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UNEMPLOYMENT COMPENSATION, BUREAU OF, ADMINISTRATOR—MAY WAIVE PENALTY INCURRED BY EMPLOYER FOR FAILURE TO FILE CONTRIBUTION REPORT—WITHIN TIME PRESCRIBED—IF DEFAULT LESS THAN SIXTY DAYS—GOOD CAUSE MUST BE SHOWN FOR WAIVER—SECTIONS 1345-18, 1345-28 G.C.

SYLLABUS:

The Administrator of the Bureau of Unemployment Compensation, by virtue of Section 1345-28, General Code, may waive the penalty incurred by an employer under Section 1345-18, General Code, for failure to file contributions report within the time prescribed by the Administrator, if the default in filing such report is of less than sixty days duration and the Administrator determines that good cause has been shown for such waiver.

Columbus, Ohio, February 28, 1952

Hon. Ernest Cornell, Administrator, Bureau of
Unemployment Compensation
Columbus, Ohio

Dear Sir:

I am in receipt of your request for my opinion as to whether, as Administrator of the Bureau of Unemployment Compensation, you may waive or cancel the penalty provided by Section 1345-18, General Code, "when such action is desirable for efficient administration, to correct inequities or to relieve hardship."

Section 1345-18, General Code, as amended, effective October 18, 1949 and now in force and effect, reads in part as follows:

"* * * In case of failure to file a contribution within the time prescribed by the administrator, there shall be added to the amount of any contribution due a penalty amounting to 10% of the contributions due; provided, that such penalty shall not be less than \$5.00 nor more than \$25.00 for each quarterly report that is filed after the due date. * * *"

An examination of the history of this section of the General Code reveals that Section 1345-18, effective September 29, 1947, read in part:

“* * * In case of failure to file a contribution report within the time prescribed by the administrator, *unless it is shown that such failure is due to good cause shown and not to willful neglect*, there shall be added to the amount of any contribution due, \$5.00 if such failure is not for more than 30 days, with an additional \$5.00 for each additional 30 days or fraction thereof, during which such failure continues, not exceeding in the aggregate of \$25.00.”
(Emphasis added.)

A comparison of the statute before and after amendment reveals that the wording of the earlier version, “unless it is shown that such failure is due to good cause shown and not to willful neglect,” has been omitted from the more recent enactment. The omission of such language clearly is indicative of some legislative intent. Was it the intent of the General Assembly to eliminate *entirely* all power of the Administrator to waive such penalty? From an examination of Section 1345-18, standing alone, there is nothing to indicate that such was not the legislative intent. However, it is necessary to examine other statutes in the Unemployment Compensation Act to determine if there is any other source of authority that would authorize the cancellation by the Administrator of such penalties.

Section 1345-28, General Code, provides in part as follows:

“If the administrator finds that any person, firm, corporation or association is, or has been at any time after December 21, 1936, an employer subject to the provisions of this act and has failed to comply with the provisions of this act, he shall determine the period during which he or it was such an employer, which finding and determination shall for all purposes of this act be prima facie evidence thereof. The administrator shall forthwith give notice of said action to the employer who shall immediately thereafter furnish the administrator with a payroll covering the period included in said finding, and shall forthwith pay the amount of contribution determined and fixed by the administrator.

“* * * The administrator, for good cause shown, may waive a default in the payment of contributions where said default is less than sixty days' duration.”

This section authorizes the Administrator, for good cause shown, to waive a default in payments of less than sixty days' duration due from an employer. A waiver of “a default in the payment of contributions” can only mean that the Administrator is authorized to waive any penalties which otherwise would accrue as the result of such default.

Section 1345-28, General Code, has been in effect since September 28, 1943 and was in effect at the time the General Assembly made its latest change in Section 1345-18, General Code. It is reasonable to assume, therefore, that the General Assembly contemplated and intended the two sections should be read and considered together.

Section 1345-18, General Code, does not prescribe the time for filing a contribution report, but the authority is delegated therein to the Administrator to prescribe the time for filing such a report.

The Administrator has prescribed the time for filing quarterly contribution reports in Section 300.1 of the Regulations of the Bureau of Unemployment Compensation, as follows:

“Every employer once subject to the Law must continue to make quarterly contribution reports until such time as permission is granted the employer to discontinue the filing of such reports. Reports must be signed by the employer; if the employer is other than an individual, by a duly constituted official of such organization. A report shall be delinquent and subject to penalty *if not filed within the month following the calendar quarter for which the report was due*. When the due date follows (falls) on a Sunday or legal holiday, the due date shall be the following day. When an employer's account is established for the first time, contribution and wage reports for all quarters, if submitted at one time, shall be deemed one report and due on the date submitted, unless it appears to the satisfaction of the Administrator that the employer has been guilty of an attempt to evade his or its liability to pay contributions. If it appears to the satisfaction of the Administrator that such employer has been guilty of an attempt to evade his or its liability to pay contributions, such reports shall be deemed to be due and subject to penalty as in all other cases. 1345-4-a (1).” (Emphasis added.)

The Administrator has provided for the quarterly payments of contributions due in Section 300.11 of the same Regulations, as follows:

“Every employer subject to the act shall for each calendar quarter pay contributions on his taxable payroll at a rate determined in accordance with the requirements of the Act. Such payments shall be delinquent *if not paid within the month following the calendar quarter for which such contributions were payable*. When the due date falls on a Sunday or legal holiday, the due date shall be the following day. Delinquent contributions for the first quarter of 1949 and for all prior quarters will be subject to interest at the rate of 8% per annum through June 30, 1949, and will be subject to interest at the rate of 6% per

annum thereafter until paid. In the computation of the 6% rate any portion of a month will be considered a full month. 1345-4, 1345-13(a)(1)."

(Emphasis added.)

A comparison of these Regulations shows the Administrator has prescribed that the time for filing of the quarterly report and the time for quarterly payment should coincide. This is further evidenced in other Regulations of the Administrator, as follows:

Section 300.12:

"The final *report and payment* of a liable employer who dissolves, discontinues, or disposes of his business shall be made within thirty days of the date of such termination of his liability. 1345-4."

(Emphasis added.)

Section 300.14:

"When in the judgment of the Administrator the fund might suffer a loss by reason of quarterly payments from an employer, the Administrator or his deputy may by order require such employer to *report and pay* contributions monthly. In such cases contributions will be due and payable at the discretion of the Administrator. 1345-13(a)(5)."

(Emphasis added.)

The quarterly report is the actual basis for determining the amount of quarterly payment due from an employer so the report and the payment are really component parts of one and the same event.

Where the Administrator has authority, under the provisions of Section 1345-28, General Code, to waive a default in payments of less than sixty days' duration due from an employer, it reasonably follows that the Administrator has the same power to waive or cancel penalties for the same length of time when an employer fails to file the contribution report referred to in Section 1345-18, General Code, because it is a necessary and integral part of the same event in determining the amount of the payment owed by the employer.

Prior to the amendment of Section 1345-18 in 1949, the Administrator, *without any time limitation*, could waive the penalty provided therein for failure to file the contribution report in time, but in case of failure to pay the contributions in time, he could only waive the default where such payment was made within sixty days of the time due. Since, under the rules of the Administrator, both the contribution report and

the payment were due at the same time, and since the payment necessarily is predicated upon the amount due as shown by the contribution report, the effect of such legislation was to create an anomalous situation. I believe that by the elimination of the language of Section 1345-18, which had given the Administrator the right to waive the penalty *without any time limitation*, the General Assembly intended to limit such power of waiver to the sixty days provided by Section 1345-28, and that the General Assembly recognized the provisions of Section 1345-28 as being applicable to the penalty provided by Section 1345-18.

There, of course, are situations where the employer may be physically unable to report timely because of circumstances beyond his control due to illness, accident, etc. and there are occasions where the minimum penalty of \$5.00 might far exceed the amount of the contributions due. I can not conceive that the General Assembly, by the amendment in 1949, intended to totally eliminate any power on the part of the Administrator to waive the penalty provided by Section 1345-18, General Code, but, instead, conclude that it was its intention to limit such power to waiver of penalties where the contribution report was filed and payment made within sixty days of the time due.

Accordingly, it is my opinion that the Administrator of the Bureau of Unemployment Compensation, by virtue of Section 1345-28, General Code, may waive the penalty incurred by an employer under Section 1345-18, General Code, for failure to file contribution report within the time prescribed by the Administrator, if the default in filing such report is of less than sixty days duration and the Administrator determines that good cause has been shown for such waiver.

Respectfully,

C. WILLIAM O'NEILL

Attorney General