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1. ADMINISTRATOR HAS DISCRETION TO RECONSIDER DETERMINATION OR TO REFER REQUEST FOR RECONSIDERATION TO BOARD OF REVIEW.
2. BENEFITS MAY BE PAID A CLAIMANT (1) WHERE REFEREE AFFIRMS DECISIONS OR RECONSIDERATION, (2) WHERE BOARD OF REVIEW AFFIRMS DECISION OF REFEREE. H.B. No. 1130, SEC. 3., 103RD GENERAL ASSEMBLY, SECTIONS 4141.28 AND 4141.35, R.C.

SYLLABUS:

1. Objections taken by claimants or employers to recomputations and redeterminations made pursuant to Section 3 of House Bill No. 1130 of the 103rd General Assembly (effective October 16, 1959) are governed by the procedure set forth in Section 4141.28, Revised Code, as amended by said bill.

2. Under division (G) of Section 4141.28, Revised Code, as effective October 16, 1959, the administrator of the bureau of unemployment compensation has the discretion to reconsider a determination which he has made, on request for reconsideration, or to refer such request for reconsideration to the board of review, bureau of unemployment compensation as an appeal.

3. The instances specified in division (H) of Section 4141.28, Revised Code, as effective October 16, 1959, where (1) a referee affirms a decision on reconsideration, and (2) where the board of review affirms a decision of a referee allowing benefits, constitutes the only situations where benefits may be paid a claimant pending a further appeal.

4. Where pursuant to Section 4141.28, Revised Code, as effective October 16, 1959, benefits have been paid a claimant even though further appeal has been prosecuted, recovery of such payments could not be made at a later time under Section 4141.35, Revised Code.

Columbus, Ohio, December 3, 1959

Hon. Donald B. Leach, Administrator,
Bureau of Unemployment Compensation
Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“House Bill 1130 contains an uncodified provision, section 3, requiring the administrator, on application by certain claimants, to recompute the weekly benefit amount and the total benefit pay-

able to each such claimant. The general purpose of the provision is to afford claimants who filed claims prior to the effective date of the bill the increased benefits provided in such bill for claimants whose claims are filed after the effective date. Pursuant thereto, the Bureau has undertaken such recomputations and has notified affected claimants and employers.

“Protests or applications for reconsideration have been filed by employers in approximately ten thousand such recomputations, and more are being filed daily. Payment of the recomputed benefits is contested on the basis that such section 3 is unconstitutional.

“The filing of such applications and the issue raised therein present several questions of immediate importance in the administration of the law and in the handling of such cases.

“The specific questions so presented are as follows:

- “1. Do the provisions of section 4141.28, Ohio Revised Code, which section specifically covers the determination of benefit rights, claims for benefits, and appeals therefrom, apply also to uncodified section 3 of House Bill 1130, which section covers recomputation of the weekly benefit amount and redetermination of total benefits, so that objections taken by claimants or employers to such recomputations and redeterminations may be handled as applications for reconsideration under section 4141.28, Ohio Revised Code?
- “2. If your opinion as to question number one is in the negative, may an employer, by virtue of section 4141.26, Ohio Revised Code, contest permissible charges to his account of the increased benefits paid to claimants by reason of the recomputations and redeterminations made pursuant to uncodified section 3 of House Bill 1130?
- “3. If your opinion as to question number one is in the affirmative, do the provisions of 4141.28, Ohio Revised Code, as contained in House Bill 1130 apply or do the provisions of such section as it existed prior to the effective date of House Bill 1130 apply?
- “4. If your opinion as to question number one is in the affirmative, and if, in answer to question number 3 your opinion is that the provisions of section 4141.28, Ohio Revised Code, as contained in House Bill 1130, apply,
 - “(a) Is the type of proceeding here involved, the review portion of which is initiated by an application for reconsideration alleging solely that uncodified section 3 of House Bill 1130 is uncon-

stitutional, an application for reconsideration that the administrator should reconsider or is it an application that he may judge to pose an issue requiring a 'hearing,' as that term is used in section 4141.28 (G) involving referral thereof to the board of review as an appeal?

- "5. If your opinion as to question number four is that a hearing may be judged to be required, and, further, if such judgment is made by the administrator, the case thereby being referred to the board as an appeal,
- "(a) Would a determination by a referee, affirming the initial and only determination of the administrator or deputy in making the recomputation and redetermination, in compliance with uncodified section 3 of House Bill 1130, constitute a 'double affirmance' under the provisions of section 4141.28 (H), Ohio Revised Code, so that payment of the increased benefits, as recomputed, should then be made even though further appeal is prosecuted; and
- "(b) Would a determination of the board of review affirming such initial and only determination of the administrator or his deputy constitute such 'double affirmance' if the board were to take immediate cognizance of the issue pursuant to section 4141.28 (J), Ohio Revised Code, and no determination were made by a referee?
- "6. On the same assumptions as those set out in question number four and if the administrator should reconsider and allow the payment of the increased benefits as recomputed, would a "double affirmance' occur if the board were to affirm after taking immediate cognizance of the issue pursuant to section 4141.28 (J), Ohio Revised Code, and no determination were made by a referee?
- "7. If your opinion as to question number one is in the affirmative, and a 'double affirmance' under section 4141.28, Ohio Revised Code, occurs, causing payment of increased benefits as recomputed to be made, even though further appeal is prosecuted, is the administrator required, pursuant to section 4141.35, Ohio Revised Code, to order repayment of such increased benefits so paid in the event uncodified section 3 of House Bill 1130 should be determined to be unconstitutional?

“In order to afford you the material for consideration of the concrete issues presented, we are attaching hereto, as exhibits, the following:

- “A. Form BUC-401-RD, Application for Recomputation,
- “B. Form BUC-465-RD, Notice of Redetermination of Benefits,
- “C. Form BUC 418, Letter of Protest, and
- “D. One complete, typical file from the date of original application for the determination of benefit rights through the employer protest or application for reconsideration.

“In all cases the information on the form is that contained in an actual case. The names of the employer and of the employee have been removed for obvious reasons.

“You will note that, on Form BUC 465-RD, provision is contained to notify the employer and claimant that each has appeal rights. This is not deemed to commit the Bureau to any interpretation of the law, which, of course, is your province, but was intended to alert the parties to the possible need for taking prompt action to preserve any rights that might be considered to have been abridged. The filing of such appeal would certainly protect such rights under any applicable provision of chapter 4141, Ohio Revised Code, if any appeal rights are therein provided.

“If it be assumed that the appeal procedure of amended section 4141.28, Ohio Revised Code, does apply to protests filed either by claimants who believe the recomputed amounts to be inaccurate, or by employers, who believe the same, or that section three of House Bill 1130 is unconstitutional, then many problems arise in connection with the so-called double affirmance rule.

“Neither the administrator, the referees of the board of review, nor the board of review, all being administrative officers, has power to rule on the constitutionality of statutes under the doctrine of *East Ohio Gas Company v. P.U.C.O.*, 137 O.S. 225. Double affirmance would, therefore, necessarily, occur on employer protests, assuming the occurrence of the procedural conditions as set forth in section 4141.28, Ohio Revised Code.

“This raises a question as to the construction of the administrator’s power to refer cases to the board without reconsidering them when he deems a ‘hearing’ to be required. All litigated matters require a hearing in the broad sense of the term. It would appear, therefore, that in the general context, the ‘hearing’ referred to in subsection (G) is that needed in certain types of

cases only and not in all types of cases. Otherwise, a question of unconstitutional delegation of legislative power might be raised.

“This, in turn, involves the construction of section 4141.28 (H), Ohio Revised Code. If it is construed literally, then the administrator might prevent the occurrence of one set of conditions prerequisite to double affirmance by referring such case to the board, and the board, in turn, could prevent the other condition from occurring by determining the case without permitting it to be heard by a referee as authorized under section 4141.28 (J), Ohio Revised Code.

“Involved also is a possible dilemma of reconciling the purposes of subsections (G) and (H). Subsection (H) seems clearly designed to speed payments of benefits to a claimant when, after two reviews, he is found to be authorized. It thus prevents the indefinite postponement of payment of benefits because of extended litigation. At the same time, subsection (G) seems clearly designed to expedite some types of proceeding so that ultimate determination may be obtained more quickly than has been possible heretofore. One of the fundamental aspects of the question, therefore, is whether expeditious procedure under one subsection may automatically prevent expeditious payment under the other.

“While I realize the problems here presented are manifold, complex, and of far-reaching importance, I am sure you appreciate, as we do, the need for as prompt a reply as possible because, under current circumstances, the contested recomputed benefits are not being processed and cannot be, pending your reply.”

I may observe initially that I fully agree with your notion that neither the administrator nor the board of review may undertake to declare invalid the statute in question, nor do I consider it within my own province to question such possible invalidity under the constitution.

Coming then to consider your questions seriatim you will note, as to your first query, that Section 3 of House Bill No. 1130 provides in pertinent part:

“* * *

“Any individual * * * shall * * * have his eligibility to receive benefits * * * determined in accordance with the provisions of sections 4141.01 to 4141.46, inclusive, of the Revised Code, *as amended by this act*, * * *.” (Emphasis added)

It seems entirely clear to me that where the administrator acts on an application under Section 3 of this act to determine "eligibility to receive benefits" he will have made a "determination of benefit rights" within the meaning of division (G) of Section 4141.28, Revised Code, the more especially as Section 3 itself provides that the claimant may, upon application have (1) his weekly benefit amount recomputed, and (2) his total benefits determined; and that this be done "in accordance with" the provisions of enumerated sections which comprehend Section 4141.28, Revised Code, "as amended."

Accordingly, your first and third questions must be answered in the affirmative, and it becomes unnecessary to consider the second question stated.

As to your fourth question, division (G) of Section 4141.28, Revised Code, provides in part:

"* * *

"* * * if in his judgment the issues are such as to require a hearing, the administrator may refer any request for reconsideration to the board as an appeal."

In *Atst Ohio Gas Co., v. Public Utilities Commission of Ohio*, 137 Ohio St., 225, the court in its per curiam opinion said:

"In the instant case, the application for rehearing was filed and the appeal taken within the required time. It seems quite obvious that the requirement of the filing of an application for rehearing contemplates the enumeration only of the grounds which the Public Utilities Commission would be authorized to consider and determine. It was the manifest duty of the commission to proceed under and in accordance with the terms and provisions of the statute with the assumption of its constitutionality. Constitutionality of statutes is a question for the courts and not for a board or commission."

Under this rule it is equally the duty of the administrator and the board of review to abstain from any consideration of the possible constitutional invalidity of the statute. It may well happen, however, that the appellant who contests such question will find it necessary to make a factual "record of the proceedings before the board" upon which to base his appeal to the courts as provided in division (N) of Section 4141.28, Revised Code. In short, such appellant could conceivably be under the necessity of showing, in a hearing before the board, such facts as would

establish the vested right of which he claims to be deprived, and such actual impingement of the statute on his rights as would establish his right to raise the constitutional question on appeal to the courts.

Accordingly, since the administrator is given complete discretion in referring such requests for reconsideration to the board without himself acting on them, I cannot see that he is under any duty in such a case to refrain from doing so.

As to your fifth question, the pertinent statutory provision is found in division (H) of Section 4141.28, Revised Code, as follows:

“* * * if an appeal is filed, payment of benefits which are in dispute shall be withheld pending the decision on the appeal provided when a referee affirms a decision on reconsideration, or 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 a decision is finally reversed, no employer’s account shall be charged with benefits so paid.”

This language quite plainly refers to a referee’s affirmance of a “decision on reconsideration” by the administrator. Where the administrator refers a request for reconsideration to the board under division (G) of Section 4141.28, Revised Code, it is clear that he has not thereby made such “decision on reconsideration.” Accordingly, although the matter comes to the board “as an appeal,” it is not an appeal from a “decision on reconsideration.” Hence, both branches of your fifth question must be answered in the negative.

Your sixth question is also resolved by the language of the final sentence in division (H) of Section 4141.28, Revised Code, as amended. The language therein is express and is free of ambiguity. It provides only two situations in which benefits may be paid pending a further appeal, and the situation which exists where (1) the administrator makes a “decision on reconsideration,” and (2) the board of review affirms that decision without the intervention of a referee, is not one of them. Whether the General Assembly intended such a result we are not permitted to inquire, in the face of such express and unambiguous language. See *Slingluff v. Weaver*, 66 Ohio St., 621.

Coming now to the final question stated in your letter, the second paragraph of Section 4141.35, Revised Code, reads:

“If the administrator finds that an applicant for benefits has been credited with a waiting period or paid benefits to which he was not entitled for reasons other than fraudulent misrepre-

sentation, the administrator shall within three years by order cancel such waiting period and require that such benefits be repaid in cash to the bureau or be withheld from any benefits to which such applicant is or may become entitled before any additional benefits are paid. No such order cancelling a waiting period or requiring the repayment or withholding of benefits shall hereafter be made, nor shall such cancellation, repayment or withholding hereafter be required, by the administrator solely because private unemployment benefits have been or will be paid with respect to weeks prior to the effective date of this section under arrangements or plans described in section 4141.36."

You will note that the recovery provision found in the second paragraph of Section 4141.35, Revised Code, is applicable to those cases in which the administrator finds that an applicant has been "paid benefits to which he was not entitled for reasons other than fraudulent misrepresentation." Where a "double affirmance" occurs within the scope of division (H) of Section 4141.28, Revised Code, however, the express provision of that section that "such benefits shall be paid, notwithstanding any further appeal," becomes operative. In the face of such express requirement of payment during a further appeal I can see no basis for a subsequent determination that the claimant "was not entitled" to receive them. Hence, I conclude that no recovery of such payments could be had under Section 4141.35, Revised Code.

I may add in passing that I do not regard the decision in *Cornell v. Perschillo*, 93 Ohio App., 495, to be in any way pertinent here for the reasons (1) that that case did not involve interim payments under a provision analogous to division (H) of Section 4141.28, Revised Code, and (2) that Section 1345-25, General Code, as it then existed authorized the administrator to institute recovery action "notwithstanding any other provisions of the unemployment compensation act," a provision not now to be found in Section 4141.35, Revised Code.

Accordingly, in specific answer to your inquiry, it is my opinion:

1. Objections taken by claimants or employers to recomputations and redeterminations made pursuant to Section 3 of House Bill No. 1130 of the 103rd General Assembly (effective October 16, 1959) are governed by the procedure set forth in Section 4141.28, Revised Code, as amended by said bill.

2. Under division (G) of Section 4141.28, Revised Code, as effective October 16, 1959, the administrator of the bureau of unemployment compensation has the discretion to reconsider a determination which he

has made, on request for reconsideration, or to refer such request for reconsideration to the board of review, bureau of unemployment compensation as an appeal.

3. The instances specified in division (H) of Section 4141.28, Revised Code, as effective October 16, 1959, where (1) a referee affirms a decision on reconsideration, and (2) where the board of review affirms a decision of a referee allowing benefits, constitute the only situations where benefits may be paid a claimant pending a further appeal.

4. Where pursuant to Section 4141.28, Revised Code, as effective October 16, 1959, benefits have been paid a claimant even though further appeal has been prosecuted, recovery of such payments could not be made at a later time under Section 4141.35, Revised Code.

Respectfully,
MARK MCELROY
Attorney General