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Disqualification from Unemployment Benefits in North Carolina

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of discriminatory enforcement, and by draining resources away from the effort to control more serious misconduct.¹⁰⁸

The basic problem is whether it should be up to the state or up to the individual conscience to regulate this so-called immoral behavior. In attempting to control this behavior, the criminal law has overstepped its primary function, that of protecting a person and property from unwarranted invasions. The legislature has overstepped its primary function in attempting to legislate private morality. This extension of the legislative function and the legitimate scope of the criminal law is not only unwarranted, but expensive and ineffective. Many feel that "no criminal liability should attach to acts not involving direct injury to another."¹⁰⁹ Since victimless crimes are primarily directed against one's self, it is not necessarily in the best public interest to attempt to control these "crimes."

A change in priorities is due. There should be an overall decriminalization of victimless crime. Rather than attempting to deal with the "deviant" behavior through the criminal law, the legislature should redirect the efforts towards control through licensing and through rehabilitative measures.

But the legislatures have so far been reluctant to decriminalize some of these offenses. They feel that decriminalization would be read as an approval of the behavior which they somehow feel is basically immoral and wrong. For fear of condoning the victimless crimes, the legislatures in most jurisdictions have not seen fit to revise the current criminal status of these crimes.

EVELYN CHEVERIE

Disqualification From Unemployment Benefits in North Carolina

INTRODUCTION

In order to examine the basis for disqualification from unemployment benefits, it is first necessary to extract the subject from the statutory and judicial framework in which it lies. Therefore, the approach shall be one of denuding the subject by revealing and disposing of the background to its establishment and the interpretations and amendments to its essence.

108. NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE, *THE RULE OF LAW, AND ALTERNATIVE TO VIOLENCE* 551 (1970).

109. Decker, *supra* note 2, at 50.

UNEMPLOYMENT BENEFITS

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The source for all state programs of unemployment compensation lies in the various acts contained in the general program of Federal Social Security. Among these are the Federal Insurance Contributions Act¹ and the Federal Unemployment Act.² In instituting these acts, it was conceived that the individual states would respond by creating their own acts. Through these Federal Acts, Congress has provided a system whereby individual states might take some considerable advantage in the administration of their own unemployment compensation laws and thus be permitted to work together with the several states towards a common end.³

This common end, or purpose behind the various federal and state acts, is one which has been the subject of numerous court decisions in an effort to interpret the acts according to some semblance of legislative intent. It is generally agreed that unemployment compensation statutes are enacted for beneficent⁴ and humane⁵ reasons. In considering the recipients of these acts, it has been conceded that the acts were intended to include as many persons as possible.⁶ In the manner of a digressive note however, it has been held that the acts exist to promote the common good or the public or general welfare,⁷ and not merely the particular welfare of the individual to whom the benefits might accrue.⁸ Through the various decisions of the courts, then, it can be summarized that the public as a whole is intended to benefit primarily from the overall plan of unemployment compensation, and that the monetary benefits doled out to the individual are a mere consequence of the act rather than its substance.

In further consideration of the purpose for the acts, the courts have held that a primary objective is to provide protection for employees⁹ and not to control the relationship between employer and employee,¹⁰

1. Federal Insurance Contributions Act, 26 U.S.C. 1400, *et seq.*

2. Federal Unemployment Act, 26 U.S.C.A. 1600, *et seq.*

3. Charles C. Steward Machine Company v. Davis, Alabama, 301 U.S. 548 (1936).

4. Sinclair Refining Company v. Unemployment Compensation Commission, 189 Va. 692, 54 S.E.2d 72 (1949).

5. Tennessee Coal, Iron & R. Co. v. Martin, 33 Ala. App. 502, 36 So. 2d 535, affirmed 251 Ala. 153, 36 So. 2d 547 (1948).

6. General Wayne Inn v. Rothensies, 47 F. Supp. 391, D.C. Pa. (2d Cir. 1942).

7. Hearst Publications v. U.S., 70 F. Supp. 666, D.C. Cal. (9th Cir.), affirmed 168 F.2d 751 (9th Cir. 1948).

8. Krisman v. Unemployment Compensation Commission, 351 Mo. 18, 171 S.W.2d 575 (1943).

9. Cohen v. District Unemployment Compensation Board, 167 F.2d 883, 83 U.S. App. D.C. 220 (1948).

10. Homer Laughlin China Company v. Hix, 128 W. Va. 613, 37 S.E.2d 649 (1946).

nor to guard against any possible loss to an employer.¹¹ In order to relieve the public generally of the economic burden caused by unemployment, this burden has been placed on industry¹² by distributing the cost thereof among the employers of industry who hire workers.¹³ While this series of interpretations speaks on behalf of employee interests, the various acts cannot be construed as being pro-labor. In direct contradiction to such a view is a holding in which the purpose of an act is described as not existing to promote the objectives of labor organizations.¹⁴

Unemployment statutes or laws are considered to be remedial in nature¹⁵ and administrative in character.¹⁶ In considering the remedial nature of the statutes, and the stated purpose to afford benefits to eligible unemployed workers coming within its coverage, the acts as a whole have been held, in fact often entitled, to be in the nature of insurance.¹⁷ However, because of the source of the burden, the general public welfare's interest, and the non-guarantee of benefits to all unemployed persons, the acts have also been held not to be, except in a limited sense, insurance.¹⁸ In further consideration of the remedial nature of the statutes, the courts have held that all doubt in construing the act and its related taxing provisions should favor coverage rather than exemption.¹⁹

One of the more practical purposes in enacting such legislation is, of course, to create an administrative agency which is authorized, through various provisions of the act, to administer²⁰ the act, and to hear and determine, among other things, matters of fact arising from claims under the act.²¹

The role of the court in describing the purpose of the various acts quite naturally is one of interpretation of legislative intent, and courts

11. *Meyer v. Michigan Unemployment Compensation Commission*, 311 Mich. 440, 18 N.W.2d 886 (1945).

12. *Horsman Dolls v. Unemployment Compensation Commission*, 7 N.J. 541, 82 A.2d 177 (1951).

13. *Moorman Manufacturing Company v. Iowa Unemployment Compensation Commission*, 230 Iowa 123, 296 N.W. 791 (1941).

14. *Barclay White Company v. Unemployment Compensation Board of Review*, Department of Labor and Industry, 356 Pa. 43, 50 A.2d 336, *cert. denied*, *Seifing v. Barclay White Company*, 332 U.S. 761 (1947).

15. *Ewing v. McLean*, 189 F.2d 887, C.A. Idaho (9th Cir. 1944).

16. *Charles Headwear, Inc. v. Board of Review*, 11 N.J. Super. 321, 78 A.2d 306 (1951).

17. *Tennessee Coal, Iron & R. Co. v. Martin*, 33 Ala. App. 502, 36 So. 2d 535, *aff'd* 251 Ala. 153, 36 So. 2d 547 (1948).

18. *Berdan v. Unemployment Compensation Board of Review*, 153 Pa. Super. 49, 33 A.2d 264 (1943).

19. *Ewing v. McLean*, 189 F.2d 887, C.A. Idaho (9th Cir. 1944).

20. *Johnson v. Pratt*, 200 S.C. 315, 20 S.E.2d 865 (1942).

21. *Id.*

generally must defer to the legislature in most matters regarding such acts. The Supreme Court has upheld the notion that, subject to federal and state constitutions, an unemployment insurance or compensation act may be established by legislative enactment.²² This recognition by the courts of the legislature's power extends to other areas as well. In other decisions, the courts have held that questions as to the manner and operation of the acts are legislative questions and ordinarily are not within the power of the courts to consider in determining the validity of an act.²³ In order to carry on the process of administering the statute, the legislature can also lay down the definitions and tests which are to be applied by the agency established for that purpose.²⁴

The suggestion that the legislature may act has been referred to in the general plan of the Federal Social Security Acts. The power to do so stems from the taxing power²⁵ of the legislature or from the exercise of its police powers.²⁶ However, in considering the source of the legislature's power and the resultant effect on the nature of the statute itself, it must be noted that courts have held that the tax features of such acts are incidental to the major purpose and therefore are not controlling²⁷ in the sense of making the acts tax statutes.

Since the purpose of this comment is to discuss the disqualification of individuals from benefits under a plan of unemployment compensation, it becomes necessary to examine who is initially qualified, how they became so qualified, and why they are deemed to be so privileged. The unanimous rule is that benefits, under any plan of unemployment compensation, are payable only to those individuals who are unemployed within the meaning of the particular statute.²⁸ The basis for deciding the grounds upon which compensation can be awarded falls within the power of the legislature to specify.²⁹ Thus it can be seen that the legislature comprises the "how" in determining the origin of these benefits, and that they further determine "who" is to be eligible to receive them. The reasons "why" they are made available have been alluded

22. *Commonwealth v. Perkins*, 41 Pa. Dist. & Co. 55, 50 Cauph. Co. 18, aff'd 342 Pa. 529, 21 A.2d 45, aff'd 314 U.S. 586 (1941).

23. *Spielmann v. Industrial Commission*, 236 Wis. 240, 295 N.W. 1 (1940).

24. *Unemployment Compensation Commission v. City Ice and Coal Company*, 216 N.C. 6, 3 S.E.2d 290 (1939).

25. *California Employment Commission v. Los Angeles Down Town Shopping News Corporation*, 24 Cal. 2d 421, 150 P.2d 186 (1941).

26. *In re Auto Electric Repair and Parts Company*, 41 F. Supp. 3, D.C. Ky. (6th Cir. 1941).

27. *Latimer v. U.S.*, 52 F. Supp. 228, D.C. Cal. (9th Cir. 1943).

28. *Battaglia v. Board of Review of Division of Employment Security of Department of Labor & Industry*, 14 N.J. Super. 24, 81 A.2d 186 (1951).

29. *W.H.H. Chamberlain, Inc. v. Andrews*, 159 Misc. 124, 286 N.Y.S. 242, modified on other grounds 271 N.Y. 1, 2 N.E.2d 22, aff'd 299 U.S. 515, rehearing denied 301 U.S. 714 (1936).

to above in discussion about the purposes of the various acts. Regarding the legislative determination of who shall receive benefits, it can be generally stated that unemployment compensation is payable to those who are unemployed through no fault of their own. This supposition, which exists throughout the statutes, agency regulations, and interpretive court decisions, seems to place the basis for any agency decision upon the action(s) of the individual claimant. It has been held that generally, unemployment compensation is payable to those who are unemployed because their employers are unable to provide work for them or the conditions and wages in such existing employment are significantly below prevailing standards.³⁰ This seems to imply that the employers or the conditions of the job determine when an individual is eligible for unemployment benefits. A close examination of the statutes, and subsequent interpretations by the courts in a particular jurisdiction, in this instance North Carolina, will show that this is a very specious implication that is not borne out by the realities which come to bear in the process of an individual making a claim for these benefits. It will be shown that the Unemployment Insurance Division of the Employment Security Commission of North Carolina places primary weight in the action(s) of the individual claimant in considering whether (s)he is initially eligible for benefits under the Act or is in some way disqualified for a period from receiving those benefits.

NORTH CAROLINA STATUTES GOVERNING COMPENSATION FOR UNEMPLOYED INDIVIDUALS

North Carolina provides two separate sections of its General Statutes to describe the particular circumstances by which individuals are determined to be either eligible or in some way disqualified from receiving unemployment benefits. Section 96-13 of the North Carolina General Statutes describes the requirements an individual must meet in order to obtain the benefits extended to her (him) by the Employment Security Commission as provided in Chapter 96 of the Statutes. Section 96-14 of this chapter details the grounds upon which an individual may be declared as disqualified from receiving benefits as an unemployed person.

ELIGIBILITY CONDITIONS

The conditions constituting eligibility for benefits, as set out in G.S. 96-13, are fairly simple in their construction and are not the subject of much interpretation by the courts in their role of giving final deter-

30. *White v. Review Board of Indiana Employment Security Division*, 114 Ind. App. 383, 52 N.E.2d 500 (1944).

mination to claims which reach that arena through the appeal process. There are some general rules which the courts have applied in the matter of determining eligibility for benefits and the construction of the statutes which attempt to define and control this aspect of unemployment compensation.

In keeping with one stated purpose for such acts, it is the general rule that the beneficent provisions of an act should receive a liberal or broad construction in favor of those claiming benefits.³¹ In further consideration of the effects of statutory construction, it generally follows that in instances where one section of the act generally states that the person be unemployed through no fault of his own, and another section explicitly deals with disqualification from benefits, the general words are subject to the express provisions in the other section.³² Thus the courts have *de facto* established a standard which seems to indicate that in cases of disputed construction, those who are deemed to be eligible are determined by establishing those who are not disqualified.

The specific provisions of the eligibility section refer to the receipt of benefits for a particular week. This weekly basis for receiving benefits also applies in the subsequent section on the Commission refers to a particular week and does not imply an indefinite status of eligibility or disqualification. Based upon this weekly period, the section continues by defining the conditions which must be met to be eligible for benefits. In addition to being unemployed, a claimant must register for work at the employment office and continue to report to that office in accordance with regulations prescribed by the Commission.³³ The individual is required to file a claim for the benefits in accordance with the provisions of G.S.96-15(a).³⁴ These two requirements are primarily to aid in the administrative process of the Commission. Although they are necessary, they do not comprise the principal basis for determination of eligibility for benefits.

The main factors in such a determination demand that an individual is able to work, is available for work, and shows to the satisfaction of the Commission that (s)he is actively seeking work.³⁵ It is this section of the act that is qualified and expanded upon in the section dealing with disqualification from benefits. For example, certain actions by the individual which are held to disqualify her (him) from benefits may be based on the theory that these actions may make the individual unavailable for work.

31. *Latimer v. U.S.*, 52 F. Supp. 228, D.C. Cal. (9th Cir. 1943).

32. *Tucker v. American Smelting & Refining Company*, 189 Md. 250, 55 A.2d 692 (1951).

33. N.C. GEN. STAT. § 96-13(1) (1969).

34. N.C. GEN. STAT. § 96-13(2) (1969).

35. N.C. GEN. STAT. § 96-13(3) (1969).

In an attempt, within this section, to further describe an individual's eligibility, the status of seasonal workers, vacationing workers, and those attending approved vocational training is described. With regard to seasonal workers, the section requires that persons engaged in seasonal employment must be actively seeking employment for which the individual is qualified to perform based upon past experience or training during such non-seasonal period. No individual, under the language of this section, will be considered eligible for benefits following a determination that such unemployment is due to a vacation. The maximum period for consideration of vacation-caused unemployment is two weeks, and these two weeks are determined on the basis of the payroll week as established by the employing unit.

Persons attending a vocational school or training program approved by the Commission shall be deemed available for work. The benefits received as a result of this determination are to be reduced in instances where the individual receives an allowance for the period of this training. The amount of the reduction is the amount of the allowance. In determining whether a training course may be approved for an individual, the Commission relies upon three factors:

- a. Reasonable employment opportunities for which the individual is fitted by training and experience do not exist in the locality or are severely curtailed;
- b. The training course relates to an occupation or skill for which there are expected to be reasonable opportunities for employment; and
- c. The individual within the judgment of the Commission has the required qualifications and aptitude to complete the course successfully.

Benefits paid to any individual based on services for non-profit organizations, hospitals, or state hospitals and state institutions of higher education which are subject to this chapter are paid on the same basis as other individuals who are paid benefits under this chapter. One exception to this rule is that benefits are not paid for periods which relate to the time between terms, quarters, or semesters, or for periods of paid sabbatical leave provided for in an individual's contract of employment. This applies only if the individual is contracted to be employed for both academic years or terms for which such a period represents a mere temporary break in employment.

The final provision describing eligibility for benefits entails the one week waiting period before an individual can receive benefits. During this period, an individual must be available for work as described in the other subdivisions of this section.

DISQUALIFICATION FROM BENEFITS

Section 96-14 of the General Statutes purports to describe the specific grounds upon which an individual may be deemed ineligible to receive unemployment benefits. The section sets out eight different criteria by which the Commission may rule an individual to be disqualified. However, these eight subsections are subject to considerable interpretation by the Commission at all levels of processing the claim and are, upon ultimate appeal, subject to further interpretation by the courts. Thus, the eight subsections are not in the nature of specific disqualifying acts attributable to the claimant, but are general categories which are subject to broad discretionary interpretations, without specific guidelines, by a large number of persons many of whom have questionable backgrounds for making such decisions.

Each subsection begins by describing the range of time for which an individual claimant may be disqualified because of allegedly violating the provision contained within that particular subsection. The subsection, indeed the chapter, gives no indication whether the time period of the penalty relates to the length of the alleged violation or whether it relates to the gravity of the infraction. The penalty, as well as the basis for it, seems to be totally a matter of discretion for the person empowered to act upon the claim. Without adequate statutory guidelines, the term of the penalty is clearly open to possible, and even likely, abuse of discretion. Once the period of disqualification is determined, the amount of benefits due during a benefit year is reduced by multiplying the number of such weeks by the weekly benefit amount. This formula is applied in all eight disqualifying subsections.

Subsection one provides for a disqualification from benefits in an instance where the claimant was unemployed because (s)he quit her (his) job without good cause attributable to the employer.

Subsection two refers to a claimant who was discharged for misconduct connected with work.

Subsection three, as amended, deals with a claimant who has failed without good cause to apply for suitable work when directed by the Commission's employment office; or who fails to accept suitable work when offered her (him); or fails to return to her (his) customary self-employment when directed to do so by the Commission. In its amended portion, the subsection describes what factors the Commission may consider in determining if work is suitable for an individual. The Commission will consider the degree of risk involved to the individual's health, safety, and morals, their physical fitness and prior training, as well as experience, prior earnings, length of employment, prospects for securing local work in the individual's customary occupation, and the

distance of the available work from the claimant's residence. Work will not be deemed suitable if: the position is open because of a strike or other labor dispute; if pay, hours, or conditions are substantially less favorable than in other similar jobs in the locality; if employment requires an individual to join a company union or to resign or refrain from joining any bona fide labor organization.

Subsection four disqualifies an individual who: failed without good cause to go to a vocational or training program when directed by the Commission; discontinued training without good cause; was separated from training for misconduct.

Subsection five denies benefits when the total or partial unemployment is caused by a labor dispute in active progress at the place of claimant's present or last employment. This denial of benefits may continue for a reasonable period after the settlement of the dispute until business can physically resume.

Subsection six disqualifies an individual who can reasonably return to customary self-employment.

Subsection seven withholds benefits where an individual makes claims under an employment security act other than that of North Carolina.

Subsection eight provides that an individual shall be disqualified where (s)he receives payment pursuant to an order of the National Labor Relations Board, or by private agreement, consent or arbitration for loss of pay by reason of discharge. When the amount is paid by the employer in a lump sum and covers a period of more than one week, the amount shall be allocated to the weeks in the period on a pro rata basis, except that if the amount is less than (s)he is entitled to under this chapter the individual shall get benefits as provided in 96-12 of this chapter.

INTERPRETIVE NORTH CAROLINA CASE LAW

The bulk of case law in North Carolina dealing with disqualification from benefits is of the interpretive nature. The decisions of the courts either attempt to define a provision of the statute or to determine whether a particular fact situation falls into a previously defined category.

In meeting the task of defining terms within the statutes, the court must look to itself as the source of the definition. The legislature has clearly not suggested the path to take or the question would be rendered moot. In considering the construction of the chapter the court has held that:

Sections of this chapter imposing disqualification for should be strictly construed in favor of the claimant and should not be enlarged

by implication or by adding to one disqualifying provision words found only in another.³⁶

The Supreme Court of North Carolina supplied the basis for determining some measure of "suitability" of employment in its decision of *In re Watson*, 273 N.C. 629, 161 S.E.2d 1 (1968). This case provided the impetus for the legislature to amend subsection three of G.S.96-14.

The facts of the case indicate that Janet B. Watson worked for the Sprague Electric Company of Lansing, North Carolina. Janet had worked for the company for eleven years as a first shift bench assembler. She was laid off on March 16, 1967 because the company said there was no work available for her. On March 17, 1967, Janet Watson filed for benefits as an unemployed person as required by the statute. She continued to do so until June 9, 1967.

On May 1, 1967, the employer offered claimant a job doing identical work at the same pay, but on the second shift. Claimant refused this job because she had to care for her nine year old son during the hours of the second shift. Janet Watson's claim was heard by a claims deputy of the Commission who determined that Ms. Watson was eligible for benefits from March 27 through April 27, but not thereafter. Ms. Watson appealed from this decision, and the appeals deputy determined that she was eligible for benefits to and including June 1, 1967. The employer appealed this decision to the Chairman of the Commission, who affirmed the decision of the appeals deputy. Subsequently, the employer appealed to the Superior Court which reversed the decision of the Chairman and remanded the proceeding to the Commission for entry of an order in accordance with the court's determination that Ms. Watson was not entitled to benefits on and after April 28, 1967. This appeal to the North Carolina Supreme Court by Ms. Watson followed the decision of the Superior Court.

In addition to the facts above, the court adopted these additional facts from the previous hearings: In the labor market area where claimant resides, approximately seventy percent of job opportunities for one of the claimant's abilities and vocation are found during daylight hours. The remaining thirty percent of such jobs occur on the second shift; during the period in question, claimant has been physically able to work and has made an active search for work with potential employers in the area.

In consideration of these facts, the court, per Justice Lake, held that the sole issue is: "Whether or not accepting work on second shift solely because of having to care for child disqualifies claimant from unem-

36. *In re Watson*, 273 N.C. 629, 161 S.E.2d 1 (1968).

ployment insurance benefits?" In deciding this issue, the court undertook the following logical investigation.

The terms 'able to work', 'available for work', and 'suitable employment' are not precise terms capable of application with mathematical precision. They are somewhat akin to the terms 'reasonable man' and 'due care', which continue to defy the best efforts of both the lexicographer and the professor of torts to define them satisfactorily and yet are applied with considerable success each day by juries through application of common sense and experience. A large measure of administrative discretion must be granted to the Employment Security Commission in the application of these terms in the statute to specific cases. The key words in the guidance of this exercise of discretion are 'through no fault of his own' and 'without good cause.' See, *In Re Abernathy*, 259 N.C. 190, 130 S.E. 2d 292, app. diem. 375 U.S. 161, 84 S.Ct. 274, 11 L.Ed.2d 261. Admittedly, these guiding phrases themselves are not precise terms. They do, however, focus attention back upon the legislative purpose to provide temporary income to one 'involuntarily unemployed' who is physically able to work and desirous of work.

While not attempting to define "suitability"³⁷ for all cases, the court indicated that the term relates primarily to:

1. skill required
2. compensation paid
3. risks incurred by reason of nature of work or environment or time in which it is done.

Despite the handicap in time, the court felt that the work offered was suitable because Ms. Watson was not endangered personally, nor did the other criteria appear lacking. However, rejection of the job did not disqualify her from benefits. The court held that: "The statutory disqualification arises only if her rejection of suitable work offered was 'without good cause'." G.S. 96-14(1) refers to good cause attributable to the employer, but G.S.96-14(3) refers only to good cause. It was 96-14(3) which was the basis for the original denial of Ms. Watson's claim, and only the language therein could be considered in deciding the case.

In using the "reasonable man" standard of judging "good cause"³⁸ the court rejected the contention that a person must be available for work at any and all times. By considering public policy and the purpose for enactment of the statute, the court was able to reverse the decision of the Superior Court and to grant benefits to Ms. Watson.

37. *Id.* See also *In re Troutman*, 264 N.C. 289. In this case a claimant refused a job 180 miles away in another state at a rate of \$3.50 per hour (compared to old rate of \$3.15) because of the distance involved and because of his wife's job in N.C. The court determined that the job was *not* suitable.

38. 20 CLEV. ST. L. REV. 597 (defines good cause under Ohio Law).

The North Carolina Court of Appeals considered the statutory question of "misconduct" in its decision of *In Re Collingsworth*, 17 N.C. App. 340, 194 S.E.2d TE0 (1973). In deciding the case, the court adopted the following concept of "misconduct.":

Misconduct is limited to conduct evincing such wilful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

The facts show that Ballard C. Collingsworth was employed by the Cone Mills Corporation as a loom fixer until he was discharged on August 23, 1971. Claimant filed a claim on Aug. 24, 1971 which was continued for one week. The original determination of the claim held that Collingsworth was disqualified from Aug. 24 through Nov. 8 "because of separation." The appeals deputy reduced the period of disqualification "because of separation" from Nov. 8 to Sept. 27, 1971.

At a hearing before the Chairman of the Commission, the following facts were established:

1. Cone Mills had a policy that all employees who worked in an area where the noise level was above 90 decibels must wear an ear protection device.
2. Claimant worked in such an area.
3. Cone Mills furnished four types of ear protectors.
4. Claimant used furnished soft plastic plugs for thirty minutes and found them unsatisfactory.
5. Claimant refused to wear ear protectors.
6. Cone offered a medical exemption, but claimant refused to be examined by Cone's doctors or his own doctor at Cone's expense.
7. Cone offered a transfer to a less noisy area, but claimant refused because he feared a lower wage in another area.
8. Cone had a supervisor confer with claimant who told him he must wear protectors, secure exemption, be transferred, or be discharged.
9. The rule regarding ear protectors was required to be adopted by Cone pursuant to the Federal Occupational Safety and Health Act of 1970.
10. Claimant refused all suggested alternatives and was discharged.

The Commission Chairman concluded that as a matter of law claimant was discharged for "misconduct" connected with his employment because he willfully and deliberately violated a company rule which was

reasonably and necessarily imposed. Subject to G.S.96-14(2), he was disqualified from benefits for a period of five weeks.

In an appeal, the Superior Court adopted the findings of fact, but held that the discharge "resulted from an honest difference over company policy and not from any misconduct on the part of this employee."

Cone Mills and the Commission appealed this decision, and in his ruling Judge Britt held that the claimant was guilty of misconduct for deliberate violation of the company's rule which was enacted pursuant to the Occupational Safety and Health Act of 1970.

STRUCTURE OF EMPLOYMENT COMMISSION

The organizational structure for the agency empowered to enact this chapter of the statutes is outlined in G.S.96-3. This section entitles the agency, Employment Security Commission of North Carolina.

The Commission consists of seven members who are appointed by the Governor. The Governor also designates one of the members to serve as Chairman of the Commission. The act provides that the Chairman shall engage in no other business, vocation, or employment while serving in this capacity. In order to further eliminate any conflict of interest, the members of the Commission are not allowed to serve as an officer or committee member of any political party organization. The members serve for a term of four years, and upon expiration of their respective terms, their successors are appointed for four year terms. A member who is appointed to fill a vacancy is appointed only for the remainder of such term. The Governor may at any time, after giving notice and conducting a hearing, remove any Commissioner for gross inefficiency, neglect of duty, malfeasance, misfeasance, or nonfeasance in office.

The Commission consists of two co-ordinate divisions. The North Carolina State Employment Service Division, created pursuant to G.S.96-20, deals with the task of obtaining employment for individuals. The other branch is the Unemployment Insurance Division whose task is to administer benefits to unemployed persons. Each division is responsible for the discharge of its own distinctive functions. For this purpose, each division maintains a separate administrative unit except where the Commission finds that such separation is impracticable.

In order to effect policy for the Commission, a quorum must be present. Under the statutes, a quorum consists of the Chairman and three members of the Commission.

Section 96-4 of the General Statutes describes, with more particularity, the administration of the Commission. The Commission has a duty to meet at least once every sixty days. Special meetings may be

called by the Chairman or any three members of the Commission. The Commission is empowered to adopt, amend, or rescind such rules and regulations, to employ such persons, make such expenditures, require such reports, make such investigations, and take such other action as it deems necessary or suitable in the administration of the act. However, general and special rules may be adopted, amended, or rescinded by the Commission only after public hearings have been held. Notice of such hearings is required, and may be accomplished by publication in one or more newspapers of general circulation in the state.

The rules, regulations, and biennial reports to the Governor are required to be published by the Commission and to be furnished to any person who makes an application for these materials.

In addition to the Commission and its own personnel and administration, the Governor appoints a state and local advisory councils. The councils consist of an equal number of employer and employee representatives who are deemed representative because of their vocation, employment, or affiliations. In addition, the councils consist of any members representing the general public whom the Governor might designate. Their task is to aid in formulating policies and discussing problems related to the administration of the act. They are intended to assure impartiality and freedom from political influence in the solution of such problems.

In its efforts to administer the act, the Commission is empowered to administer oaths and affirmations, to take depositions, to certify to official acts, and to issue subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of the act.

PROCEDURES OF EMPLOYMENT COMMISSION SUBMISSION OF CLAIMS

The individual who seeks to obtain benefits from the Commission has the responsibility to initiate the necessary action towards that end.³⁹ This action consists of filing a claim for benefits pursuant to G.S.96-15(a). Further action on the part of the individual consists of active compliance with the eligibility conditions found in G.S.96-13, to wit: being able and available for work, and actively seeking such work.

Once the simple requirements are met, a determination is made at the initial level as to the eligibility of the individual to receive benefits. In most instances, the decision of this claims deputy is the basis for all

39. A proverb which illustrates the necessity for action was supplied to his class by Dr. Kajumbula on Nov. 5, 1974. "When the baby doesn't cry, it gets no milk."

action taken by the agency. However, in cases where facts, or the decision based on those facts, are in dispute the claimant has a right to appeal this initial decision.

APPEAL PROCEDURES

In cases where the decision of the claims deputy is disputed and an appeal is undertaken, the burden of proof is on the claimant to show the facts have been misconstrued, the statutes misinterpreted, or some other irregularity exists.⁴⁰

Hearings are before an appeals deputy, as provided in G.S.96-15(2). The deputy is required to give due notice to the parties, afford them a reasonable opportunity for a fair hearing, and find facts and make a decision thereon.

An appeal from this decision is heard before an appeal tribunal as provided in G.S.96-15(2)(d) and (c). This shall consist of a salaried examiner or a body of three, one of whom is a salaried examiner serving as chairman. The other two members of the group will respectively represent either the employer or the employee(s).

The appeal process may continue beyond this level on the motion of the Commission, but an additional appeal within the agency is not a matter of right. The only subsequent appeal procedure for a claimant is to seek relief in the courts. This may be done only after all administrative remedies are exhausted. It must be noted that the decision of the Commission becomes final after ten days, thus all notices of appeal must be filed within this period. In cases before the court, the Commission is deemed to be a necessary party to all such judicial actions.

ANALYSIS OF RELATIONSHIPS BETWEEN STATUTES, CASE LAW, AND AGENCY STRUCTURE AND PROCEDURE

The current state of the law dealing with unemployment compensation presupposes a close relationship between the Employment Commission and the applicable statutes and case law.

The position of the Commission in relation to the statutes and judicial decisions is a unique one. Despite the theoretical distinction between the Employment Security Commission and the Unemployment Division, the same basic agency is empowered with the responsibility for providing employment for the same persons who are seeking to obtain benefits as unemployed individuals. The nature of any bureaucracy is to do its directed tasks in the most efficient manner possible. Thus, the agency must appear to be finding jobs for the unemployed while trying

40. *State v. Jarrell*, 231 N.C. 381, 57 S.E.2d 403 (1950).

to fairly and impartially compensate those same unemployed individuals. The basic concept of bureaucratic efficiency makes a lie of this dual role forced on the Commission. The question that is raised is - In which instance is the unemployed individual shortchanged in dealing with the Commission?

Section 96-4(f) of the General Statutes supplies some clues in answering this question. This section imposes an affirmative duty on the Commission, with the aid and advice of its advisory councils, to take all appropriate steps to reduce and prevent unemployment. The means suggested for this task include the establishment and operation by municipalities, counties, school districts, and the State, of reserves for public works to be used in the times of business depression and unemployment.

It is clear that the nature of the Commission's work in locating employment consists of responding to job requirements as submitted to them by a few employers. There is no comprehensive program of reserves or of public works administered by the Commission. This condition is a more definite indication of failure by the Commission to provide jobs, especially in light of the present "times of business depression and unemployment." This might seem to indicate that the dual nature of the Commission's position tends to place most of the shortcomings in the area of providing employment. However, by disregarding its responsibility to take affirmative steps in this direction, the Commission can point to its activities in responding to the needs of employers soliciting their services as an indication of its effectiveness in meeting employment needs.

If the agency is unable to find employment for all the individuals seeking benefits then, in order to maintain its image of efficiency, the responsibility for finding jobs is thrust on the claimant. In the event the claimant is unsuccessful, then the Commission makes certain determinations regarding the claimant's "availability for work", her (his) accepting or seeking "suitable" work, or her (his) basic eligibility for benefits as determined by the reasons for her (his) unemployment. The Commission is entrusted with wide discretionary powers in making such determinations. It is in the area of this wide discretion that the various statutes and the corresponding case law are intended to have the strongest influence on the Commission.

The statutes governing eligibility for, and more particularly disqualification from, unemployment benefits are extremely broad and vague in their construction. The gaps in their interpretation are left to be filled by the Commission except in instances where the courts have specifically addressed themselves to the disputed points. This situation is dramatically pointed out in one instance mentioned above (*In re Wat-*

son, supra). Subsection three of G.S.96-14 set out a disqualification in an instance where an individual failed to accept "suitable" employment. As originally written, the Commission had complete discretion in determining the "suitability" of such employment. In numerous challenges by claimants in the courts, a general set of standards was evolved by which the Commission was to judge the "suitability" of offered employment. Later, subsection three was amended to include these standards for judging "suitability." This is a pattern which might be repeated for all the various provision relating to eligibility and disqualification. However, even this backwards process has not proceeded beyond the single instance just mentioned. The courts have made decisions interpreting various statutory provisions and the Commission is bound by them. These decisions do not attempt, however, to establish guidelines, but merely to decide individual cases based upon their own particular facts. The next step must be taken, as it was in G.S.96-14(3), by the legislature. It was suggested in introductory remarks that the legislature has the power to do so, and this power has been affirmed by the courts (see note 24).

The statutes dealing with disqualification from unemployment benefits state, in general terms, the reasons for which an individual may be refused benefits. The power to extract particular rulings from the statutes lies with the two dimensional Commission. The courts, when they are finally petitioned, only serve to rule upon the merits of individual claims. Thus, despite all the stated legislative purposes for enacting unemployment compensation statutes, the Commission is able to make decisions based upon its own beliefs and needs. The relationship of the statutes and the applicable case law to the position of the Commission must be clearly viewed as a subservient one.

CONCLUSION

In considering the sum of all the factors influencing disqualification from unemployment benefits, certain inequities become quite apparent. First, the Commission itself is in an extremely untenable position due to its dual nature of having to secure employment and to compensate the unemployed; second, the Commission is wrongfully empowered with overly wide discretionary powers due to a lack of guidelines; and third, the statutes and the court decisions fail to limit these first two inequities.

The solutions to these problems lie in many different areas. In terms of administration, the agency empowered to dispense benefits should not be the same agency responsible for finding employment; although a close association and cooperation is obviously helpful in terms

of statutory construction, the legislature must make up for its shameful failure to provide guidelines to be followed by the agency which acts under these statutes. This has partially been done in the instance of G.S.96-14(3), but the amendment or re-writing must go much further. In terms of judicial conduct, the courts must be willing to impose standards that narrow the statutes in all subsequent cases rather than merely resolving particular disputes. In terms of equity, the whole system must begin to reflect the original purposes of providing benefits to individuals who are genuinely unemployed through no fault of their own.

The alternative to these proposals is a growing unemployment rate, a bankruptcy of revenues provided for these benefits, and a growing distrust and less of respect on the behalf of disadvantaged citizens towards the administrative agencies, the legislature, and the courts. In conclusion, revolutionary changes are needed to dissipate revolutionary reaction.

M. ALLEN MASON

Parole Revocation In North Carolina: The Arrest of a Parole Violator

At one time, Parole revocation received little attention from the courts or the legal profession as a whole. However, during the nineteen-sixty's an era of social awareness was produced which brought on an in depth examination of criminal procedure. During that period the once forgotten area of post-conviction criminal procedure, including parole revocation, was being considered by the courts in a large number of decisions. This awakening to problems of due process in parole revocation procedures culminated in *Morrissey v. Brewer*,¹ wherein; the Supreme Court finally delineated the procedures due to parolees in the revocation hearing.²

The focus of this comment will be on the procedure employed by North Carolina in arresting a parole violator. First a description will be given of the parole system in existence in North Carolina. Then a detailed picture of the arrest procedure will be presented, with atten-

* The author worked as a research intern with the North Carolina Parole Commission during the summer of 1974.

1. 408 U.S. 471 (1972).

2. *Id.* at 489.