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UNEMPLOYMENT COMPENSATION ACT—PERSON WHO FILED VALID CLAIM FOR UNEMPLOYMENT COMPENSATION—BASED UPON UNEMPLOYMENT IN WEEK BEGINNING AUGUST 28, 1949— FILED CLAIM FOR BENEFITS PRIOR TO AUGUST 22, 1949—APPLICATION ALLOWED WITH BENEFIT YEAR COMMENCING JULY 3, 1949—ENTITLED TO INCREASED WEEKLY BENEFIT—TOTAL BENEFITS PAYABLE DURING BENEFIT YEAR SHOULD BE RECOMPUTED PROPORTIONALLY FROM AND AFTER AUGUST 22, 1949—SECTION 1345-8, SUBSECTION b G.C.—AMENDED SENATE BILL 142, 98 GENERAL ASSEMBLY.

SYLLABUS:

A person who filed a valid claim for unemployment compensation based upon unemployment in the week beginning August 28, 1949, who had filed a claim for benefits prior to August 22, 1949 and which application was allowed with the benefit year commencing July 3, 1949, is entitled to the increased weekly benefit provided for by subsection b of Section 1345-8, General Code, and the total benefits payable to such person during his benefit year should be recomputed proportionally from and after August 22, 1949 in accordance with the increase provided for by subsection d of said section, as amended by Amended Senate Bill 142 of the 98th General Assembly.

Columbus, Ohio. September 12, 1949

Hon. Frank J. Collopy, Administrator
Bureau of Unemployment Compensation
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

> "Amended Senate Bill No. 142 became affective August 22, 1949. Certain questions have arisen concerning the maximum benefit amounts and duration payable under this law.
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> As an illustration, a person files a valid claim for compensation based upon unemployment in the week beginning August 28, 1949. This person had previously filed a valid claim for benefits which was allowed with the benefit year commencing July 3, 1949. No appeal was taken and the determination became final, the said determination being entered as follows:
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> 2 weeks' waiting period; $21 per week for 22 weeks, for a maximum of $462
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> QUESTION: What is the maximum weekly benefit amount and duration of such payments payable on this claim on and after August 22, 1949?"

I fully recognize the importance of the question which you have raised and have sought by careful inquiry to ascertain so far as possible all factors and aspects affecting the question, and the application of the law thereto.

Your question is, in essence, is a person whose benefit year commenced before August 22, 1949, entitled to the increases and other benefits provided for by Amended Senate Bill No. 142 which became effective on said date? Your injuiry is directed specifically to the increase in the amount of weekly benefits and the increase in the total benefits in any benefit year to which an individual is entitled under Section 1345-8, subsections b and d of said Act. However, the reasoning and conclusions which follow will apply, I believe, to other questions which may arise under the remaining amendments to the Act.

This is the second request for my opinion involving interpretation of Amended Senate Bill 142 which you have submitted to me. Your first request concerned whether or not the dependency allowance pro-

vided for by subsection e of Section 1345-8 of said Act applied to claimants whose benefit year commenced prior to the effective date thereof. You will recall I answered that in my opinion the allowance should be paid to all qualified persons claiming benefits for weeks subsequent to August 22, 1949, regardless of when their benefit year commenced to run. See Opinion No. 895, dated August 23, 1949. My opinion in that instance was limited to the question asked by you and was not intended to be binding in case of subsequent questions arising from the administration of Amended Senate Bill 142. However, whenever appropriate, I shall take occasion to refer to parts of the earlier opinion and to incorporate them herein by reference.

I should like again to call to your attention the rule of liberal construction specifically set forth in the unemployment compensation act, and the discussion thereof in the earlier opinion. Applying this rule to the instant case, it would be appropriate to keep in mind that the increase in the weekly and total benefits which may be received under the Unemployment Compensation Act was in recognition of the high cost of living and the proportions of the unemployment problem.

I should like to mention that to my knowledge the precise questions which you have presented to me have not previously been considered by any court in the State of Ohio nor in any other jurisdiction so far as I have been able to determine. Analogous questions arose, I understand, in the course of administering the unemployment compensation benefit increases provided for by the General Assembly in 1941 and 1945. I do not believe, however, that the experience or the precedent resulting from these increases is sufficiently strong or consistent to warrant any conclusions being drawn therefrom. From a legal standpoint, I am of the opinion that the closest analogy to the situation confronting you is found under the administration of various pension and retirement funds.

At 118 A. L. R. 992, the question, "Increase of pension benefits as applicable to those already receiving benefits", is annotated. It is pointed out in the note that there is a conflict of authority between several states as to whether or not a person receiving a pension at the time of a legislative increase is entitled to the increase. The courts of California and Kentucky appear to permit the collection of increased benefits while those of Illinois and Oklahoma forbid it. I am inclined to adopt the view of the California and Kentucky courts. (It should be noted that the note includes an Illinois case, Raines v. State Teachers

Pension and Retirement Fund, 365 Ill. 610, 7 N. E. 2d 489, where the Supreme Court of Illinois held that an increase in teachers' retirement and pension benefits applied to persons receiving pensions at the time the increase became effective, distinguishing between cases when contributions to the fund involved are made on a compulsory basis and when made on an optional or voluntary basis. I am inclined to think that this case indicates a tendency on the part of the Illinois courts to limit or restrict the decisions denying pensioners the right to subsequent increases in their pensions. To the same effect as the Raines case, see Ridgely v. Board of Trustees of State Institutions Teachers' Pension and Retirement Fund, 371 Ill. 409, 21 N.E. 2d 286.)

The following California and Kentucky cases were among those referred to in the A. L. R. note:

1. Aitken v. Roche, 48 Cal. App. 753, 192 Pac. 464, where it was held that a pensioner who had been retired on a pension based on his pay as a policeman was entitled to an increased pension from and after the effective date of an amendment increasing the pay of policemen.

2. In Klench v. Pension Fund Commissioners, 79 Calif. App. 171, 249 Pac. 246, a similar conclusion was reached under a statute providing that a police patrolman should upon retirement be entitled to "a yearly pension equal to one-half of the amount of salary attached to the rank which he may have held on such police force at the date of such retirement."

3. In Policemen's Pension Fund v. Schupp, 223 Ky. 269, 3 S.W. 2d 606, an action by a retired policeman to recover increased pension payments after the statute authorizing such pension had been amended so as to double the amount payable thereunder, it was held that the policeman was entitled to the increased benefits from and after the effective date of the amendment.

Additional weight is given to the position taken in the California and Kentucky cases by the decision of the Supreme Court of Colorado in People ex rel. Albright v. Firemen's Pension Fund, 103 Colo. 1, 82 Pac. 2d 765, 118 A. L. R. 984, also reviewed in the A. L. R. note referred to. It was held that the increased pension provided by a statute amending the law providing for the payment of pension to firemen, their widows or dependents, was not limited to those who acquired a

pensionable status after the effective date of the amendment. See also State ex rel. Creel v. Bocker et al. (Fla.) 1 So. 2d 167, where the Florida Supreme Court held that a retired policeman was entitled to the increase in policemen's pensions provided for by a statute subsequent to the date he acquired his pensionable status.

The reasoning of the Supreme Court of Ohio in Mell et al v. State ex rel. Fritz, 130 O. S. 306, 199 N.E. 72, appears to be consistent with the position taken by the courts in the cases referred to above. The court stated the question and answered it as follows:

> "The sole question presented for our determination is whether the board has the power to reduce or increase pensions of those already receiving them. * * *
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> "In determining that question we must first decide whether the right to pension is a vested right.
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> "A pension is generally defined as a gratuity, at all times subject to the will of the donor. It is a creature of law rather than of contract, and the pensioner has no vested right in the continuance of a gratuitous allowance. * * *
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> "And this is so even where a pensioner has made compulsory contributions to the fund. * * *
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> "The right to pension not being vested, the board has a right at any time, in its discretion, to modify or alter pension awards by increasing or decreasing them, so long as it acts reasonably and not in an arbitrary fashion."

Subsequent to this decision the law pertaining to the fund involved was amended to provide that pensioners thereunder had a vested right to their pensions. See Section 4628-1, General Code. See also In re. Price v. Farley et al, 22 O.C.C. 48.

Before passing from the pension cases, I should like to point out that it should be more difficult to find in favor of pensioners than unemployment benefit claimants, because in the pension cases reviewed the petitioners had made contributions in relation to their salaries and the amount of the pensions which they were receiving at the time of the legislative increase was generally based on their salary rate at the time of their employment. Also, in the pension cases the rights of subsequent claimants to the fund involved were proportionately decreased to the extent that increased pensions were allowed to persons who qualified under the old or lesser rate.

It may be urged that Section 26 of the General Code, which provides in effect that the repeal or amendment of a statute shall "in no manner affect pending actions, prosecutions, or proceedings, civil or crimial", is applicable in determining the question presented by you. While there are numerous decisions construing this section, I do not feel that it provides the answer to your question. As I pointed out in my earlier opinion to you, so far as I can ascertain it has been uniformly applied to preserve and protect rights which otherwise would be taken away by the amendment. In the only case involving the unemployment compensation law which I have come across in which Section 26 was construed, the section was held to apply to preserve the right of appeal given to employers under the act prior to the amendment in question. See State ex rel. Cleveland Railway Company v. Atkinson, Administrator of the Bureau of Unemployment Compensation, 138 O. S. 157, 34 N.E. 2d 233.

Further research with respect to Section 26 of the General Code has revealed that the section has been generally applied in cases involving the right to appeal, remedies or manner of enforcing rights, procedure to be followed, jurisdiction, and similar matters; which leads me to the suggestion that a distinction might be drawn between a "proceeding", as contemplated by Section 26 General Code and the "amount to be paid" a claimant under a statutory grant. Following from this, it is difficult for me to see how a rule of law which is limited in its application to pending proceedings can be utilized to deny claimants to unemployment compensation the increased benefit rate for weeks of unemployment subsequent to the effective date of the statute providing for the increase. The amount to be paid can not be termed a "proceeding". The "proceeding" constitutes the steps which one goes through in order to establish his claim. The amount which is paid as a result of the claim is mandatory and is based on a mathematical computation.

In my opinion, there is a further reason why Section 26 is not applicable here. Section 26 General Code is a very old statute and is general in its scope. However, there is a provision in the unemployment compensation law which is specific in terms. I refer to Section 1345-30 of the General Code effective December 17, 1936, which provides as follows:

> "All the rights, privileges, or immunities conferred by this act, or by acts done pursuant thereto, shall exist subject to the

power of the general assembly to amend or repeal this act at any time."

This is a direct and specific mandate of the General Assembly, and even if it were held that the claimant for unemployment compensation had a vested right, it would be subject to the provisions of this section whereby the General Assembly reserves to itself the right "to amend or repeal this act at any time." "All the rights, privileges, or immunities" arising from the unemployment compensation law are made subject to this condition.

It is of course apparent that in so far as a general statute and a special statute are in conflict, the special statute must prevail. Likewise, where a statute older in point of time and one more recently enacted are in conflict, the more recent statute is held to prevail.

Could it be said that the General Assembly lacks the power to repeal the unemployment compensation law, and that in case of such repeal claimants would have a right to continued benefit payments notwithstanding such repeal after the effective date of the repealing statute. I do not believe such position is tenable. Or, could it be said that the General Assembly lacks the power to reduce the maximum amount of payments and that after the effective date of an amendment which reduces such payments claimants would have some sort of right to the benefits they previously were receiving? I believe that such position is equally untenable.

The need for unemployment compensation, the benefits to be paid, the reservations which should be imposed and similar factors are questions which properly belong with the General Assembly. They are questions of legislative policy. It is well recognized that during recent years there has been not only a rise in wages in many fields of endeavor but also there has been a rise in the cost of items required for sustenance. The General Assembly has evaluated those factors and has determined that $4.00 a week should be added to the maximum weekly benefit amount and that four weeks should be added to the maximum number of weeks of benefit payments during a benefit year. If the reverse condition should exist and there was a general decline in wages and a reduction in the cost of living, could it be said that if the General Assembly should desire to reduce the amount of weekly and total benefit payments that it would be without power to do so as to any and all who had started on a benefit year?

In connection with the argument of the applicability of Section 26 General Code to the present inquiry it may be urged that to grant the increased benefits to claimants whose benefit year commenced prior to August 22, 1949, would give retroactive effect to Amended Senate Bill 142. I think that such position could be answered by referring to the following language of People ex rel. Albright v. Firemen's Pension Fund, supra, quoted from 118 A.L.R. 984, 990:

> "Neither the original act nor the act as amended was intended to be retroactive. The original act provided for the payment of pensions to firemen and their dependents who, after the adoption of the law, occupied a certain status. It did not require that the status entitling one to a pension should result entirely from occurrences subsequent to the passage of the law. In determining the status entitling one to a pension, what occurred in the way of service prior to the passage of the act is permitted to be taken into consideration in determining the pensionable status. Similarly, the act as amended provides that occurrences prior to its amendment may be considered in determining a status entitling one to a pension. *We think that an act is not retroactive if it applies to persons who presently possess a continuing status even though a part or all of the requirements to constitute it were fulfilled prior to the passage of the act or amendments thereto.* * * *
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> *"We are of the view, since the increased payments are to be made only from the date the amendment to the act became effective, that the law construed to entitle relators to such benefits does not thereby operate retroactively."* (Emphasis added.)

See also, Harvey v. Ciocco et al. 9 O.N.P. (n.s.) 126, 127 and the same case on appeal, 14 O.N.P. (n.s.) 232.

A further argument occurs to me which would outlaw application of Section 26 General Code and it would independently establish the right of an existing claimant to the increased unemployment compensation benefits provided for in Amended Senate Bill 142. In effect a claimant for unemployment compensation benefits establishes his right thereto on a week to week basis. In so far as the claimant is concerned, as I view it, each week must stand or fall by itself and in effect involves a new application for benefits. In this connection I should like to call your attention to the reasoning of the Supreme Court of Idaho in the case of Talley v. Unemployment Compensation Division, etc., 63 Idaho 644, 124 Pac. 2d 784. In this case the applicant filed a claim

for unemployment compensation on April 29, 1941, and on May 6, 1941 there was a determination by the proper authorities that in all respects the applicant was entitled to receive benefit payments of $11 per week, or a total benefit amount of $187.00. Two days after this determination, on May 8, 1941, an amendment to the law became effective providing that one of the personal eligibility conditions of a benefit claimant should be that his unemployment was not due to his voluntarily quitting his last employment without good cause. The agency on July 2, 1941, issued a corrected determination denying the eligibility of this applicant because "she had voluntarily quit her employment without good cause." In the course of the opinion the court noted as follows, quoted from 124 Pac. 2d 784 at pages 785 and 786:

> "Appellant's main position is that having established her benefit year by filing her claim prior to May 8, 1941, the effective date of the amendment, she acquired the right to serve compensable weeks thereafter, and to receive benefits in the total amounts set forth in her initial determination; that she acquired some sort of a vested right not subject to change by reason of the 1941 amendment.
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> The initial determination is preliminary and determines only whether a benefit year is established and whether or not disqualification should be assessed at that time. Such initial determination is not a final adjudication of the right to unemployment benefits. Sec. 3-7, p. 399, and sec. 5, p. 403, of Chapt. 182 of Section Laws of 1941. During the benefit year, employees may be eligible one week and ineligible the following week. * * *
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> The Unemployment Compensation Law requires the eligibility of an applicant for unemployment compensation to be determined weekly before such applicant is entitled to receive benefits, for the reason that compensable weeks in a benefit year are not necessarily continuous and there may be several intervening periods of employment or other intervening cause arise between different compensable weeks in a benefit year, which may create an ineligibility. A compensable week can never be determined at the time the first claim for compensation benefits is filed and the initial determination made."

Cited with approval in Moore v. Bureau of Unemployment Compensation et al. 73 O. App. 362 366, 56 N. E. 2d 520.

If it could be said that a claimant to benefits under the unemployment compensation act had a vested right thereto it is possible that I

could arrive at a different answer to your question. I think it is quite clear, however, that there is no vested right to unemployment benefits. In the case of Shelley v. National Carbon Company, 285 Ky. 502, 148 S. W. 2d 686, the Court of Appeals of Kentucky rejected the theory that an applicant for unemployment compensation benefits had vested rights therein, in the following language:

> "Appellant contends that his right to benefits became vested under the 1936 act which was in effect at the time he became unemployed and that the legislature was without constitutional authority to impair that right because of Article 1, Section 10, of the Constitution of the United States, and Section 19 of the Constitution of Kentucky, prohibiting the enactment of any ex post facto law or law impairing the obligations of a contract. We think the premise of the argument is a false assumption. No claim could be asserted under the 1936 law before January 1, 1939, and the right to recover was dependent upon certain conditions and contingencies. It was therefore a contingent and not a vested right. 11 Am. Jur., Constitutional Law, Section 370; State Highway Commission v. Mitchell, 241 Ky. 553, 44 S.W. 2d 533. Moreover, it was expressly stipulated in Section 20 of the act: 'The General Assembly reserves the right to amend or repeal all or any part of this Act at any time; and there shall be no vested private right of any kind against such amendment or repeal. All the rights, privileges, or immunities conferred by this Act or by Acts done pursuant thereto shall exist subject to the power of the General Assembly to amend or repeal this Act at any time.'
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> "Therefore, all of the appellant's rights were subject to this reservation or action which might be taken under it. * * *"

See also Moore v. Bureau of Unemployment Compensation, supra, for an Ohio case to the effect that a claimant to unemployment compensation benefits had no vested rights therein.

On the basis of the preceding, I am therefore of the opinion and in specific answer to your question, a person who filed a valid claim for unemployment compensation based upon unemployment in the week beginning August 28, 1949, who had filed a claim for benefits prior to August 22, 1949 and which application was allowed with the benefit year commencing July 3, 1949, is entitled to the increased weekly benefit provided for by subsection b of Section 1345-8, General Code, and the

total benefits payable to such person during his benefit year should be recomputed proportionally from and after August 22, 1949 in accordance with the increase provided for by subsection d of said section, as amended by Amended Senate Bill 142 of the 98th General Assembly.

Respectfully,

HERBERT S. DUFFY,
Attorney General.