local office issued an initial determination holding that claimant was unavailable for employment from

November 9, 1949 to January 1, 1950 and that he was overpaid \$156 in benefits. The basis for the determination was that claimant was engaged in self-employment. Claimant worked from November 1942 to January 6, 1949 as a time study engineer for a chain company earning \$450 a month. He was laid off from this employment. In October 1945, claimant acquired a half interest in a mat manufacturing business from the sole proprietor for the sum of \$250. He entered into partnership agreement with the proprietor whereby he was to receive 60 cents an hour for the time devoted to manufacturing mats and one-half of the profits of the business. During the period that claimant was employed as a time study engineer, he worked evenings, Saturdays and Sundays in this venture. During claimant's reporting period he devoted all of his time to the partnership business. He spent 200 working hours in October 1949, 156 hours in November 1949 and 171 in December 1949. For the month of November 1949, he received \$82.24 and in December 1949 \$285.75 representing compensation for hours of work and his share of the profits. The volume of orders for November 1949 amounted to \$802.36 and for December 1949 the sum of \$339.49. He solicited orders from prospective customers; he cut tires, punched strips, assembled and closed mats and disposed of the strips. On January 6, 1950, claimant obtained employment as a salesman for an automobile agency. E continued to devote some time to his side venture despite his full-time employment. Claimant stated that he was at all times ready, willing and able to accept full-time employment in which event he would work in the mat business evenings and weekends and even hire somebody to work in the plant if found necessary.

Appeal Board Opinion: The referee overruled the determination on the theory that claimant undertook the manufacture and sale of mats as a side line and that his activities in connection therewith in no way interfered with his acceptance of full-time employment. Although the referee was justified in this conclusion that claimant would have accepted full-time employment had it been offered to him, nevertheless it clearly appears that situation does not differ from that of any other person who has full time employment but is willing to abandon such employment for more remunerative pursuits. Under the circumstances herein, it cannot be said that claimant, while devoting his full-time to the business of the partnership was in fact available for employment.

Appeal Board Decision: The initial determination of the local office that claimant was unavailable for employment from November 9, 1949 to January 1, 1950 and overpaid \$156 in benefits is hereby sustained. The decision of the referee is reversed. (Dated September 11, 1950)

### Comments

Self-employment is not considered as "employment" within the meaning of the Unemployment Insurance Law. Consequently, a self-employed claimant, whatever the intensity and other circumstances of his self-employment, would meet the test of "total lack of any employment" of Section 522 of the Law. That distinguishes him from a claimant who has employment as an employee. Such claimant does not meet this test on any day on which he is so employed, however short the hours in which he works and however small the wages which he earns, and would therefore not be eligible for benefits for this reason.

However, a self-employed claimant, although he experiences total lack of employment within the meaning of the law, is not eligible for benefits if he does not meet the test of availability.

There is no hard and fast rule by which it can be measured whether a self-employed individual would be "available for work" in a manner that satisfies the statutory requirement. Several Appeal Board decisions on this point have been rendered. In case

#12,622-46, the Board held that self-employment which requires continuous attention removes the claimant from the labor market (Index No. 725H-10). It is of interest, however, that the Board in that decision emphasized the fact that "the record fails to show any efforts on his (the claimant's) part to seek employment during the hours he devotes to the practice of his profession." The claimant was a dentist and professed to seek night work. It is also of interest that the Board in that decision quoted from Case #5768-41 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 business have removed themselves from the labor market (Appeal Board, 4763-41; 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."

On the basis, the Board concluded that "the claimant's devotion to the practice of his profession was of such continuous nature as to make him unavailable for employment."

As against this decision, there are other cases where the Board held a self-employed claimant to be available for work. This includes the case of an attorney who devoted "only his spare time to his law office in an effort to supplement his income" and who was "at all times available for work during the usual daytime hours" (Case #12,844-46; Index No. 725H-11). It includes the case of a claimant whose "activities as a real estate salesman were merely intended as a 'side line' during his reporting period" and which "would not have prevented him from accepting suitable full-time employment had it been offered to him." (Case #13,127-46; Index No. 725H-12). It also includes Case #14,660-47, dealing with a claimant who undertook the sale of junk, which shows language, such as this: "Claimant undertook the sale of junk as a side line 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 a livelihood." And further; "He would have willingly abandoned such activities and accepted an offer of employment for which he was fitted." (Index No. 725H-13)

Taking only these previous decisions into account, it could have been concluded that a claimant is "available" if he demonstrates his preference for a job and his readiness, willingness and ability to abandon his self-employment, including "full-time" self-employment, particularly if supported by genuine search of work.

It is not quite apparent whether the principles now enunciated in Case #23,493-50 are superimposed on those laid down in previous decisions, or merely supplement them. This doubt stems mainly from the fact that the Board in its former decisions utilized the willingness to abandon the self-employment, evaluated in the light of the circumstances of the case, as an important, and possibly in the last analysis as the decisive, test. Even in the first mentioned case, that of the dentist to whom benefits were denied, the Board considered it essential to point to the lack of a showing that claimant was interested in work as an employee "during the hours he devotes to the practice of his profession."

However, in the instant case, the Board referred to the claimant's statement that he was "at all times ready, willing and able to accept full-time employment in which event he

would work in the mat business (claimant's self-employment) evenings or weekends and even hire somebody to work in the plant if found necessary." In other words, the claimant was held to be unavailable in spite of the fact that he would have abandoned his self-employment and accepted a job for the very same hours which he devoted to his self-employment. As a matter of fact, claimant obtained employment on January 6, 1950. He was, nevertheless, held to be unavailable for the period from November 9, 1949, when he fled his claim, until January 1, 1950, and to be overpaid in the amount of \$156 which he had received as benefits during that period.

All of this is an indication of a sterner attitude towards self-employment as reflecting unavailability than has been shown in the past. It seems proper to conclude that the decision in case #23,493-50 stands for the principle that a claimant is not eligible for benefits regarding periods during which he devotes a substantial portion of his time to self-employment, irrespective of his prior work history and regardless of his willingness to abandon the self-employment in order to accept work as an employee. It deserves mention, however, that the self-employment in the instant yielded income of appreciable size. It is conceivable that a somewhat more "lenient" attitude would be appropriate if the income were only negligible.

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A-750-962

Index No. 1710-5

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

December 13, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
VOLUNTARY LEAVING OF EMPLOYMENT  
Health or Safety

Appeal Board Case Number 23,452-50

VOLUNTARY LEAVING OF EMPLOYMENT; SHIP BOUND FOR DANGEROUS WAR ZONE

A seaman who refused to resign shipping articles on a vessel which was bound for a dangerous zone (China coast) because of a war, not involving the United States, voluntarily left his employment with good cause.

Referee's Decision: The initial determination of the local office holding that claimant voluntarily left his employment without good cause is overruled. (April 10, 1950)

Appealed By: Industrial Commissioner

Findings of Fact: Hearings were held at which claimant and representatives of the claimant's former employer and of the Industrial Commissioner appeared and testified. Claimant, a radio operator on a ship, filed for benefits on December 9, 1949. By initial determination effective the same day, he was disqualified for 42 days for voluntary leaving of employment without good cause. Claimant had sailed for the China Coast on June 22, 1949, and returned on December 7, 1949. The ship was due to make another foreign voyage. The claimant did not re-sign articles. When interviewed at the insurance office, claimant stated that he did not re-sign articles because he had personal business to take care of. He reiterated this reason when requesting a hearing. At the hearing, however, the claimant stated that his real reason for not

re-signing articles was that he believed that the ship was bound for the China waters. He testified that it was common knowledge that a trip would be made to that area. He further stated that he saw cargo being loaded on the ship which indicated that the destination was Shanghai. According to the employer, the vessel left New York on December 9 and docked at Alexandria, Columbo, Singapore, Manila and subsequently, Korean and Japanese ports, thence to the West Coast of the United States, through the Panama Canal to New York. The employer's representative could not state whether the ship's original destination was to China waters. He conceded that many times there is a change in the itinerary as to the ports for which the ship is bound. Claimant contended that he was justified in leaving the vessel and not re-signing articles, because the ship was found for a dangerous zone, and he did not ask for a leave-off, because he did not want it known what his reasons were. Claimant pointed out that on the prior voyage his ship had been detained by the Chinese Communists, and that no incidents occurred after the ship sailed, and that in all probability, that resulted in the change of itinerary.

Referee's Opinion and Decision: On the credible evidence, I find that the claimant was justified in leaving his employment. It appears to me that the original destination of the ship was to dangerous China waters and that it was not until after the ship had sailed that the itinerary had been changed. Claimant, therefore, was justified in not re-signing articles. His leaving of employment was, therefore, with good cause. The initial determination is overruled.

Appeal Board Opinion and Decision: After a careful review of the record, testimony and evidence adduced before the referee and due deliberation having been had thereon and having found that the referee's findings of fact and conclusions of law are fully supported by the evidence in this case, and that no errors of fact or law appear to have been made, the Board adopts the findings of fact and the conclusions of law made by the referee as the findings of fact and conclusions of law of this Board. The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case. The decision of the referee is affirmed. (November 3, 1950)

#### COMMENT

Although, under the circumstances presented in this case, claimant had good cause for not reshipping on a vessel bound for the zone where war conditions prevailed, the United States not being involved in that war, it is likely that a different conclusions would result during a national emergency. All seamen would then be expected to serve their country. Also, in the instant case, opportunities for other maritime employment, not of a dangerous nature, existed. At the time in question (December 1949) only a small percentage of vessels sailed the China coast.

The decision represents an application of the general principle that, under normal conditions, a claimant may with good cause refuse or quit a job that would entail danger to his health or safety.

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A-750-963

Index No. 765.7

NEW YORK STATE DEPARTMENT OF LAOR  
UNEMPLOYMENT INSURANCE DIVISION  
ADJUDICATION SERVICE OFFICE  
December 29, 1950

INTERPRETATION SERVICE-BENEFIT CLAIMS  
DETERMINATION OF BENEFITS  
AVAILABILITY AND CAPABILITY  
Willingness and Efforts to find Work

Appeal Board Case No. 23,662-50

AVAILABILITY; LACK OF DILIGENT SEARCH IN ACTIVE LABOR MARKET

Referee's Decision: The initial determination of the local office disqualifying claimant from receiving benefits upon the ground that she refused employment without good cause is overruled. (May 3, 1950)

Appealed by: Industrial Commissioner

Findings of Fact: Claimant, a secretary-stenographer, with approximately five years experience was last employed in her customary occupation at \$52 per week. Prior thereto, claimant worked for several other employers in a similar capacity. On January 31, 1950, claimant was offered employment, allegedly as a secretary, at \$45 weekly. The hours involved were 9 a.m. to 5 p.m. daily and in addition every third Saturday she would have been required to work from 9 a.m. to 12:30 p.m. Claimant refused such employment primarily because she deemed the salary insufficient and because of her objection to Saturday work. Claimant restricted herself to employment as a secretary in the hotel industry. She was unwilling to accept less than \$50 weekly. Claimant's prior experience, although consisting principally of hotel work, was not exclusively in that field. Claimant's last employment of a permanent nature terminated on October 7, 1949. Except for a temporary period of approximately one month in or about January 1950, she has had no other work since that date. Approximately five months prior to the hearing before the Board, claimant, concededly withdrew from the labor market. Based upon claimant's refusal of employment, the local office made an initial determination disqualifying her from receiving benefits upon the ground that such refusal was without good cause. Claimant requested a hearing and the referee overruled the initial determination of the local office. The Industrial Commissioner thereupon appealed to this Board.

Appeal Board Opinion: The referee, in overruling the initial determination of the local office, concluded that the proffered employment was at a rate substantially less favorable than the wages prevailing in the locality for similar work. We are not completely in accord with the referee's disposition of this case. Claimant's proper job classification is somewhat obscure in light of the evidence adduced. Moreover, the accurate job title of the proffered employment is likewise not clear. Consequently, difficulty is experienced in arriving at a definite conclusion as to the suitability of the job offer in question. While we entertain some reservation as to the propriety of the terms and conditions of the proffered employment, we cannot overlook claimant's long period of unemployment in an apparently active labor market. We believe that her entire course of conduct and utter lack of due diligence in search of employment, over a considerable period of time, rendered claimant unavailable for employment. Concededly, she was not an active members of the labor force within the five or six month period immediately preceding the Board hearing. Her efforts to seek employment prior thereto were sporadic, indicating a tenuous attachment to the labor market. We believe claimant's refusal of the offer of employment was further indication of her unavailability for work. Upon all the facts and circumstances herein, we are persuaded that claimant was not available for work. Consequently, the proper initial determination in this case is unavailability for employment rather than disqualification for job refusal without good cause.

Appeal Board Decision: The initial determination of the local office, is hereby modified by holding claimant ineligible for benefits, effective January 31, 1950, upon the ground that she was unavailable for employment and, as so modified, is sustained. The decision of the referee is reversed. (Dated October 27, 1950)

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A-750-964

Index No. 765.10  
795.1  
815.4

NEW YORK STATE DEPARTMENT OF LABOR  
UNEMPLOYMENT INSURANCE DIVISION  
ADJUDICATION SERVICE OFFICE  
December 29, 1950

INTERPRETATION SERVICE-BENEFIT CLAIMS  
DETERMINATION OF BENEFITS  
AVAILABILITY AND CAPABILITY  
Other Causes  
Efforts to Find Work  
REPORTING AND CERTIFYING  
Requirements

Appellate Division Decision

Matter of Sorrentino

Appeal Board Case No. 20,361-49

ELIGIBILITY, QUESTION OF; REFUSAL TO GIVE REQUIRED INFORMATION CONCERNING  
EMPLOYERS CONTACTED

Where claimant refused to answer questions on a prescribed form or at an oral interview relative to prospective employers contacted in seeking employment, held not entitled to receive benefits during the period of such refusal.

(See Comment after Decision)

Referee's Decision: The initial determination of the local office disqualifying him from benefits from February 16, 1949, to March 15, 1949 on the ground that he was unavailable for employment is sustained. (May 25, 1949)

Appealed By: Claimant

Appeal Board Findings of Fact: Claimant filed an original claim for benefits on November 5, 1948. He had last worked as a fee collector in a city park. During the three weeks preceding Christmas claimant obtained employment as a floorwalker in a department store and worked three evenings each week. During this period he reported such employment and filed several additional applications for benefits. A question arose as to whether claimant could not have worked full time during the pre-Christmas weeks had he desired and an initial determination was issued by the local office holding him ineligible for benefits because of unavailability on December 15, 17 and 22. The basis for this was that work was available to claimant on these

days and he failed to work. Claimant denied this, stating that full-time work had been refused him during those weeks. In the course of interviewing claimant on the above determination he was questioned concerning his efforts to find employment. He had previously stated that he expected to obtain employment with the city or the county. On February 2 he stated that he did not wish to make a statement as to the contacts he made for work but was willing to report to the employment office every day to make any contacts for work that they suggested.

He stated also that he had been interviewed for a position. On February 9 the local office mailed to claimant a form 337 which contained blank spaces for the listing of employers contacted for work and requested that claimant fill out the form. Claimant filled out the form but did not list employers contacted for work. He stated that he was looking for and willing to take work as an interviewer, paying and receiving teller, claims examiner, inspector, clerk, interpreter, etc. Under "Remarks" he stated: "Due to the true fact that the persons I have contacted for employment are persons of highest esteem and reputation, I must withhold the information." On February 16 the local office issued an initial determination ruling claimant ineligible for benefits, effective February 16, 1949 because of unavailability for employment based upon "Your refusal to complete form 337 or give definite information on your effort to find employment." On February 23 claimant filled out another form 337 on which he stated "I am willing to go to your employment office any time you wish." On the same day he stated that he had been assured of work with the municipality and repeated that he was available for work at all times. Claimant continued to report as required. He was next interviewed on March 9 at which time he stated that he had contacted a certain employer since his previous visit and others which he did not want to mention and also that he looked in the newspapers every day. On March 16 claimant filled out another form 337 in which he listed a few employers whom he had contacted on March 12 and thereafter. On the basis of this form claimant was reinstated in benefits by the local office as of March 16, 1949. Claimant remained in good standing thereafter until he obtains employment on May 1, 1949 as a fee collector in a city park. At the hearing before the referee claimant testified that he had made contacts for employment with various industrial firms during the period February 16 and March 15, 1949 but that he did not know the date of each contact.

Appeal Board Opinion: The referee overruled the initial determination of the local office ruling claimant unavailable for employment during the pre-Christmas weeks and this issue is not now before us. The only question is claimant's availability for employment during the period February 16 to March 15, 1949. As to this, the referee ruled claimant unavailable, stating that he was not convinced that claimant had made contacts for employment during this period and that claimant was spending his time making contacts toward the job which he obtained in May 1949. He added that claimant had unreasonably restricted his availability for employment by being interested only in one job. We are unable to accept the referee's conclusions on this issue. In the first place, the determination of unavailability was not based on the charge that claimant failed to contact employers, but solely on the ground that he refused to disclose the details of his contacts. It was not contended before the referee that this reflected in any way on the question of claimant's willingness to work. While we recognize that it was a subject of proper inquiry, it does not follow that claimant's refusal to give all the information requested is a sufficient basis in itself for a holding of unavailability for employment. Claimant insisted throughout his reporting period, and there is no reason to doubt, that he wanted to work and was making independent efforts in that direction. If he exerted his greatest efforts towards obtaining the job in the city park, it hardly follows that he was unreasonably restricting his availability by doing so since it appears that this was the work which he had the best chance of obtaining. On the basis of all the evidence in this case we find that there is insufficient support for the determination that claimant was unavailable for employment from February 16 to March

15, 1949. Certainly, there is nothing to indicate that his circumstances or his attitude towards work differed during that period from that during the period for which the local office authorized the payment of benefits.

Appeal Board Decision: The initial determinations of the local office ruling claimant unavailable for employment are overruled. The decision of the referee is modified accordingly. (Dated September 30, 1949)

Appealed By: Industrial Commissioner

Appellate Division Decision: Appeal by the Industrial Commissioner from a decision of the Unemployment Insurance Appeal Board which determined the claimant available for unemployment insurance benefits. Under the provisions of Unemployment Insurance Law (Labor Law, Article 18) the Industrial Commissioner has the statutory delegation of power to prescribe the manner of filing of claims, notification of unemployment and reports on the existence and continuance of the unemployment of a claimant to benefits under the statute. (sects. 591, par. 1; 596, APRs. 1 and 2). The Commissioner has prescribed that claimants shall show in detail prospective employers contacted, giving precise data. During the period in controversy here, from February 16, 1949 to March 16, 1949, the claimant refused to answer questions directed to this subject in a form prescribed by the Commissioner, or to answer similar questions on an oral interview at the local office. The claimant stated in the form that "due to the true fact that the persons I have contacted are persons of high esteem and reputation I must withhold the information" and he later said to an interviewer that this information was a "personal matter". The question is directed to the good faith of the claim for unemployment insurance. The Commissioner is entitled to have answers to such questions which are reasonably within the scope of the authority delegated to him. A fair reading of the statute indicates that if the information is refused "effective days" which are the statutory bases of benefits, need not be calculated during the period of such refusal, and that there is, therefore, no availability for employment during such a period. The determination of the appeal Board is reversed, on the law, and the claim disallowed during the period in controversy, without costs. (November 15, 1950)

#### COMMENT

Even though the Court, in following the issue as set forth in the initial determination, stated that under the circumstances of the case here discussed "there is no availability for employment", the result could also have been rationalized on the basis of a failure to comply with reporting requirements. As a matter of fact, an alternate determination to his effect was made when the case was argued before the Appeal Board on a reopening. A claimant who fails to report as required will, under existing Regulations, not be credited with days of unemployment intervening between the date of such failure and the date he, thereafter, reports in accordance with requirements. The Court recognized that the Industrial Commissioner "is entitled to have answers to such questions which are reasonably within the scope of the authority delegated to him". Consequently, the claimant did not report in accordance with reasonable requirements and his failure to comply can be considered in the same light as if he had not appeared at all in the local office.

Mention is made of this line of reasoning because a finding of ineligibility on the basis of failure to comply with registration or reporting requirements is, as a rule, simple and direct. Such failure can be ascertained with considerably greater ease than elements, such as unavailability, which are only established as a conclusion drawn by inference from the claimant's acts or actions. Drawing of such conclusions is often a matter of judgment and opinion. They are

subject to challenge and some degrees of uncertainty. Hardly any of these disadvantages attach to findings of a failure to comply with reporting requirements.

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A-750-966

Index No. 1640A-1  
1735C-1

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

December 29, 1950

INTERPRETATION SERVICE – BENEFIT CLAIMS  
VOLUNTARY LEAVING OF EMPLOYMENT

Higher Skill

Violation of Employer's Agreement

Appellate Division Decision

Matter of Muir

277 App. Div. 1026

VOLUNTARY LEAVING OF ASSISTANT BOOKKEEPER POSITION; POSTING DUTIES NOT  
IN EMPLOYMENT CONTRACT – LAST EXPERIENCE AS FULL-CHARGE BOOKKEEPER

A full-charge bookkeeper who obtained employment as an assistant bookkeeper and left shortly thereafter because of the requirement to devote one day a week to payroll posting work, such duties not being mentioned at the time of hiring and which allegedly were distasteful and hard on her eyes, voluntarily left employment without good cause since she was properly fitted for the job by training and experience and to make a distinction between general bookkeeping and bookkeeping duties which include payroll work draws too fine a line.

Referee's Decision: The initial determination of the local office disqualifying claimant from receiving benefits for 42 consecutive days upon the ground that she voluntarily left her employment without good cause is overruled. (January 30, 1950)

Appealed By: Industrial Commissioner

Referee's Findings of Fact: A hearing was held at which claimant and representatives of the employer and of the Industrial Commissioner appeared and testified. Claimant filed a claim for benefits on November 7, 1949. By initial determination effective the same date, she was disqualified for 42 days because of voluntary leaving of employment. Claimant was employed for approximately two years to October 21 as a full-charge bookkeeper and last received \$60 per week. She was laid off from this employment. She secured other employment at \$50 starting November 1 through a newspaper advertisement. The advertisement called for an assistant bookkeeper with knowledge of accounts payable, monitor board operations, and typing. She was interviewed by the employer and was given a general description of the duties. Payroll work was not mentioned at the time and she had never done that kind of work. On November 3 claimant was asked to do the payroll work in connection with the records of the 75 to 80 persons then employed by the establishment. The work was continuous and caused claimant to have a severe eyestrain. She had never done payroll work before. For these reasons, she notified the employer on the morning of November 4 that she intended to leave.

She left the employment at the close of that working day. Claimant secured other employment on November 27 as an assistant bookkeeper, not requiring payroll work. Her starting salary was \$50 and at the end of one week the salary was raised to \$55.

Referee's Opinion and Decision: Claimant had good cause under the Unemployment Insurance Law to leave the employment when she did. She had not done payroll work before and the terms of the contract of hire did not include payroll work as one of her duties. Her desire to work was unquestioned. In these circumstances, the initial determination cannot be permitted to stand. The initial determination is overruled.

Appeal Board Opinion and Decision: After a careful review of the record, testimony and evidence adduced before the referee and due deliberation having been had thereon and having found that the referee's findings of fact and conclusions of law are fully supported by the evidence in this case and no errors of fact or law appear to have been made, the Board adopts the findings of fact and the conclusions of law made by the referee as the findings of fact and conclusions of law of this Board. We make an additional finding of fact as follows: Work on payroll would have consumed approximately 20 percent of claimant's working time. The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case. The additional duties imposed by the employer were substantial and could not reasonably be implied from the general job description furnished claimant at the time of hiring. The decision of the referee is affirmed. (Dated April 28, 1950)

Appealed By: Industrial Commissioner

Appellate Division Decision: Claimant had previously been employed as a Full Charge Bookkeeper at \$60.00 a week. She took a position as Assistant Bookkeeper at \$50.00 a week. She was told that her duties would consist of handling accounts payable, monitor board, relief duty on the switch board and typing. After she had gone to work she learned for the first time that she would also be required to devote a day a week to work on the payroll. She had had no payroll experience and although she did the work satisfactorily to her employer, she found it distasteful to her and hard on her eyes and thereupon left the employment and filed her claim for benefits. The record indicates that the wages paid were those prevailing for similar work in the locality and that the duties of the position customarily included work on the payroll. There can be no question but that the claimant, who had been a bookkeeper for some eighteen years, was properly fitted by training and experience to do this job. To make a distinction for the purpose of unemployment insurance benefits between general bookkeeping duties and bookkeeping duties which include payroll work draws too fine a line. We are of the opinion that claimant's voluntary separation from her employment because she was required to post some payroll figures was without good cause, as a matter of law, and disqualified her from unemployment insurance benefits pursuant to Section 593 of the Labor Law. The decision of the Unemployment Insurance Appeal Board is reversed on the law and the determination of the Industrial Commissioner reinstated, without costs. (Dated November 29, 1950)

#### COMMENT

It is interest to note that the Referee, the Appeal Board and the Court in rendering their decisions disregarded entirely claimant's contention of eyestrain. At the Referee's hearing, claimant testified that her eyes "were very tired at the end of the day." Apparently, such contention by claimant was not taken seriously. It had been contended on behalf of the Industrial Commissioner that it is difficult to concede that a bookkeeper who is required to work with figures all day long would be any more tired performing payroll work than any other type of

bookkeeping work. Obviously, contentions of impairment of health should not be taken at face value but should be thoroughly explored for credibility.

The Court based its decision on these considerations:

The wages paid were for those prevailing for similar work in the locality;

Claimant was properly fitted by training and experience to do the job; and

To make a distinction for the purpose of unemployment insurance benefits between general bookkeeping duties and bookkeeping duties which include payroll work draws too fine a line.

While not indicated in their decisions, the Referee and the Appeal Board in overruling the local office determination might have been influenced by the fact that the job which claimant left was that of an assistant bookkeeper at \$50 per week whereas she had been previously employed as a full-charge bookkeeper at \$60. The Court decision does not make direct reference to claimant's higher skill as a full-charge bookkeeper.

Nevertheless, it is significant that they found claimant to be "properly fitted by training and experience to do this job." While a full-charge bookkeeper may have, under certain conditions, good cause for refusing employment as an assistant bookkeeper because of "higher skill," it appears that such factors may have less weight on voluntary leaving issues even though the accepted employment of lesser skill is held for only a few days. (See A.B. 13,906-46; Serial No. [A-750-773](#); Index 1640C-3)

An employer at the time of hiring an employee is not expected to specify each and every duty which the employee will be required to perform. Therefore, a voluntary leaving of employment because of a desire not to perform a function closely related to the duties of the job accepted, should generally be considered without good cause.

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A-750-971

Index 755 A.4

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

JANUARY 22, 1951

INTERPRETATION SERVICE - BENEFIT CLAIMS

AVAILABILITY AND CAPABILITY

Restrictions - Hours

Work History - Short-time worker

AVAILABILITY - QUESTION OF - HOURLY RESTRICTIONS BY "SHORT-TIME WORKER"

A short-time worker who restricts himself to a specified schedule of hours which is non-existent for all practical purposes, is not available for employment within the meaning of the Law, even if he previously worked at such hours.

A.B. 21,971-49

Referee's Decision: The initial determination of the local office holding claimant ineligible for benefits, effective September 12, 1949, upon the ground that she was unavailable for employment is overruled. (November 18, 1949)

Appealed By: Industrial Commissioner.

Findings of Fact: Claimant, a dictaphone operator, filed for benefits on June 27, 1949. Thereafter, she reported regularly at the local office. On September 22, 1949, an initial determination was issued, effective September 12, 1949, holding claimant ineligible for benefits upon the ground that she was unavailable for employment. The basis for such initial

determination was an interview with the claimant at the local office on September 12, 1949. Said interview was reduced to writing and subscribed by the claimant. For a few years prior to the birth of her child, claimant was employed on a full-time basis with a stock brokerage firm. Subsequently, she was unable to arrange for her child's care during normal working hours and accordingly arranged to work part-time. From September 17, 1948 to May 19, 1949, claimant pursued a schedule which required her to work approximately 4:00 p.m. to 8:30 p.m. on Monday, Tuesday and Wednesday and on Thursday from about noon to approximately 8:00 p.m. On Friday, she worked a full day during the normal business hours. This work schedule was imperative because claimant's husband was also gainfully employed. He was available to take care of the infant child during the above hours. Following termination of such employment, claimant sought similar part-time work by examining newspaper advertisements, reporting regularly at the employment service as required and by registering with several private employment agencies. She also attempted to procure work as a salesclerk in the local department stores in the vicinity in which she resided. Claimant was unsuccessful in obtaining employment during the hours to which she restricted her availability. Claimant was classified by the employment service as a dictaphone operator and given a deferred code. Such coding is customarily applied to applicants possessing qualifications rarely sought by prospective employers. The employment office at no time registered the claimant nor was any record ever made of the restrictions imposed by her. Such restrictions were revealed for the first time when claimant was interviewed at the local office, on September 22, 1949. She became re-employed for a few days starting February 17, 1950. Based upon disclosures made at the above interview, the local office issued the initial determination herein. Claimant requested a hearing and the referee overruled the initial determination of the local office. The Industrial Commissioner thereupon appealed to this Board. At the hearing before the Board, the Industrial Commissioner made application to amend the initial determination to the extent of revising the effective date thereof by fixing the same as of June 27, 1949.

Appeal Board Opinion: The referee, in overruling the initial determination of the local office, concluded that opportunities for employment did not exist during the hours to which claimant restricted her employment. We do not subscribe to this view. In our opinion, restrictions imposed by claimant constituted an effective barrier to employment. The most convincing evidence in this respect is her long period of unemployment, during which she unsuccessfully sought work meeting the restrictions imposed by her, despite her apparent effort in search of a position. Part-time clerical work was, for all practical purposes non-existent during the hours claimant desired. Her limitations to sales work in the immediate vicinity of her residence, during the hours she made herself available, in effect, rendered possibility of employment nil. However, prior to September 22, 1949, there was no evidence whatsoever as to claimant's unwillingness or inability to accept employment under existing conditions. As of that date, it appears that her restrictions as to hours and locality rendered her virtually unavailable. On September 22, 1949, there was evidence for the first time tending to establish claimant's unavailability (Matter of Salavarría, 266 App. Div. 922, affirming Appeal Board 7831-42). Upon all the facts and circumstances herein, we are persuaded that claimant was unavailable for employment effective September 22, 1949.

Appeal Board Decision: The initial determination of the local office holding claimant ineligible for benefits, effective September 12, 1949, upon the ground that she was unavailable for employment, is modified to the extent of making the effective date thereof September 22, 1959, and as so modified, is sustained. The decision of the referee is reversed. (November 24, 1950)

#### COMMENT

This decision is released to point out that a short-time worker, within the meaning of Section 596, subdivision 3 of the Law, may be unavailable because of restrictions to specified hours

even though such restriction is for compelling reasons and the hours are identical with or similar to those previously worked. The test in such cases is the question whether reasonable opportunities exist to secure employment during the specified hours. In the instant case, the claimant was held to be unavailable since "part-time clerical work was for all practical purposes, non-existent during the hours claimant desired." That part of the Appeal Board decision which modified the unavailability determination by changing the effective date from 9/12/49 to 9/22/49 appears to be contrary to the Appellate Division decision, Matter of Anderson (Ser. No. A-750-902, Index No. 778B-4). Therefore, an appeal from that part of the decision has been recommended.

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A-750-972

Index No. 1275A-4

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

January 22, 1951

INTERPRETATION SERVICE – BENEFIT CLAIMS  
REFUSAL OF EMPLOYMENT  
Experience and Training  
Qualifications – Skill

Appellate Division Decision

Matter of Boyle

277 App. Div. 1155

REFUSAL – STENOGRAPHER TO CLERK-TYPIST

A stenographer who refused an offer of employment as a typist-clerk at a salary satisfying the prevailing wages for either typist-clerk or stenographer, held to have without good cause refused employment for which she was reasonably fitted by training and experience.

Referee's Decision: The initial determination of the local office disqualifying claimant from benefits for refusal of employment without good cause is overruled. (November 10, 1949)

Appealed By: Industrial Commissioner

Referee's Findings of Fact: Hearings were held at which the claimant and representatives of the Industrial Commissioner appeared and testimony was taken. Claimant, a stenographer, filed for benefits on June 9, 1949. An initial determination disqualified her effective August 3 for refusal of employment and ruled her ineligible effective August 3 for unavailability. Claimant was last employed, at the time in issue, as a stenographer with an Engineering Company in New York City to July 9, 1948, at \$190 a month. Prior to that she had been employed as a stenographer in a law office. She is married and has a child one year of age. She lives with her mother who takes care of her child. Claimant has been employed since October 21 as a secretary with an employer located in New York City at \$40 a week. She obtained this job through a private employment agency. Prior to that she had worked for three weeks at a bank in Lynbrook as a stenographer and teller trainee. On August 3 the claimant was offered employment as a typist-clerk with an employer in Valley Stream at \$40 a week, a wage above that prevailing in the locality for similar employment. It was an unusual wage for that work. The claimant refused the

job because she desired to obtain employment as a stenographer. The employment interviewer conceded that the work of a typist utilizes a skill lower than that of a stenographer and that continued work as a typist would cause a deterioration of the claimant's skill as a stenographer.

Referee's Opinion and Decision: In view of the fact that the claimant's primary occupation and skill is that of a stenographer and because acceptance of work as a typist would result ultimately in a deterioration of her skill, she refused the employment with good cause. The initial determination is overruled.

Appeal Board Opinion and Decision: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case. The decision of the referee is affirmed. (Dated April 28, 1950)

Appellate Division Decision: Appeal by the Industrial Commissioner from a decision of the Unemployment Insurance Appeal Board granting benefits to respondent. By its decision the Board has determined that respondent's refusal of an offer of employment was legally justified. Respondent's last previous employment as a stenographer. The offer refused was as a typist-clerk at a wage found to be above the prevailing wage of either typist-clerks or stenographers. The respondent's objection to the offered employment was that she preferred work as a stenographer. There is no evidence that respondent was not reasonably fitted by training and experience for the offered employment. All of the requirements of the statute were met and the refusal of the offer was without just cause. (Matter of Heater (Corsi) 270 App. Div. 311.) December 1, 1950)

#### COMMENT

Claimant's prior employment as a stenographer was at a skill higher than that of a typist-clerk. It is therefore of importance to note that the Court found "no evidence that respondent (claimant) was not reasonably fitted by training and experience for the proffered employment." The Court also found that the offered wages satisfied those prevailing for either typist-clerks or stenographers and concluded that "all of the requirements of the statute were met." The decision in Matter of Heater which the Court quoted, was released under Serial No. [A-750-697](#).

The significance which attaches to the finding that the offered wages corresponded not only to those prevailing for clerk-typists, but also to those for stenographer, is somewhat speculative. It is possible, but not at all certain, that a different decision would have been reached if they had been substantially below those for stenographers or claimant's previous wages.

However, this decision reemphasizes the holdings of the same Court in other cases to the effect that fine distinctions are improper in establishing whether a claimant is "fitted by training and experience" for the offered employment and that standards should be applied which are broader than those sometimes heretofore outlined.

Whether a claimant in such a case has "good cause" on general grounds to refuse the employment, is a different question. It does not seem likely that a refusal could be justified because the wages, although prevailing for the refused job for which a claimant is fitted by training and experience, are not prevailing for a different job, requiring a higher skill.

Yet, such a conclusion is not a complete answer. There remains the question whether the claimant had "good cause" under the general provisions of the statute. The relationship of the general "good cause" clause to the special provisions, such as those dealing with prevailing wages, is this: If the conditions of the special provisions are met, this means that the claimant had good cause as a matter of law by virtue of paragraphs (a), (b), (c) or (d) of Section 593

subd. 2, without power vested in the Commissioner of exercising any discretion or judgment. If the conditions which are claimed to represent good cause are not covered by the specific provisions in these paragraphs, the finding whether there is good cause is a matter of judgment resting with the Industrial Commissioner. Such judgment is usually exercised by evaluating the claimant's action by that of a reasonably prudent person who is genuinely seeking employment.

Applying this reasoning to the instant case, and assuming that the offered wage had not been commensurate with those of a stenographer, this question would present itself; Would the claimant, if acting as a reasonably prudent person genuinely interested in a job, have refused the employment because of the offered wage level?

This question can only be answered if all the surrounding circumstances are known, which would include the probabilities of finding a better paid job.

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A-750-981

Index No. 735B.9  
795.14

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

February 16, 1951

INTERPRETATION SERVICE- BENEFIT CLAIMS  
AVAILABILITY AND CAPABILITY  
Claims from without the State  
Removal of Residence

Appellate Division Decision  
Matter of Geller

Appeal Board Case No. 21,383-49

AVAILABILITY -TEMPORARY RESIDENCE IN ANOTHER CITY DURING SEASONAL SLACK

Claimant who filed a claim and certified for a month in Baltimore after being temporarily laid off in New York was held available for employment since his unemployment was caused by the seasonal slack in the garment industry in both cities, rather than a desire not to work or lack of independent efforts to secure other employment.

(See Comment after Decision)

Referee's Decision: The initial determination of the local office holding that claimant was unavailable for employment effective June 24, 1949 is sustained. (September 27, 1949)

Appealed By: Claimant

Findings of Fact: Claimant is 65 years old. He is a dress operator with many years of experience. He was continuously employed for 17 years ending June 22, 1949 by a single employer. Prior to that he had been employed for 15 years in a different establishment. On June 22, claimant was temporarily laid off because of the slack season. On June 23, 1949, claimant filed an application for benefits and registered for employment in the City of New York. At the time of his registration claimant advised the local office that he lost his wife in November 1948 and that he desired to visit Baltimore to reside temporarily with a married daughter during the period of his unemployment. He asked for permission to maintain his registration in New York and to report by mail from Baltimore. The local office denied claimant permission to report

from without the state but advised him to file an original claim in Baltimore under the Interstate Benefit Plan. On June 24, 1949, claimant left the City of New York for Baltimore. On June 30, 1949, claimant filed a claim for benefits and registered for employment in the City of Baltimore under the Inter-state Benefit Plan. He thereafter reported for insurance benefits and for employment on July 7, 14 and 21. At the time of his registration, the claims taker discussed possibilities for employment in the City of Baltimore and he advised claimant that the garment industry in the City of Baltimore was under going a seasonal slack period. The claims taker deemed claimant available for employment. Prior to leaving New York City for Baltimore, claimant advised, his employer of his intention to reside temporarily in Baltimore. He left his temporary address in Baltimore with his employer, asking that he be notified when work was available. Throughout the period of his stay in Baltimore claimant was at all times ready, able and willing to accept employment if any were offered to him. He was also at all times ready to return to New York for employment if recalled either by his employer or by the New York State Employment Service. on July 20 , 1949, claimant was notified by his employer that work would be resumed in his establishment on July 25, 1949. Claimant returned to New York City on July 24, 1949 and resumed work the next day. The City of Baltimore has a population of about 942,000. The annual production of the garment industry and accessories aggregates about \$108,800,000. The annual production of women's coats, suits and skirts is valued at \$8,900,000 and the annual production of women's dresses is valued at \$4,100,000. on August 10, 1949, after an interview at the local office, an initial determination was issued holding that claimant was unavailable for employment beginning June 24, 1949. Claimant contested the initial determination and requested a hearing. The referee sustained the initial determination and claimant appealed to this Board.

Appeal Board Opinion: The sole issue on this appeal is whether or not claimant is available for employment. In Appeal Board, 2065-40, we defined availability as "the claimant's readiness, willingness and ability to perform work for which she is reasonably fitted". It is not contended that claimant, in this case, is physically incapable of performing the work. Therefore, the test of claimant's availability is his state of mind of being ready and willing to accept employment when offered. Claimant's state of mind can be judged from his expression and his conduct. Claimant did not quit a job to go to Baltimore. At the time he went to that city, he was in a period of unemployment caused by the arrival of the slack season in the garment industry in the City of New York. He did not go to Baltimore for a vacation. Baltimore is not a vacation resort. Claimant lost his wife shortly before the period in issue and it is quite understandable that he desired to spend the period of his forced idleness in New York with members of his family who were then located in the City of Baltimore. He made arrangements for return as soon as work was available for him. He consistently maintained that he was ready and willing to accept employment at all times either in the City of New York or in the City of Baltimore. The local office predicates its conclusion that claimant was unavailable on the fact that he left his Normal labor market to go to Baltimore. Claimant's labor market is any place in the United States where garments are manufactured. The record clearly discloses that Baltimore is a substantial garment center with an annual production in excess of \$108,000,000 per year. The garment industry in that city includes the production of dresses in which line claimant is engaged. The temporary shortage of job opportunities in a going industry in Baltimore does not of itself establish claimant's unavailability. Availability is claimant's readiness to accept work and not his ability to obtain work in a going industry. The further argument of the local office that claimant was unavailable because he failed to make individual efforts to obtain work in Baltimore is without substance. Claimant was advised by the employment service in Baltimore that the garment industry was undergoing its slack season, a condition which was similar to that prevailing in New York City. In the light of the information received, it appears to us it would have availed claimant little particularly in the light of his advanced age, to canvass industrial

establishments in the City of Baltimore. Although our experience indicates that there is some labor turnover during the slack period in the garment industry, nevertheless claimant properly relied on the information given to him by the employment service in Baltimore. We believe the language of the Court in Nelson v. Review Board of Indiana Security Division et al. 82 N.E. (2nd) 523 is in point. The court there said:

This court judicially knows that job opportunities are limited to individuals 70 years of age and over, and the record does not disclose a complete lack of effort to seek work on the part of the claimant or a refusal to accept any type of employment on the part of the claimant. It seems clearly apparent from a consideration of the circumstances that the failure of the claimant to make a further independent search for work was not proximate cause of his continued unemployment... The availability test must be applied with a full consideration of the facts and circumstances of the particular case. There must be some basis for an inference that with some effort on behalf of claimant he could reasonably be expected to find work for himself. Such basis does not exist in this case.

We hold that under the circumstances of this case, claimant was clearly available for employment and entitled to benefits during the period of his residence in the city of Baltimore (Matter of Samuel Loeb, 269 App. Div. 917).

Appeal Board Decision: Claimant was available for employment commencing with June 30, 1949. The initial determination of the local office is overruled. The decision of referee is reversed. (March 31, 1950)

Appealed By: Industrial Commissioner

Appellate Division Opinion and Decision: Claimant is a sewing machine operator, employed for many years in the City of New York. On June 22, 1949, he was laid off temporarily because of a decline in business. On June 23, 1949, he filed a claim for benefits, and informed the local office that he desired to visit his married daughter in Baltimore. He requested permission to report by mail during this visit to Baltimore. This request was denied and he was informed that he must file an original claim in Baltimore, Maryland under the Interstate Benefit Plan with New York. Claimant went to Baltimore and remained there about a month, when he returned and resumed his employment in New York City. While at Baltimore he reported there to the local unemployment insurance office on several occasions. The issue presented is whether claimant under the circumstances disclosed became unavailable for employment as a matter of law. The Board has held that under the circumstances claimant was available for employment and entitled to benefits during the period of his residence in the City of Baltimore. It is to be noted that claimant made some effort to find work and the record does not disclose any refusal on his part to accept suitable employment. We think, therefore, the issue presented is clearly one of fact, and that there is substantial evidence to sustain the , determination of the Board. Decision unanimously affirmed with costs to claimant against the Industrial Commissioner. (January 16, 1951)

#### COMMENT

This decision is not in conflict with current principles relative to the unavailability of claimants who move to areas of limited employment opportunities, claimants sojourning at resort areas, etc. It shows, however, that an unavailability issue may be clearly one of fact and the test must be applied with full consideration of the specific circumstances of the particular case. Further, a sound determination should contain some basis for an inference that claimant's action, or lack thereof, is the proximate cause of his continued unemployment.

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

February 16, 1951

INTERPRETATION SERVICE – BENEFIT CLAIMS

VOLUNTARY LEAVING

Higher Skill

Prospect of Other Work

Appeal Board Case Number 24,039-50

VOLUNTARY LEAVING – PROSPECT OF SECURING JOB COMPARABLE TO PRIOR  
EARNINGS AND EXPERIENCE

Where a sales engineer accepted employment as a timekeeper and material checker and voluntarily left after ten weeks because of a belief that he could obtain a position more in keeping with his prior earnings and type of work, such leaving was held to be without good cause since he left his job at a time when there was work available for him and he had no definite assurance of a job.

Referee's Decision: The initial determination of the local office disqualifying claimant from receiving benefits for 42 days, effective February 28, 1950, on the ground that he voluntarily left his employment without good cause is overruled. (June 13, 1950)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant, a sales engineer, during a period of unemployment, accepted work as a timekeeper and material checker in connection with a certain alteration job taking place in a New York City hotel. The salary was \$50 per week. Claimant worked at this job for approximately 10 weeks until January 13, 1950. At the time he left, there was still work available for him and he could have continued on the job. He left the job believing that he had a position with a manufacturer of automobile tires which he considered more in keeping with his prior earnings and type of work. The claimant did not have a definite job with the prospective employer but it was merely in the stage of negotiation. The prospective job offer never materialized. He subsequently tried soliciting orders on a free lance part-time basis for the automobile tire firm but was unsuccessful. Prior to taking the material checker job claimant worked for three months selling plumber and marine supplies on a commission basis. He had a drawing account of \$150 a week. At the termination of this employment claimant's drawings exceeded his earned commissions. Prior to this employment claimant was employed as an expeditor by a manufacturer of water conditioning equipment. On this job claimant earned \$58 a week. Claimant filed for benefits on February 28, 1950. The local office issued an initial determination disqualifying claimant from receiving benefits on the ground that he voluntarily left his employment without good cause. The claimant requested a hearing. The referee overruled the initial determination and the Industrial Commissioner appeals to this Board.

Appeal Board Opinion: In view of the fact that claimant left his job at a time when there was work available for him and that he had no definite assurance of a job, he was not justified in leaving his employment. It must be deemed that he voluntarily left his employment without good cause.

Appeal Board Decision: The initial determination of the local office disqualifying the claimant from receiving benefits for 42 days, effective February 28, 1950, on the ground that he voluntarily left his employment without good cause, is sustained. The decision of the referee is reversed. (Dated January 5, 1951)

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A-750-985

Index Nos. 1700.2  
1720.3

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

February 16, 1951

INTERPRETATION SERVICE – BENEFIT CLAIMS  
VOLUNTARY LEAVING OF EMPLOYMENT  
Self-Employment

Appeal Board Case Number 23,543-50

VOLUNTARY LEAVING; ANTICIPATION OF BECOMING SELF-EMPLOYED – NO DEFINITE PLANS

Voluntarily leaving employment in anticipation of becoming self-employed but with no definite plans, was held to be without good cause.

Referee's Decision: The initial determination of the local office that the claimant voluntarily left his employment without good cause and withdrew from the labor market is sustained. (April 4, 1950)

Appealed By: Claimant.

Findings of Fact: A hearing was had at which the claimant and a representative of the Industrial Commissioner appeared. Testimony was taken. The claimant filed an original claim for benefits on December 9, 1949. By initial determination he was disqualified for 42 days for voluntary leaving of employment without good cause, under circumstances indicating a withdrawal from the labor market. He was ruled ineligible effective December 9, and until such date as he certified to a bona fide return to the labor market and to his availability for employment. The claimant was employed from July 18, 1949 to November 4, 1949 at Utica, New York, by an electrical company as a foreman of an assembly line at \$68.50 per week. The claimant had previously been employed by the same employer at Clyde, New York, for two and one-half years. The employer closed its Clyde plant on June 30, 1949. The claimant voluntarily left his employment at Utica, New York and returned to Clyde, New York, because he anticipated becoming self-employed as the operator of a bar and grill. The claimant had no definite plans regarding his self-employment when leaving his job in Utica. Upon returning to his home at Clyde, New York, the claimant has intermittently assisted his father-in-law in performing farm work. he admittedly had made no search for work since filing his claim, stating that he did not wish to accept employment and then leave such employment when he entered into his business. There appears to be no reason why the claimant could not have remained in his employment at Utica, New York, until definite plans had been consummated regarding his entry into business.

Referee's Opinion and Decision: The initial determination is sustained. The reason advanced by claimant for the voluntary leaving of his employment does not constitute good cause within the meaning of the Law. At the time of leaving the claimant had no definite plans with respect to entering into business for himself. Since filing his claim for benefits he has made no effort to secure work and has been partially engaged in assisting his father-in-law on a farm. Such circumstances reveal that the claimant voluntarily left his employment without good cause under circumstances indicating a withdrawal from the labor market.

Appeal Board Opinion and Decision: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case. The decision of the referee is affirmed. (Dated October 20, 1950)

#### COMMENT

Release [A-750-937](#) should be reviewed with the decision here reported. In particular, attention is drawn to the "Comment" in the prior release in which it was stated:

"In order that an intention of entering self-employment constitute good cause for voluntary leaving employment, an individual must have a definite prospect of self-employment. Leaving employment to seek self-employment or to investigate a business proposition is not good cause."

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A-750-986

Index No. 1520-1

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

February 16, 1951

INTERPRETATION SERVICE – BENEFIT CLAIMS  
MISREPRESENTATION OR MISSTATEMENT  
Concealment of Earnings

Court of Appeals Decision

Matter of Bernstein

303 NY 755 Affg. 278 AD 625

#### FORFEITURE PENALTY – CERTIFICATION TO KNOWN FALSE STATEMENTS

Claimant's failure to report one day's employment with earnings of less than \$24 believing that such employment did not affect eligibility, represents a wilful false statement to obtain benefits since the statute (1) authorizes the forfeiture when claimant knowingly certifies to a false fact regardless of his interpretation of the ultimate effect of his statement, and (2) does not require a criminal intent or proof sufficient to support larceny.

Referee's Decision: The initial determination of the local office that claimant made wilful misrepresentations to obtain benefits is overruled. (December 21, 1949)

Appealed By: Industrial Commissioner

Findings of Fact: A hearing was held at which claimant and representatives of his union and of the Industrial Commissioner appeared. Testimony was taken. Claimant, a fur cutter, filed for benefits on August 15, 1949. An initial determination ruled him ineligible for August 17, 1949, for lack of total unemployment. Another initial determination ruled him ineligible for August 18 through August 23 for failure to comply with reporting and registration requirements. By an initial determination the claimant's benefits were forfeited for 42 effective days for a wilful false statement to obtain benefits. It was further determined that the claimant had been overpaid \$26. The claimant admits that he was employed for approximately five hours on August 17, 1949, and earned on that day \$23. He did not report that sum because he was under the impression that earnings below \$24 in one week did not effect his eligibility, and, therefore, need not be reported. The employer for whom the claimant worked on August 17 was the same employer that he had worked for immediately preceding the filing of his claim of August 15. After his employment, pursuant to the rules promulgated by the Industrial Commissioner, the claimant was required to refile his claim on August 18, 1949, but did not do so. The claimant alleges that he failed to refile his claim because he either did not read the booklet of instructions furnished to him, or that he forgot. The insurance office allowed the claimant a constructive refiling effective August 23, 1949. The claimant's application to excuse his failure to refile his claim was denied.

Referee's Opinion and Decision: It is undisputed that the claimant was employed on August 17, 1949. In my opinion the claimant's application to excuse his failure to refile his claim was properly denied. The claimant has shown no justifiable reason to excuse his omission. However, I am of the opinion that the claimant did not wilfully misrepresent his employment. It is to be noted that the employer for whom he worked on August 17 was the same employer that he worked for immediately preceding the filing of his claim. He knew or should have known that the insurance office communicates with the last employer of a claimant. Furthermore, the claimant misunderstood that provision of the Law dealing with the eligibility of a claimant earning more than \$24 a week. He mistakenly believed that earnings below that figure need not be reported. That is understandable, and upon the proof submitted is accepted. However, inasmuch as the claimant was not totally unemployed on August 17, and did not refile his claim until August 23, he could not have any effective days credited to him in the week ending August 21, 1949. The initial determinations of lack of total unemployment and failure to comply with reporting requirements are sustained. The initial determination forfeiting the claimant's benefit days for wilful misrepresentation is overruled. The claimant has been overpaid as charged. (December 21, 1949)

Appeal Board Opinion and Decision: The Board is of the opinion that the referee made proper findings of fact and correctly determined the issue involved in this case. The decision of the referee is affirmed. (May 26, 1950)

Appellate Division Opinion and Decision: Appeal by the Industrial Commissioner from a decision of the Unemployment Insurance Appeal Board which affirmed a decision of an unemployment insurance referee overruling an initial determination of the Industrial Commissioner that a forfeiture of twenty-four "effective days" be imposed under Sec. 594 of the Unemployment Insurance Law because the claimant had "wilfully made a false statement to obtain benefits." Claimant was laid off for a temporary period on August 15, 1949 and filed a claim for benefits under the Unemployment Insurance Law the same day. Two days later, on August 17, 1949, claimant returned to work for the same employer for 5½ hours and was paid \$23.00. At the end of the week on August 23, 1949, claimant certified that he had suffered "total unemployment" during the entire week ending August 21, 1949. Concededly this information was false and claimant knew at the time that it was false. The referee and the Unemployment Appeal Board have excused the false statement on the theory that claimant misinterpreted the

law and did not intend to defraud. Sec. 594 does not require a criminal intent or proof sufficient to support larceny. The officials charged with the proper administration of the Unemployment Insurance Law are entitled to true facts upon which to make their determination. If a claimant certifies to a false fact, knowing that it is false, the statute authorizes the forfeiture regardless of claimant's interpretation of the ultimate effect of his false statement. Decision of the Unemployment Insurance Appeal Board reversed, on the law, and the initial determination of the Industrial Commissioner reinstated, without costs. (January 16, 1951)

### COMMENT

This Court decision is important because it gives a new meaning to Section 594 of the Law. In the past, there has been a hesitancy to apply penalty forfeitures for false statements when claimants presented excuses, such as that they had no intention to defraud, that they misunderstood their rights under the law, etc. The Court established that Section 594 of the law does not require "a criminal intent or proof sufficient to support larceny" but that the statute authorizes the penalty forfeiture when a claimant certifies to a false fact, knowing that it is false, "regardless of claimant's interpretation of the ultimate effect of his false statement."

The imposition of the forfeit penalty under Section 594 of the Law only requires, therefore, that the following three elements be present:

Claimant makes a false statement

Claimant knows that the statement is false

The false statement is made in relation to his claim for unemployment insurance benefits

The Court decision can be rationalized to mean that the forfeit penalty is not a punishment for a fraud or attempted fraud but, pure and simple, a penalty for the making of a false statement, with or without fraudulent intent. In other words, the penalty applies whenever there is a failure to disclose true facts on which information relating to benefit determination is requested. This is supported by the Court's reasoning to the effect that "The officials charged with the proper administration of the Unemployment Insurance Law are entitled to true facts upon which to make their determinations."

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A-750-987

Index No. 1280-3

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

February 16, 1951

INTERPRETATION SERVICE – BENEFIT CLAIMS  
REFUSAL OF EMPLOYMENT

Distance – Physical Inability to Travel

Appeal Board Case Number 23,795-50

REFUSAL; INABILITY TO TRAVEL ONE AND ONE-HALF HOURS – CONTENTION OF  
NAUSEOUSNESS

Refusal of employment necessitating one and one-half hours travel on the ground that traveling made claimant nauseous, was without good cause even though supported by a medical statement; no credence was given to the vague and contradictory proof submitted by claimant who had previously traveled without ill effects and who, prior to the referee's hearing, informed the local office that she had no physical defects, the only reason for the refusal being "travel time is too long."

Referee's Decision: The initial determination of the local office disqualifying claimant as of February 26, 1950 on the ground that, without good cause, she refused employment for which she is reasonably fitted by training and experience and charging her with an overpayment in the sum of \$52 in benefits is overruled. (May 17, 1950)

Appealed By: Industrial Commissioner

Findings of Fact: Claimant, a sewing machine operator on men's shirts, was employed for a period of six years to February 1950 with a firm located on West 18<sup>th</sup> Street, in the Borough of Manhattan, City of New York. At that time she resided in the Borough of Brooklyn. After her separation from employment she moved to Laurelton, Borough of Queens. On February 6, 1950, claimant refiled for benefits. On February 15, 1950, claimant visited the local office and signed a statement in which she stated, among other things, that she expected to be recalled by her last employer and that she had no physical defects which might affect her working. On February 16, 1950 claimant was offered employment in her customary occupation on a piecework basis in a union shop. This establishment was located on West 19<sup>th</sup> Street, Borough of Manhattan. Claimant contemplated contacting the prospective employer but changed her mind because of the travel time involved. On March 9, 1950, in a summary of insurance interview, claimant stated the following: "I refused to accept the referral because the traveling time is too long. That is the only reason I refused the job. I will not accept a job in Manhattan – I will work only in Queens and as a facing maker." Claimant would have been required to travel one and one-half hours from her home to reach the establishment of the prospective employer. The local office thereafter issued an initial determination holding that claimant refused the proffered employment without good cause and charged her with an overpayment in the sum of \$52 in benefits. Claimant contested this initial determination. At the scheduled hearing before the referee, claimant offered a certificate issued by her physician dated December 24, 1950 (incorrectly dated) to the effect that any undue amount of travel caused claimant to be nauseous and for which reason her physician suggested that claimant seek employment within a short distance from her home. In a supplementary medical statement submitted by claimant's physician, it was stated that claimant was under the doctor's care for January 1950 to April 6, 1950 and claimant's alleged ailment was diagnosed as "Travel makes her (referring to claimant) nauseous." The referee overruled the initial determination on the ground that, in view of claimant's alleged physical condition she was justified in refusing the job in question because of the extended travel involved. From this decision the Industrial Commissioner now appeals to this Board.

Appeal Board Opinion: It is significant that when claimant resided in the Borough of Brooklyn, she traveled for about six years to her last employment in the Borough of Manhattan without any ill effect. On February 15, 1950, when claimant visited the local office and was requested to list any physical defects, which might affect her working, she listed none. On March 9, 1950, when claimant was interviewed at the local office concerning her refusal of the proffered employment, she stated that her only reason for doing so was that "The travel time is too long." In the light of the above factors we cannot give any credence to the proof submitted by claimant which is vague and contradictory. Claimant's objection to traveling to the proffered employment, therefore, seems to us to have been prompted by a consideration of personal convenience rather than hardship. There remains one point on which to comment. The Board has consistently held that travel consuming no more than one and one-half hours one way is not excessive (Appeal Board, 20,444-49, 23,687-50). Under these circumstances we must conclude that claimant refused, without good cause, employment for which she is reasonably fitted by training and experience.

Appeal Board Decision: The initial determination of the local office disqualifying claimant as of February 16, 1950, on the ground that, without good cause, she refused employment which she is reasonably fitted by training and experience and that she was overpaid the sum of \$52 in benefits, is sustained. The decision of the referee is reversed. (December 29, 1950)

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A-750-993

Index No.735B.13

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

April 3, 1951

INTERPRETATION SERVICE- BENEFIT CLAIMS  
AVAILABILITY AND CAPABILITY  
Desire and efforts to find work

Appeal Board Case Number 24,512-50

AVAILABILITY OF ITINERANT WORKER UPON RETURNING HOME DURING PERIOD OF  
UNEMPLOYMENT

Claimant, whose occupation is such that he customarily works anywhere in the United States, was not held to be unavailable upon his return to his home during periods of unemployment where his type of employment is non-existent, since he was found to have exerted efforts to find employment in the most effective manner available to him, and in the usual and customary method of securing employment in his branch of the industry.

(See Comment after Decision)

Referee's Decision: The initial determination of the Out-of-State Resident Unit disqualifying claimant from receiving benefits, effective March 1, 1950, upon the ground that he was unavailable for employment is sustained. (June 28, 1950)

Appealed By: Claimant

Findings of Fact: Claimant has been a stage hand for the past 40 years and is a member of the International Alliance of Theatrical Stage Employees and Motion Picture Operators Union of the United States and Canada having general offices in New York City. He lost his employment, when the show with which he was traveling closed. He has been a resident of Berea, Virginia for the past five years where he has his home. Claimant filed a claim for benefits on February 13, 1950 in New York and returned to his home in Virginia at which time he filed a continued interstate claim for benefits in Fredericksburg, Virginia. The Out-of-State Resident Unit issued an initial determination that claimant was unavailable for employment effective March 1, 1950. The basis of the determination was that the claimant removed himself from an active labor market to an area where his type of employment was non-existent, thereby rendering him unavailable for employment. At an insurance interview held on April 27, 1950 in New York City, claimant stated that he went to Berea, Virginia after he lost his last employment because his home was there and that while in Virginia, he made contacts with his union and producers of road shows by correspondence and telephone, seeking employment. Claimant works as a traveling stage hand approximately six months a year and devotes an additional two months to a side line hanging draperies for studios et cetera. Claimant is not a member of the New York City local of his union. He is a member of the El Paso, Texas local and has a traveling union card issued by the International Union. He is classified as a traveling stage employee and has been so engaged for a number of years. He could only get a job as an extra in New York when

all the local members of the union are fully employed. Jobs as extras were scarce in New York during the period of his unemployment. Claimant customarily works anywhere in the United States in his own or a related line, wherever such work is available. He exerted efforts to obtain work by contacting former producers he worked for and friends in the same profession and through the medium of the union. Claimant did not contact any employers personally because he had found from previous experience that this was not an effective method of obtaining work. It is not necessary for him to do so since it is the usual and customary practice in his branch of the trade for the employers to contact him by phone or mail and vice versa. Claimant has been employed from March 31, 1950 to date.

Appeal Board Opinion: The referee sustained the determination on the premise that claimant moved from a locality in which work opportunities exist to a community in which there are no work opportunities in his usual occupation. The referee's conclusion lacks support in the record now before the Board. Claimant's availability for employment is not to be judged by the standards to be applied in a case where a claimant living in a small community is willing to work only in the area in which he resides, where his normal labor market is elsewhere. In the instant case, claimant did not impose any limitations with respect to the local of his employment. Claimant has been residing in his present home since 1946. He was willing to work and did work anywhere in the United States. It cannot be said that solely because of the nature of the efforts he exerted in search of such work he failed to satisfy the availability requirements of the statute. Claimant sought work in the most effective manner available to him and in the usual and customary method of securing employment prevailing in his branch of the industry. During periods of unemployment in his trade he obtains work hanging draperies as a side line, and his continued unemployment during the period in issue is not attributable to any lack of effort on his part to seek work.

Appeal Board Decision: The initial determination of the Out-of-State Resident Unit disqualifying claimant for unavailability for employment is overruled. The decision of the referee is reversed. (January 26, 1951)

#### COMMENT

There is now general acceptance of the principle that a claimant does not, as a rule, meet the availability requirements of the Law if he removes himself from a locality in which work opportunities exist to a community in which there are no work opportunities in his usual occupation. This case is here reported to show that there are exceptions to this principle under unusual and unique circumstances. It should be noted that the claimant's labor market area is not the community where he has his home and where he resides temporarily. His labor market is outside that community, and the Board found that he made reasonable job efforts to find employment in his labor market area.

Similar conditions may exist in other occupations. Cases of steel construction workers are probably another illustration since such workers customarily go from job to job without limitation as to location and without restrictions as to State lines.

April 3, 1951

INTERPRETATION SERVICE- BENEFIT CLAIMS  
AVAILABILITY AND CAPABILITY  
Claims Filed from without the State

Appeal Board Case Number 24,894-50

AVAILABILITY--CONFINING SEARCH IN RESORT AREA TO USUAL OCCUPATION FOR  
WHICH NO EMPLOYMENT OPPORTUNITIES EXISTED

Claimant, who filed a claim in Florida and confined his search of employment to jobs in a vocation which because of local conditions and personal circumstances it was impossible to obtain, was not available for employment within the meaning of the statute.

Referee's Decision: The initial determination of the Out-of-State Resident Unit disqualifying claimant from benefits effective November 21, 1949, because of unavailability for employment is overruled. (August 11, 1950 )

Appealed By: Industrial Commissioner

Findings of Fact: Claimant, a pharmacist, formerly licensed in Hungary, came to the United States in 1948 and his first employment was in New York City. For about 10 months to September 10, 1949, he worked in Cleveland, Ohio, as an apprentice pharmacist pursuant to a license issued to him by the State of Ohio. He left the employment to study English and to take a pharmacist's examination in Washington, D.C. which he took in April 1950. He did not pass the examination. Claimant refiled a claim for benefits and registered for employment in Miami, Florida, on November 21, 1949, having arrived there the day before. He went there because his wife had a job in a hotel in Miami Beach for the winter season. While there he sought work only in the pharmaceutical line as apprentice pharmacist, or an assistant or clerk. At the insurance interview he stated that he would accept a minimum salary of \$50 per week although he previously earned \$60 per week. Claimant could not find work in Florida limited to filling prescriptions only as an assistant pharmacist because all employers required the assistant also to work on other counters as a salesman. Claimant admittedly could not do sales work because of his limited knowledge of the English Language and consequently failed to find work. Claimant was not licensed to practice pharmacy in Florida, but may have been eligible for an apprentice license if he first found such employment. Claimant and his wife returned to New York City on March 21, 1950. The Out-of-State Resident Unit issued an initial determination disqualifying claimant from benefits, effective November 21, 1949, on the ground that claimant was unavailable for employment, inasmuch as his chances of securing work in a drug store at a salary of \$50 per week were remote.

Appeal Board Decision: The referee overruled the initial determination and held that claimant met the test of availability. The referee pointed out the employers would not hire claimant because of local conditions which required an apprentice pharmacist to do courier sales work and that his language difficulties prevented him from doing such work and concluded under all the circumstances that claimant was available for employment. We cannot agree With the referee's conclusions. In the course of his search for work in his vocation, claimant learned in a relatively short time that the lack of a pharmaceutical license and his lack of understanding of the English language were two substantial obstacles to his securing the desired employment. Nevertheless, he persisted in confining his search to work involving only the filling of prescriptions. Thus, claimant virtually precluded himself from the possibility of obtaining any employment while in Florida. We hold that claimant's efforts to seek work fell short of meeting the test of availability set forth in Appeal Board, 17,064-48\*.

Appeal Board Decision: The initial determination of the Out-of-State Resident Unit that claimant was ineligible for benefits is hereby sustained. The decision of the referee is reversed. (Jan 12, 1951)

\* See A-750-839, Index 735A.3

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