799.

BUREAU OF UNEMPLOYMENT COMPENSATION—ADMINISTRATION—REDETERMINATION OF BENEFITS—INTERPRETATION "AVERAGE WEEKLY WAGE"—REPEAL SECTION 1345-29 G. C., RULE 3—ENACTMENT AMENDED SENATE BILL 57, 93rd GENERAL ASSEMBLY.

SYLLABUS:

The administrator of the Bureau of Unemployment Compensation is not now precluded from causing a redetermination of benefits to be made in accordance with Rule 3, adopted by the Unemployment Compensation Commission February 23, 1939, by the repeal of Section 1345-29, Ohio General Code, and the enactment of Amended Senate Bill No. 57, 93rd General Assembly.

COLUMBUS, OHIO, June 23, 1939.

HON. HERSCHEL C. ATKINSON, *Administrator, Bureau of Unemployment Compensation, 427 Cleveland Avenue, Columbus, Ohio.*

DEAR SIR: Your request of recent date for my opinion reads as follows:

> "The method of determining the 'average wage' of a claimant for unemployment compensation was changed on February 23 by the old Commission.
>
> Upon the adoption of a new rule, the Commission issued blanket statements that all current claims would be automatically redetermined and that beneficiaries would receive adjustment checks. An important point is that our benefit period runs through sixteen weeks, and so no claimant had been completely paid out on February 23, since benefit payments were not made prior to January 1.
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> The question has been raised as to the right of the Administrator under the law to make a redetermination, in view of the fact that the law specifies a ten-day period for protest from any party affected by the payment.
>
> Will you examine this question and give me an opinion as to my position as Administrator on this question?"

To properly approach and understand the question here presented, some review of the legislative enactments and subsequent happenings giving rise to this question must be made.

The authority of the Unemployment Compensation Commission (now the Bureau of Unemployment Compensation) to make and enforce rules for the administration of the Unemployment Compensation Act is found

in Section 1345-13, Ohio General Code, so much of which is material to this inquiry is here set out:

> "(a) In addition to all other duties imposed on the commission and powers granted by the provisions of this act, the commission shall have full power;
>
> (1) To adopt and enforce reasonable rules and regulations relative to the exercise of its powers and authority, and proper rules to govern its proceedings and to regulate the mode and manner of all investigations and hearings; to prescribe the time, place and manner of making claims for benefits under this act, the kind and character of notices required thereunder, the procedure for investigation, hearing and deciding claims, the nature and extent of the proofs and evidence and the method of taking and furnishing the same to establish the right to benefits, and the method and time within which adjudication and awards shall be made; to adopt rules and regulations with respect to the collection, maintenance and disbursements of the unemployment and administrative funds; and to amend and modify any of its rules and regulations from time to time in such respects as it may find necessary or desirable;
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> * * * * * * * * *
>
> (7) To receive, hear, and decide claims for unemployment benefits, and to provide for the payment of such claims as are allowed;
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> * * * * * * * * *"

Pursuant to the authority granted in the above quoted section, the Unemployment Compensation Commission, early in its existence, adopted what became known as Rule 3, which provided for the method of compilation of average weekly wage, which in turn determined the amount of benefits payable to individual claimants.

In February of 1939, it became necessary, because of facts not here important, to alter the rule determining average weekly wage and thereafter on February 23, 1939, a modified Rule 3 was adopted which changed the method of determining the average weekly wage and consequently, made a change in the amount of benefits determinable therefrom.

It is not necessary here to set out the content of Rule 3 as originally formulated or as subsequently modified. It is only necessary to bear in mind the fact that changes in amounts of benefits payable resulted therefrom.

Upon the adoption of the new Rule 3, the predecessor to the new Bureau of Unemployment Compensation, the Unemployment Compensation Commission, announced through the press and its various local offices that claimants for benefits need not apply for a redetermination of their benefits payable under modified Rule 3, but that such redetermination

would follow as a matter of course and upon the initiative of the Commission. The question is now raised whether or not it lies within the authority of yourself, as administrator, to redetermine such benefits payable from the adoption of modified Rule 3 in the absence of application from the individuals to whom benefits are payable. Under Section 1345-29, Ohio General Code, which was operative until March 2, 1939, it was provided as follows:

> "The commission shall have full power and authority to hear and determine all questions within its jurisdiction, and its decisions thereon shall be final. The powers and jurisdiction of the commission shall be continuing, and it may from time to time modify its former findings and orders, and may rehear or reconsider any question or claim previously decided or passed upon. Provided, however, that any employer or employee aggrieved by an order or decision of the commission may, within thirty days therefrom, appeal from such order or decision to the court of common pleas of the county wherein said appellant, if an employe, is resident or was last employed, or of the county wherein the appellant, if an employer, is resident or has his principal place of business in Ohio. Such appeal shall be heard upon a transcript of the proceedings before the commission; and said order or decision shall not be modified or reversed unless said court shall find that it was unlawful or unreasonable. Either party shall have the right to prosecute error from the court of common pleas as in other civil cases."

The last quoted section was superseded by the following section of Amended Senate Bill No. 57, 93rd General Assembly, which became effective March 2, 1939, in so far as is here pertinent:

> "Claims for benefits shall be filed with a deputy of the administrator designated for the purpose. The administrator or his deputy shall promptly examine any claim filed, and on the basis of any facts found by him shall determine whether or not the claim for benefits is valid and if valid the week with respect to which benefits shall commence, the weekly benefits payable, and the maximum duration thereof. The claimant and other parties who may be affected by such determination shall promptly be notified of the decision and the reasons therefor.
>
> Any interested party may within the time provided for filing an appeal apply for or consent to a reconsideration of the deputy's determination, and such application or consent shall stay proceedings on any appeal filed prior to the decision upon reconsideration. Unless the claimant or other affected parties file an appeal from such decision with the board within ten cal-

endar days after such notification was mailed to the last known post office address of the appellant and applies for a hearing, such decision of the administrator shall be final and benefits shall be paid or denied in accordance therewith. In the event that an appeal is filed with the board, the payment of benefits shall be withheld pending decision on the appeal, but when the board affirms a decision of the referee allowing benefits, such benefits shall be paid, notwithstanding any further appeal which may thereafter be taken, but if such decision is finally reversed, no employer's account shall be charged with benefits so paid.
Where an appeal from the decision of the administrator is taken, a referee shall, after affording the parties reasonable opportunity for a fair hearing, affirm, modify or reverse such findings of fact and the decision of the administrator as to him shall appear just and proper."

The question now becomes, does the last quoted section and the repeal of former Section 1345-29, supra, preclude the redetermination of such claims which were due as of and previous to February 23, 1939, the date of the adoption of new Rule 3?

As of February 25, 1939, the Unemployment Compensation Commission, which preceded yourself as the administrative authority, from the clear intent of Section 1345-29, supra, had the authority to redetermine the benefits payable as such Commission publicly led claimants to believe would be done. Such intent can be gathered from the following words previously quoted:

> "The powers and jurisdiction of the commission shall be continuing, and it may from time to time modify its former findings and orders, and may rehear or reconsider any question or claim previously decided or passed upon."

However, as previously stated, the above section was on March 2, 1939, repealed and succeeded by Section 4 of Amended Senate Bill No. 57 which contains no such provision for the administrator on his own initiative to reconsider findings.

From the facts thus far stated and without examining other sections of the act relating to unemployment compensation to find authority for a present redetermination of benefits, it would appear that the right of yourself to reopen the determination of benefits here concerned lapsed with the repeal of Section 1345-29, supra. However, in regard thereto, the provisions of Section 26, General Code, must be considered. Said section reads as follows:

> "Whenever a statute is repealed or amended, such repeal or amendment shall in no manner affect pending actions, prosecu-

> tions, or proceedings, civil or criminal, and when the repeal or amendment relates to the remedy, it shall not affect pending actions, prosecutions or proceedings, unless so expressed, nor shall any repeal or amendment affect causes of such action, prosecution, or proceeding, existing at the time of such amendment or repeal, unless otherwise expressly provided in the amending or repealing act."

Therefore, if the matter of redetermining these benefits reached the stage whereby it became a "proceeding" as used in that section, I am then of the opinion that the repeal of Section 1345-29, supra, would not operate to remove your authority in regard to redetermination.

Upon examination of the facts of the present situation, I find that on February 23, the date new Rule 3 became operative, the then Unemployment Compensation Commission passed the following resolution by the vote of two members of that body and entered the same on the Minute Book:

> "Mr. Lawrence moved that the executive director be directed to redetermine all claims for benefits filed since January 1, 1939, on the basis of the average weekly wage as adopted by the Commission on February 23, 1939." (Vol. II, page 193, Minutes of Unemployment Compensation Commission.)

It has been said that Section 26, supra, is to be read as a saving clause in all statutes which amend prior enactments, Bode vs. Welch, 29 O. S. 19. In the case of State, ex rel. Andrews vs. Zangerle, 101 O. S. 235, the Supreme Court of Ohio had before it a resolution of county commissioners ordering a road improvement and held such resolution to be a proceeding within the last mentioned section. The first branch of the syllabus of said case reads:

> "An order or resolution declaring for or in favor of a county road improvement, or fixing the assessment therefor, is a 'proceeding' within the contemplation of Section 26, General Code."

Likewise, in the case of Cincinnati, et al. vs. Davis, et al., 58 O. S. 225, the court determined that a resolution for the improvement of an alley by a proper board of a city constituted the start of a proceeding and that where an amendment of the law conferred the same authority on a separate and distinct board, the passage of the resolution by the first board constituted a proceeding within Section 26, General Code, and the first board was not divested of authority, by the change in law, to continue the improvement.

In Opinion No. 776 of Opinions of the Attorney General for 1927, it was the opinion of the then Attorney General that an application by county commissioners for state aid in the construction of a highway constituted a pending proceeding within the meaning of Section 26, supra, as shown by the folowing words of the syllabus:

> "A proceeding is 'pending' within the meaning of Section 26 of the General Code when a board of county commissioners makes application for state aid under the provisions of Section 1191 of the General Code, and such a proceeding may be completed under the present law after the effective date of House Bill No. 67. * * *"

In the light of the preceding interpretations of Section 26, supra, it becomes obvious that it calls for no straining of construction to find, in the instant case, that at the time of the amendment of the law here involved, there was a pending proceeding within the provisions of Section 26, Ohio General Code and that, therefore, that section would operate as a saving clause to enable yourself, as administrator of the Bureau of Unemployment Compensation, to now redetermine the benefits here referred to.

I, therefore, conclude and it is my opinion that it lies within your authority as administrator of the Bureau of Unemployment Compensation, under the circumstances here noted, to cause a redetermination of benefits of unemployment compensation to be made in accordance with modified Rule 3 adopted February 23, 1939, by the Unemployment Compensation Commission.

Respectfully,
THOMAS J. HERBERT,
Attorney General.

800.

MUNICIPAL COURT, AKRON—SECTION 1579-540 G. C., HOUSE BILL 343, 93RD GENERAL ASSEMBLY—TIME OPERATIVE, JANUARY 1, 1940—AMENDMENT—PRESIDING JUDGE—THREE JUDGES—BAILIFF—DEPUTY BAILIFFS —SALARY.

SYLLABUS:

1. The provisions of Section 1579-540, General Code (House Bill No. 343, 93rd General Assembly), do not become operative until January 1, 1940, at which time the Municipal Court of Akron will consist of a presiding judge and three other judges.

2. Until the operative date of Section 1579-540, General Code