EMPLOYMENT SECURITY COMMISSION
OF NORTH CAROLINA

Lynn R. Holmes, Chairman

COMPLETE
ESC INTERPRETATIONS

[Adopted pursuant to N.C.G.S. §96-4(b)]

The Employment Security Law of North Carolina, Chapter 96-1 et seq., came effective in 1936, has been amended extensively throughout the years, and has been the object of extensive judicial interpretation.

In light of the complex nature of the Employment Security Law, the extensive amendments and court decisions, the Commission in 1937 began issuing official written interpretations.

Interpretations are issued by the Chief Counsel as the Commission's written interpretation or legal opinion and precedent on all issues considered in the interpretation as a means to assure effective, consistent and efficient application of the Law and the operation of the Employment Security Commission.

II. Purpose

The issuance of Commission's Interpretations has two primary purposes. First, it is a reference source for use by the employees of the Commission and the public to familiarize themselves with the positions that the Commission and the courts have taken on various issues arising under the Employment Security Law of North Carolina. It is important that the employees of the Employment Security Commission become familiar with the position that the Commission has taken on various issues, and with the Commission's interpretations of various laws and various court cases before proceeding to determine an individual's rights to receive benefits or proceeding to determine an employer as obligation to pay unemployment insurance taxes.

Second, the Interpretation Manual should be used by Commission employees as an investigative and training aid because it provides detailed position that the Commission has taken on various issues.

III. How to Use

The interpretations should be maintained in a loose leaf notebook for ease in updating. New interpretations and amendments to current interpretations shall be issued to holders of the Interpretation Manual when issued by the Chief Counsel.

A copy of the Interpretation Manual shall be distributed to each local office of the Commission where it shall be available for use by the general public.

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I. Section 96-8(6)f4, 96-8(6)g6 and 96-8(20) -American Aircraft;
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207. Interpretation of the Employment Security Law of North Carolina (1) Section 96-13(3), Commission Approved Training, and (2) Section 96-18(f), Larceny and Embezzlement.

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221. Interpretation of Section 96-8(5)k, 96-8(5)a., and 96-8(6)g.17.(iv) of the Employment Security Law of North Carolina - Vocational Workshop - Rehabilitation Facility.

231. Interpretation of the Employment Security Law of North Carolina - Nonprofit Organizations:
(1) Section 96-8(5)a, 96-8(5)k, and 96-11(c)(1) - Employer and
(2) Section 96-9(d) - Method of Financing.

232. Interpretation of Section 96-8(5)k and 96-8(6)g 17(v) of the Employment Security Law of North Carolina - Nonprofit Organizations and Exempt Employment.

237. Interpretation of Section 96-11(c)(1) and 96-10(i) of the Employment Security Law of North Carolina - Request by Employer X held Liable under the Federal Unemployment Tax Act for Eight Years That He Be Allowed to

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 3

TO: W. R. Curtis, Acting Chairman

FROM: Ralph Moody, Chief Counsel

SUBJECT: Interpretation of Section 19 (f) (6) of the Law

This will answer your memorandum of June 30, 1943, in which you ask for an opinion on eight questions involving the administration of Section 19 (f) (6) of the Law.

A number of other States have somewhat similar provisions, but due perhaps to the fact that most of those provisions have been recently enacted, I have been unable to find any decisions or opinions involving the construction of such provisions that have been of any benefit.

Under Section 19 (f) (6) of the Law a new "employer" is created, as follows:

> "Any employing unit not an employer by reason of any other paragraph of this subsection, for which within either the current or preceding calendar year services in employment are or were performed with respect to which such employing unit is liable for any Federal tax against which credit may be taken for contributions required to be paid into a State unemployment compensation fund."

It seems to me that Section 19 (f) (6) of the Law must also be construed in conjunction with Section 19 (g) (7) (0), which is as follows:

> "Notwithstanding any of the other provisions of this subsection, services shall be deemed to be in employment if with respect to such services a tax is required to be paid under any Federal law imposing a tax against which credit may be taken for contributions required to be paid into a State unemployment compensation fund."

It also seems to be that, this being a taxing statute, it must be given a strict construction.

Given the strictest possible construction, this section adds nothing new to the Law. By this I mean that the phrase "contributions required to be paid into a State unemployment compensation fund", implies or presupposes existing liability to the State, for else how could contributions be "required to be paid" unless liability already existed. Perhaps this may be considered a strained rather than a strict construction. Inasmuch as the Federal Act now permits credit against the Federal tax for payments made to a State, there is no great need for the use of this language. On the other hand, if this feature of the Federal Act were repealed, it would render the provision of our Law inoperative.

However, the intent of the Law is to make any employing unit which is subject to the Federal tax an "employer" under our Law. Liability then attaches for contributions which are "required to be paid" and credit for which "may be taken" against the Federal tax. The language of the Law clearly appears to demand that a liability for the Federal Tax coexist with liability for the State tax or else the use of the language "against which credit may be taken" is without meaning. If this is true, then liability for the Federal tax in the "preceding calendar year" would not necessarily make the employing unit an "employer" during the "current" year, for there may be no liability for the Federal tax during the current year. It then appears that the phrase, "preceding calendar year", should be disregarded in such cases.

Sections 19 (f) (6) and 19 (g) (7) (0) of the Law, create the same liability as is created by the statutes of several other States, typical of which is that of Nebraska statute, which follows:

> "(6) Any employer of any person in this state not an "employer" by reason of any other paragraph of this subsection for which services in employment are performed with respect to which such employer is liable for any federal tax against which credit may be taken for contributions required to be paid into a state unemployment compensation fund; but services performed for such employer shall constitute employment for the purpose of this law only to the extent that such services constitute employment with respect to which such federal tax is payable."

The Nebraska Law clearly seems to say that liability for the State tax must coexist with liability for the Federal tax. It will be noted that this statute does not attempt to make liability for the State tax depend on liability for the Federal tax in the "preceding year", and it is submitted that this is proper if liability must coexist.

Turning now to your questions, I answer them as follows:

1. Q. If an employing unit was covered by the Federal Act in 1942, can we hold him liable effective January 1, 1943, before it is known if he is liable under the Federal Act for 1943?

   A. In the light of what I have said above, that is, that the Law requires coexisting liability, we could not hold an employer who was covered under the Federal Act in 1942 liable effective January 1, 1943, before it is known that he is liable under the Federal Act for 1943. This amounts to a disregard of that part of the Law which makes an employing unit an "employer" if he was liable for the Federal tax in the "preceding calendar year." This seems, however, to be in accord with the rule as to statutory construction. (State v. Barksdale (1921) 181 N. C. 621.)

2. Q. If an employing unit was not covered by the Federal Act for 1942, can we hold him liable effective January 1, 1943, if the facts indicate he will be liable under the Federal Act for 1943, or is it necessary to wait until he is actually held liable under the Federal Act?

   A. I think we can safely say, under Section 8 (a), that, if an

employing unit becomes liable under Section 19 (f) (6) at any time during the year 1943, his liability will date from January 1, 1943. If the employing unit was not liable for the Federal tax in 1942, but the facts indicate that he will be liable under the Federal Act for 1943 (Assuming the employment experience is already sufficient to create liability although payment of the Federal tax is not yet due), then it seems to me that liability for the State tax has also come into existence and we can hold him liable as of January 1, 1943. Of course, the Commission has no authority to determine liability for the Federal tax, and holding that the employing unit was liable for the State tax would not be determining liability for the Federal tax. This would amount to no more than finding that a factual situation exists which creates liability for the State tax. Of course, this answer is based on the fact that the employment record of the employing unit is sufficient to create an actual liability for the Federal tax. If we cover an employing unit which is subsequently held not liable for the Federal tax, we would be compelled to relieve such employer of liability. As I have pointed out in other parts of this memorandum, it seems that it is incumbent on the employing unit to report his liability as soon as it comes into existence by reason of his employment experience under the Federal Act, and his failure to do so will make him delinquent under our Law, although the due date for making reports and paying the Federal tax had not arrived.

3. Q. If we are required to wait until an employing unit is held liable under the Federal Act and has paid taxes as of January 31, 1944, wouldn't it be too late for the employer to get credit on his Federal taxes for 100% of the payment made to the State?

A. Under the Federal Act, the tax is due on January 31 of each year for taxes due with respect to employment for the preceding calendar year. The Federal Act also provides (CCH Treatise paragraph 1160) that the taxpayer may credit against the Federal tax only those contributions paid on or before the due date of his Federal return and, to a certain extent, those paid before July 1, next following such due date. It seems to me to be incumbent on the employing unit to ascertain his tax liability, both as to the State and Federal government, and make his payments accordingly. He would then receive full credit against the Federal tax for contributions paid to the State if he pays his State tax as indicated in 5(a) of this memorandum.

4. Q. What action should a Field Representative take if he finds that an employing unit should have paid taxes under the Federal Act, but did not?

A. It is my thought that neither a Field Representative nor any other agent of the Commission, nor even the Commission itself, can determine the liability of an employing unit for the Federal tax. This would appear to be clearly outside the jurisdiction of such agent or the Commission. If the Field Representative has reason to believe that an employing unit should have paid taxes under the Federal Act when he did not, he should so advise the proper Federal agent. If liability for the Federal tax should then be assessed by the Federal agency, liability for the State tax would immediately arise. (See also answer to Question 2.)

5. Q. When would contributions be due and interest start accruing, with respect to:
(a) First year coverage?
(b) Second and subsequent years of coverage?

A. (a) It is my thought that liability for the Federal tax may arise before the end of a calendar year by reason of the employing unit's having the required number of individuals in employment for the required length of time, although the tax is not due until January 31 of the following year. At the very instant the employing unit becomes liable for the Federal tax, liability for contributions to the Commission attaches, and contributions become due as provided in Paragraph 1.205 E of Regulation No. 1.200.

(b) Liability for the Federal tax depends on the employment record of the employing unit for each calendar year. Therefore, if I am correct in assuming that liability for the Federal tax must coexist with liability for the State tax, it seems to me that the answer given in the preceding paragraph equally applies here. In other words, liability for contributions for "second and subsequent years of coverage" would await liability under the Federal Act. However, this involves questions 6, 7, and 8 and reference should be made to answers to those questions. Once liability is established, it should be continued until the employer shows that he is not subject to the Federal tax. We can at that time make a refund if necessary.

6. Q. If an employing unit is liable for contributions under Section 19 (f) (6) for 1943, and not liable under the Federal Act for 1944, would the employer be covered under Section 19 (f) (6) for 1944?

A. As will be noted above, I am convinced that liability for a Federal tax is so much a part and parcel of the Law, the very bone and tissue, so to speak, that I must necessarily conclude that, if an employer is liable for contributions under Section 19 (f) (6) for 1943, and is not liable under the Federal Act for 1944, he would not be covered under Section 19 (f) (6) for 1944.

7. Q. How can an employer terminate coverage under 19 (f) (6)?

A. It is not necessary for an employer to file an application for termination of coverage to end his liability under the Federal Act. His liability thereunder automatically ceases in any year in which he does not have the required employment experience. (CCH Treatise paragraph 1305). Holding that Federal and State liability must coexist, I must conclude that coverage under the State act is also automatically terminated when the employer ceases to have the required employment experience to create liability under the Federal Act. It will be necessary for such an employer to show us that he is no longer liable for the Federal tax.

Connecticut is the only state that I have found which has a provision in its Law applying to termination of coverage of an employer who is liable under the State law because of liability for the Federal tax.

Under the Connecticut Law (CCH 4008 Conn.): "An employer subject to the federal unemployment tax act for 1941 or any subsequent year shall be subject to the provisions of this chapter from the beginning of such

year if he had one or more employees in his employment in the state of Connecticut in such year."

In the same section it is provided that: "An employer may cease to be subject to this chapter at the end of any calendar year following the calendar year in which he became subject to this chapter if he shall give written notice to the administrator, accompanied by proof satisfactory to the administrator that he has not employed as many as four employees at the same time during as many as thirteen weeks during the next preceding fifteen months, that he has paid all contributions due under the provisions of this chapter, that he is not subject to the federal unemployment tax act, and that he has notified his employees of his intention to cease to be subject to this chapter."

Under this provision it seems that an employer is, by the very language of the statute, covered for two or more calendar years. And this seems to be true when liability for the State tax arises by reason of liability for the Federal tax, even though there is no liability for the Federal tax during the second or subsequent calendar year. However, the language of the Connecticut statute does not seem to require, as does the language of the North Carolina Law, a liability for a Federal tax against which credit may be taken for contributions paid to the State.

8. **Q. Since it is possible that an employer may be liable under the Federal Act for 1943 and not liable for 1944, can coverage under the State Act be terminated under Section 8(b) after only one year of coverage?**

A. The answer to question 7 also applies to this question, in that coverage is automatically terminated. In further explanation, however, it is my thought that termination of coverage created under Section 19 (f) (6) cannot be handled under Section 8 (b). This section was intended to apply to employers who are liable by reason of their employment experience under Section 19 (f) (1), (2), (3), and (4), and I know of no rule of statutory construction which would permit this section to be applied to a situation subsequently created and not in the contemplation of the legislature at the time of passage of the Act, and the facts of which are clearly not embraced in the language of Section 8 (b).

If my conclusion that coverage automatically ceases in any year in which he does not have the required employment experience to be liable for the Federal tax is correct, then there is no need to have a provision covering termination except for the purpose of clarification. It would also seem that a provision applying to termination could not have the effect of extending liability to any year in which there is no liability for the Federal tax, if the reason for liability under the State Law is dependent upon a liability under the Federal Act.

Adopted as an official interpretation
by the Commission August 10, 1943

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

Interpretation No. 17

To: Mr. R. F. Martin, Director UC Division

From: W. D. Holoman, Senior Attorney

Subject: Labor Unions and Coverage under the North Carolina Law

When labor unions operating within the State of North Carolina, meet the prerequisites of the coverage requirements of the Unemployment Compensation Law of this State, then such labor unions are covered employers just the same as any other employing units which meet the prerequisites of the law. There are cases in which the local union or lodge is paying their officers a very nominal salary per month and also when any of the said officers, who serve on committees, must take a day from their work on the business of the union, then the union pays those officers for their regular day's work. It must be said that such services for the union are being performed for remuneration within the contemplation of the Act. It is true that most of such officers who are drawing nominal wages from the lodge or union spend the bulk of their time and earn their livelihood from other occupations; however, there is no exemption under our law, and we could not allow such unions to escape the payment of contributions on such officers as they are actually performing services for remuneration. It cannot be said that such unions or lodges are charitable organizations and in all probability it cannot be said that such are non-profit organizations or fraternal organizations.

The concensus of the rulings of the different states is that labor unions when they meet the required prerequisites of the law of those states are covered under the different Acts of the different states. Of course, you will appreciate the fact that each case shall stand on its own feet and will bear scrutiny, but as a general opinion such unions or lodges when they meet the required prerequisites are covered.

Adopted as an official interpretation
by the Commission on January 25, 1944

(Replaces Legal Department Ruling No. 9, dated January 7, 1943)

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

Interpretation No. 18

To: Mr. R. F. Martin, Director UC Division

From: W. D. Holoman, Senior Attorney

Subject: Commission Records shall show True Status of Employing Unit

At your request we hereby give you the legal department's opinion in regard to the records of this Commission showing the true status of an employing unit.

From time to time we have had requests from partnerships consisting of several different partners who ask that we show on our records the name of only one of the partners as usually such partnership is operated in the name of only one of the partners. We cannot recommend this procedure for several reasons. If a partnership is composed of two or three individuals, then our records should not show that the partnership is operating in the name of one individual alone, but the names of all the individuals should appear on our records. If we show the name of only one partner it would actually appear as if the business was operated by a sole owner. We could also easily get in difficulty on the collection of delinquent taxes if our records were set up in the name of the one partner, then it is doubtful whether or not we could docket a judgment against the partners even though they would be legally responsible for the delinquent taxes. In addition to this it appears that it would be a very bad practice as all public records show the true nature and true status of ownership.

Adopted as an official interpretation
by the Commission on January 25, 1944

(Replaces Legal Department Ruling No. 10, dated January 7, 1943)

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 27

TO: W. R. Curtis, Acting Chairman

FROM: Ralph Moody, Chief Counsel

SUBJECT: Determination of Suitable Work when Physical Disability is in Question

Reference is made to your memorandum of August 16, 1943, which deals with the above subject.

Where the physical condition of a claimant is in question, it would, of course, be desirable to have the expert opinion of a physician in all such cases. It is my thought, however, that if we require this in all such cases it would burden the claimant with too great an expense. It seems to me that a deputy ought to be able to size up most cases and reach a satisfactory conclusion without the expert opinion of a physician. I think the evidence of a physician should only be required in very difficult or extraordinary cases. It is true that there are many diseases in which the claimant himself does not know and is unable to say whether he is able to work or not because of the nature of the disease. For example, perhaps many people suffering from pulmonary tuberculosis reach a point after some rest and treatment that they feel able to undertake several different kinds of work, but a physician would say that they are not able to do any work at that particular time. It would seem to me that testimony from a physician should be required in such cases as the example I have given above. Perhaps many other examples could be given.

I also feel that there is possibly a group of situations in which the deputy could subpoena or cause some neighbors to testify and their observation would be just as valuable as that of a physician. I also call to your attention the fact that most claimants do not have any great difficulty in securing a certificate from their family physician. For these reasons, I feel that you should restrict the class of cases in which testimony of a physician is required. I further call to your attention that in the field of legal evidence, the opinion of laymen is accepted in a great many matters. For example, when the sanity of a person is in issue, the opinion of friends and neighbors who know such person is considered as valuable evidence although they are not experts.

Adopted as an official interpretation
by the Commission on January 25, 1944

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 33

TO: R. F. Martin, Director

FROM: Ralph Moody, Chief Counsel

SUBJECT: Liability Under Mandatory Provisions of Law Supersedes Voluntary Election - Termination of Coverage - Section 8 (b) and (c) and Section 19 (f) of the Unemployment Compensation Law.

We have for some time in oral discussions advised different employees of the Commission that, in our opinion, an employer who becomes liable by voluntary election and who subsequently employs eight or more persons for as many as twenty weeks in a calendar year becomes an employer under Section 19 (f) (1); that is, he becomes an employer under the mandatory provision of the law and this supersedes the voluntary election, or in other words, this by operation of law cancels out or renders the voluntary election nugatory and void.

Nearly all states that we know anything about who have considered this question agree that the above statement is correct. There is no use to cite an array of authorities on this question. One statement should be sufficient and perhaps the best statement is given by the Research Institute of America in its Social Security Coordinator. On page 2503 of Volume 1, we find the following:

"Automatic Coverage Supersedes Elective Coverage: Where an employer voluntarily elects coverage in a calendar year and later becomes automatically subject by employing a sufficient number of employees for a sufficient period of time during that same calendar year, his continued liability is based upon his automatic coverage and not his elective coverage. In such a case, the date on which the employer elected to become liable becomes immaterial and the employer is liable from the date upon which he would ordinarily become liable, usually January 1st of the year of coverage. Similarly, termination of liability will be governed by the provisions dealing with the termination of automatic coverage."

From this statement, you are advised as follows:

1. That an employer who elects coverage becomes liable under the mandatory provisions of the Act when he employs as many as eight persons for twenty weeks and regardless of the date of election of coverage, the liability then extends back to the first of the year if such employer had an employment record beginning from the first of the year, and if not, it extends back to the time when he first had employment in the calendar year and his tax liability should be based upon this record rather than when he first voluntarily elected.

2. When an employer who has become liable by voluntary election becomes automatically liable by a mandatory provision of the law, such as employing eight people for twenty weeks, the provision under which he terminates coverage should be the provision applied to such units who become liable by operation of the statute; that is, such an employer upon being automatically converted into a mandatory employer has the right to give notice of application for termination of coverage up until January 31 as provided by Section 8 of our statute.

Adopted as an official Interpretation
by the Commission March 28, 1944

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

Interpretation No. 46

Opinion of Attorney General

August 12, 1943

SUBJECT: Endorsement of Checks Intended for Unemployment Compensation Commission but Sent to Commissioner of Revenue

Recently the Commissioner of Revenue requested my opinion upon the legality of his endorsement of checks which designate him as payee, but which are sent to him with vouchers or other papers indicating that the checks were intended as payments to the Unemployment Compensation Commission. I advised the Commissioner that in my opinion there was no legal objection to his endorsement of said checks without recourse to the order of the Unemployment Compensation Commission. I discussed this matter with you and Mr. Holoman in order to ascertain whether there were any objections from the standpoint of the Unemployment Compensation Commission and you informed me both orally and in Mr. Holoman's letter of August 4, 1943, that there was no such objection.

You requested a letter from this office expressing the opinion that there was no legal objection to this procedure.

It is my opinion that there is no legal objection to the suggested procedure and that the question of whether the procedure should be adopted is purely an administrative one to be considered by the Commissioner of Revenue and the Unemployment Compensation Commission.

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

Interpretation No. 48

Opinion of Attorney General

January 5, 1944

SUBJECT: Unemployment Compensation Act; Interpretation of the Phrase - "Left Work Voluntarily Without Good Cause Attributable to the Employer," as Same Appears in Section 5(a) of the Unemployment Compensation Laws of North Carolina

Receipt is acknowledged of your letter of January 3, with enclosures, in which you request an interpretation of the phrase "left work voluntarily without good cause attributable to the employer," this section providing that an individual shall be disqualified for benefits for causes as provided therein including the phrase above quoted.

I have read your letter with a great deal of interest and I have considered very carefully the interpretation which has been placed upon this language appearing in the acts of other states by the authorities recited in the memorandum attached to your letter and those quoted therein.

It is particularly noted that the words "attributable to the employer" were added by the General Assembly of 1943 (see Chapter 377, Session Laws of 1943), and that the words "left work voluntarily without good cause" have been in Section 5(a) continuously since the passage of the original Act by the Special Session of the General Assembly of 1936.

As to this you submit the following question:

> "Considering the purpose and intent of the Unemployment Compensation Law should the Commission, in interpreting the word 'voluntarily' as applied to separation under Section 5(a) of the Act, inquire into the mental processes, constraining or compulsive forces or objective influences, or freedom or lack of freedom from external compulsion or necessity which led up to claimant's leaving work; or, on the other hand, should the inquiry of the Commission be limited to the question of whether or not the claimant left his work of his own motion, accord, or intentionally and irrespective of any extraneous forces, constraints, compulsion, or influences which brought about claimant's exercise of his volition?"

I think we can safely begin with the premise that it was the purpose of the General Assembly, in enacting the Unemployment Compensation Law found in Chapter 1 of the Public Laws, Extra Session, of 1936, to make some provision for those who are able and available for work and who are out of employment through no fault of their own.

Section 2 of the Act provides, in part, that as a guide to the interpretation and application of the Act, the public policy of the State is declared to be as follows:

> "Economic insecurity due to unemployment is a serious menace to the health, morals and welfare of the people of the State. Involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the Legislature to prevent its

spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his family. The achievement of social security requires protection against this greatest hazard of our economic life....."

I think we are fully justified in recognizing rules of statutory construction in seeking to determine the legislative intent to inquire into the purposes for which the law was enacted, and the ends which it seeks to attain, particularly with reference to the use of language which conceivably might have more than one meaning and which is, on that account, a proper object of construction.

It is inconceivable to me that the General Assembly, in enacting this beneficent social legislation intended that a person who had left his or her employment on account of illness, or other causes beyond control, would be considered as having forfeited the right to the benefits of the Act when such person, upon removal of such causes, is able and available for work but remains unemployed because of inability to find employment with his or her employer or in other suitable employment. I, therefore, am of the opinion that we would be justified in interpreting the word "voluntarily" and the phrase of which it is a part in such a way as to not deny the benefits of the Act to those for whom it was clearly intended to help, and this will result in what might generally be said to be a liberal interpretation rather than a narrow one, which apparently has been adopted in some jurisdictions.

In adopting a liberal interpretation, however, I believe that this interpretation should be confined to proper limits in order to give effect to the express intention of the General Assembly. In ascertaining whether or not an employee voluntarily left his employment, I think we would be justified in considering the mental processes, constraining or compulsive forces or objective influences, or the freedom or lack of freedom from external compulsion or necessity which led up to the claimant's leaving work, but I think that the Commission should in every case be fully satisfied that, where an employee has left the employment, the reasons for so doing were of an impelling character which, in the opinion of the Commission, afforded ample and complete justification for the severance of his employment. This would exclude all fictitious or feigned reasons or excuses for failure to continue in the work and would comprehend only such causes as operated directly on the employee which made, in the opinion of the Commission, his continuance in the employment impossible, or attended with such circumstances as to make it unreasonably burdensome for him to continue therein.

It seems to me that a cause which only indirectly operated upon the employee should be excluded and that the circumstances should be such as could reasonably be considered to have deprived the employee of freedom of choice in the matter. It is evident that the illness of an employee of such a character and nature as to disable him or her from continuing in the employment would be such a cause as to make it necessary for the employee to discontinue his work as long as this condition existed. On the other hand, I am inclined to the opinion that, except under very unusual circumstances, an illness in the family of an employee would not provide such a cause. If we accept this interpretation of the language of the section, it would necessarily mean that the answers to the various questions which may arise, many of which are instanced in your letter, would have to be determined by the findings of the Commission in the particular cases. Upon proper findings being made in such matters, I am of the opinion that the purpose and spirit of the law would be carried out and a desirable result obtained.

With regard to your second question as to the procedural matter under Section 5(a) and the burden of proof, I would say that, in my opinion, the technical rule as to burden of proof observed in court trials would not be employed. I assume that the Commission would take all of the evidence connected with the matter, whether offered by the employer or the employee, and reach its conclusion based upon whether or not all of the facts so adduced did or did not show that the employee had voluntarily left the work without good cause attributable to the employer, without observing any technical rules of the burden of proof or going forward with the evidence.

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

Interpretation No. 49

Opinion of Attorney General

January 25, 1944

SUBJECT: Unemployment Compensation Law; Effect of Docketing Judgment for Contributions; Refunds

Receipt is acknowledged of your letter of January 21, in which you advise that you have a case pending in which it develops you assessed contributions against an employer upon his failure to pay within the time prescribed by the statute. You docketed a summary judgment and issued execution which was collected by the sheriff, together with interest, a remittance of which was made to you by the sheriff. You advise further that, thereafter, this judgment was canceled and later, after a hearing, in an examination of the pay roll records of the employer for the same period involved in that for which the assessment had theretofore been made, it was ascertained that the employer was indebted for contributions in a sum in excess of that for which the original assessment was made, and that the assessment was thereupon made for the total amount ascertained in the second instance, which amount was later paid by the employer in full.

You further advise that the question arises as to which amount should be refunded, the later amount which was collected not by a judgment but which is the correct amount, or the amount collected by the judgment.

Your question involves a consideration of the provisions of the Unemployment Compensation Act found in G. S. 96-10 (b), authorizing a summary judgment in cases of this kind where the contributions remain unpaid.

In the instant case, the Commission would have authority under G. S. 96-10 (e) to make a refund of the excess payment made by the employer; that is to say, the sum above that which was actually due by the employer. This would not, in my opinion, amount in any sense to setting aside the judgment which was placed on record under the provisions of the statute. The refund should be made in accordance with the provisions of the section referred to and no question of fraud whatever would enter into this, and, in my opinion, the question of fraud would not affect this repayment in any way. The other case to which you refer would be guided by the same consideration. If there is fraud in any case, the penalties would be those prescribed by G. S. 96-18.

The docketing of a judgment under the provisions of the statute is not considered by me as amounting to a judicial determination of the amount of the contributions which would preclude the Commission or the employer from properly raising a question as to the amount, in the event of under assessment or over assessment. If the Commission later found that the amount as certified and assessed was less than the amount due, upon proper notice to the employer, the additional sum might be assessed. If the assessment was overstated, the employer would have a right to pay it under protest and have the claim reduced by the Commission if the Commission found that the payment was excessive. The provisions of the statute permitting the docketing of the claim as a judgment amounts to no more than providing an expeditious remedy for collection of a contribution which may be properly due.

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

Interpretation No. 55

Opinion of Attorney General

October 31, 1941

Subject: Unemployment Compensation Tax; Compromise of Tax Involving Claims in Litigation

In your letter of October 31, you inquire if the Commission, through its Chief Counsel, has authority to compromise a claim for taxes when a suit for the collection of the same has been instituted in the courts of the State.

It is my understanding of the law that in a real contest or litigation where a tax claim is involved in which the issues drawn are close and uncertain, the tax collecting authorities, in order to avoid extended litigation and settle disputed claims, would have the right to settle such claims by compromise. Such a course; that is to say, compromise judgment in a lawsuit by consent of all parties, would be independent of any statute which expressly authorizes a settlement. I do not think that the law would compel litigation to the bitter end of bona fide controversies as to a tax liability when a reasonable adjustment of the same could be obtained.

I wish to call your attention to a note in 61 C. J., under Section 1253, page 973, where you will find the following:

> "In Virginia (1) Code (1904) Sections 702, 702a, relating to the authority of the auditor to make adjustment of old and disputed claims, has no application to a compromise and settlement of a suit for taxes in a court of competent jurisdiction. COMMONWEALTH v. SCHMELZ, 81 S. E. 45, 116 Va. 62. (2). Where an auditor acting for the commonwealth agrees, with the consent of the Attorney General, to accept the sum awarded by the circuit court, in settlement and discharge of all claims for taxes, the agreement is binding on the commonwealth."

UNEMPLOYMENT COMPENSATION COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 69

Opinion of Attorney General

December 3, 1946

Subject: Unemployment Compensation Law; Section 96-14(a) of the General Statutes; Voluntary or Involuntary Separation from Work; Married Women Who Leave Their Work to Follow their Husbands to New Residences.

In your letter you refer to Section 96-14(a) of the General Statutes which relates to the disqualification for benefits imposed by the Commission when it is determined by the Commission that an individual is unemployed because he or she left work voluntarily without good cause attributable to the employer.

You ask the following question as related to this statute:

"When a married woman follows her husband to a new place of residence, or a new domicile, where he has secured work and such place is too far removed for the woman to continue her work, should it be considered, in connection with the above-quoted section, that she involuntarily separated from her employment, or should it be considered that she voluntarily separated without good cause attributable to the employer, which is contemplated by the above section?"

You say that you would like for our opinion to be confined to the question as to whether such person voluntarily or involuntarily quit work and that you only ask for an opinion on a case where the husband has actually established a domicile or has actually secured permanent work in another locality. You state that you are at present holding that a woman who follows her husband around from place to place where he has temporary jobs, and when he has established no domicile, should be considered as having voluntarily quit her work without good cause attributable to the employer; however, you have held that where the husband has established a domicile or has secured permanent work and the wife quits her work to follow him that she involuntarily separates in order to follow her husband and, therefore, should not be disqualified from the receipts of benefits, assuming that she meets other eligibility requirements.

The language of the disqualification section is as follows:

"For not less than four, nor more than twelve consecutive weeks of unemployment, which occur within a benefit year, beginning with the first day of the first week after the disqualifying act occurs with respect to which week an individual files a claim for benefits (in addition to the waiting period) if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he left work voluntarily without good cause attributable to the employer, and the maximum benefits due said individual during his then current benefit year shall be reduced by an amount determined by multiplying the number of such consecutive weeks of unemployment by the weekly benefit amount."

It would seem that unless a claimant leaves his or her work voluntarily, then there is no need to consider the phraseology "without good cause attributable to the employer." In our interpretation issued January 5, 1944 and designated in your record as Interpretation No. 48, we attempted to lay down some general rules that would be applicable in construing this disqualification clause. The problem

of married women separating from their work in order to join their husbands in other communities has been a vexatious problem for the various Unemployment Compensation Boards and Commissions in this country. It has been complicated by the fact that under the common law the husband had a right to choose the domicile; and it was the duty of the wife to reside with her husband at the comicile of his choice unless injurious to her health. Much of the confusion arises from the fact that under the common law the husband was entitled to the company and society of his wife which is designated in legal terms as the right of consortium. When we consider that in the enforcement of the Unemployment Compensation Law we are dealing with a law regulating industrial relationships and we are not dealing with the law of domestic relations, then the problem is not too difficult. In my opinion, there is no justification for attempting to engraft the law of domestic relations into interpretations of Unemployment Compensation Laws. The law of domestic relations regulating the relations between husband and wife belong in one field, and the construction and interpretation of the Unemployment Compensation Law is governed by its own rules of statutory construction. The Unemployment Compensation Law of this State does not attempt by the use of any statutory language whatsoever to incorporate by inference or reference the laws regulating the relationship between husband and wife. Each individual claimant is, and should be, considered on an individual basis, at least in so far as the language of the disqualification statute is concerned which is now under consideration.

In the case of HUIET v. SCHWOB MFG. CO., 27 S.E. (2d) 743, the Supreme Court of Georgia had before it the question we are now considering; and in its opinion, the Chief Justice of the Court said:

"Plainly, a married woman who voluntarily quits her work, for the sole purpose of joining and living with her husband at a point so far away that she cannot continue to work at the same place, leaves her work voluntarily without good cause connected with her most recent employment, within the meaning of the foregoing provision. The fact that she is a married woman and may owe a superior duty to her husband does not place her in duress or destroy her free agency in such matter; and while the cause of her leaving may have been a good cause from the standpoint of society, it was clearly not a cause connected with her employment. Where she thus voluntarily chooses between continuing her employment and living with her husband when she cannot possibly do both, she deliberately waives her status as an insured employee, and must accept the consequences. Even though the choice so made by her may not be termed a fault, yet the phrase 'through no fault of her own' as used in section 2, supra, evidently refers to causes beyond 'their' control, and the matter here was subject to the employee's own volition. In such case the employee becomes the author of her own disqualification; and this is true even though she as a married woman may have chosen the better part, not only for herself, but for society as well."

In the above case, the Disqualification Statute of Georgia is similar to our statute except it reads "without good cause connected with their most recent work," instead of "without good cause attributable to the employer." The above case was also affirmed by the Court of Appeals of Georgia in HEWIT, COMMISSIONER v. CALLAWAY MILLS, 29 S.E. (2d) 106.

In the case of MOORE v. BUREAU OF UNEMPLOYMENT COMPENSATION, 56 N.E. (2d) 520 (Ohio), the Court said:

"We have been furnished with many authorities on the meaning of the word 'voluntarily.' The dictionary definition is not doubtful. What confronts us is the necessity of determining its meaning as used by the Legislature.

"The context shows that the term is not used as the antonym of physical impossibility. By the terms of subdivision c, if he is discharged for just cause, his benefits are reduced by six weeks, or if his unemployment results from his quitting, his benefits are reduced by the same period, unless there were some reason arising out of his work which justified his quitting. When there is a reason arising out of his work, his benefits are not reduced by six weeks, not because his quitting is involuntary, but because his voluntary act of quitting is justified under the law.

"Now then, this provision is followed by the provision enumerating the absolute bars to benefits notwithstanding unemployment. If the employee quits work voluntarily to marry or because of marital obligations, destroys the employee's volition, every quitting under such circumstances would be involuntary, and the provision would be meaningless. If that had been the intent of the Legislature it would have placed in the appropriate place a provision that quitting to marry or becuase of marital obligations should be considered involuntary within the meaning of the act. It did not do so. It could not have meant that by the words employed.

"In a certain sense, a person may be said to act under compulsion whenever he performs a moral or legal obligation. He is required or compelled to obey the laws, but a law-abiding citizen usually acts voluntarily to gain that description.

"We construe the language used to mean that when an employee quits to marry or to perform marital obligations, he does so voluntarily and is not entitled to benefits."

In the case of EX PARTE ALABAMA TEXTILE PRODUCTS CORPORATION, 7 So. (2d) 303, the Supreme Court of Alabama said:

"We are not aided in determining this question by collateral facts. That is, whether her husband had a good job in New York and was well able to care for her. Nor whether she had children in her family that needed the benefit of a united family. Nor whether her husband had requested her to give up her job and come to live with him. The facts in no respect show that in doing so it was not her own free, voluntary act. The only cause assigned is that she went to live with her husband, a very commendable impulse.* * *Consortium, to which the husband is entitled, includes the performance by the wife of her household and domestic duties, in the sense of whatever is necessary in that respect according to their station in life. 26 Amer. Jur. 637, section 9. We doubt not that this duty persists though the wife should wish to engage in such gainful employment as would prevent her from performing such duties. This Court, was speaking with due regard to such status in observing in the opinion from which we have quoted, that it is <u>with the consent of the husband</u>, that she may give up those household duites to perform labor which conflicts with them. She is not wholly a free person to determine whether she shall thus be employed. So that if she gives up such employment in order to render her husband the duties which she owes him, and in recognition of his wishes, the voluntary act of her husband is attributable to her and becomes her voluntary act, though she might have preferred to continue in such employment."

In the case of WOODMEN OF THE WORLD LIFE INS. SOC. v. OLSEN, 4 N.W. (2d) 923, the Supreme Court of Nebraska, in dealing with this problem, said:

"It was a legislative purpose to ameliorate ills growing out of labor troubles and unemployment. Protection of the public from pauperism and from other burdens created by unemployment was also in the minds of the lawmakers. The legislature

considered these subjects and acted directly on them. Provision was made for the creation, conservation and distribution of funds to make the law effective. These funds were not intended for disqualified claimants for benefits. Disqualification as well as eligibility of claimants must be considered in giving effect to the words 'without good cause.' The legislative act does not deal directly with domestic relations. Of course it is the duty of a wife to live with her husband while the marital relation exists, if conditions permit, but the unemployment compensation law does not relieve the husband from his duty to support his wife. Her employer did nothing to prompt her decision to leave her work. The cause of her voluntary action had no connection with the abandoned relation of employer and employee. The purposes and import of the unemployment compensation law in its entirety indicate that a compensable claim for benefits must have some connection with, or relation to, the employment which the employee has lost. As stated in a recent opinion:

'Disqualification under the act depends upon the fact of voluntary action and not the motives which brought it about.* *

'The unemployment compensation act does not purport to grant benefits to workmen who leave their work voluntarily.' Deshler Broom Factory v. Kinney, 140 Neb. 889, 2 N.W. 2d 332, 335."

In the case of JOHN MORRELL & CO. v. UNEMPLOYMENT COMPENSATION COM., 13 N.W. (2d) 498, the Supreme Court of South Dakota said:

"From the facts as found by the defendant Commission, it is apparent that claimant left her employment of her own volition and was not discharged. In sustaining the decision of the Appeal Tribunal, the Commission concluded: 'Voluntary separation implies freedom of choice of the individual, either to leave employment or continue working. When the separation is made necessary in the interest of conserving health, there obviously is no freedom of choice, and the separation is not voluntary. A married woman whose separation from her job is necessitated by the danger to her health due to pregnancy, after her confinement, and upon being restored to health and organizing her household for adequate care of the child, is available for work. If, under these circumstances, she definitely seeks reentry into the labor market, she is entitled to benefits under our law if suitable work is not available.' We agree that claimant was justified in leaving her employment, but it does not follow that she was entitled to unemployment benefits. It appears to us from a consideration of the act that the legislature did not intend that employees who leave their work for reasons not attributable to or connected with their employment should receive benefit payments. Without giving the word 'voluntarily' in section 17.0830 (1), supra, an exact definition, we think that it would do violence to the intent and purpose of the statute to hold under the facts in this case that claimant did not 'voluntarily' leave her employment."

In the case of DEPARTMENT OF LABOR, ETC. v. UNEMPLOYMENT COMPENSATION BOARD, ETC., 35 A. (2d) 739, the Court of Pennsylvania considered this question and decided the case upon the meaning of the words "good cause," but in the course of the opinion the Court said: "It must be conceded that claimant voluntarily quit." In this case the wife separated from her work to spend some time with her husband who was a member of the Armed Forces in time of war. (There is authority for the fact that termination of employment because of sickness is not voluntary within the provisions of such a disqualification clause.) See FANNON v. FEDERAL CARTRIDGE CORP., 18 N.W. (2d) 249 (Minn.).

Modern statutes have relieved married women from all disabilities which existed

at common law. To say that a married woman who leaves her work does not deliberately choose to do so of her own will is to discard all considerations of common sense and normal experience. The fact that she acts upon the basis of commendable motives does not destroy her exercise of her own will and volition in the matter. The fact is that in every question in life which we must decide and with which we are confronted, we balance the motives and advantages on either side of the question, one against the other. It is not necessary to go into any discussion of the psychological processes involved in exercising what is usually called "volition" or "will."

* * * In fact, if it is said that a married woman voluntarily leaves her work when she goes to reside with her husband engaged in temporary work and with no domicile, by what logic can it be said that she leaves involuntarily or her will is destroyed simply because she joins her husband who has a permanent domicile. It appears to us that a separation in one case involves just as much exercise of the will as a separation in the other case. The clear weight of legal authority is that such a separation is voluntary.

I am of the opinion, therefore, that your question should be answered as follows: a married woman who follows her husband to a new place of residence, or a new domicile, where he has secured work and such place is too far removed for the woman to continue her work, it should be considered by the Commission, upon proper findings of fact, that such a married woman voluntarily separated from her employment without good cause attributable to the employer. This opinion is based upon the facts stated in the letter in question; and while we decide in this opinion that such a separation is voluntary, we do not mean that there may not arise cases wherein, although the separation of such a married woman is voluntary, nevertheless, there would be good cause attributable to the employer under specific circumstances as found by the Commission. In other words, we are merely giving our opinion upon the question of whether such a separation is voluntary or involuntary.

Adopted as an official Interpretation by the Commission on December 10, 1946.

(Replaces Page 5 of Interpretation No. 69, dated December 3, 1946.)

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 79

TO: R. F. Martin, Director

FROM: R. B. Billings, Senior Attorney

RE: Interpretation of Section 96-8 (g) (1) of the Employment Security Law of North Carolina Since January 1, 1949 - Definition of Employment

In discussing the changes enacted by the General Assembly during this year with respect to the definition of "employment" as contained in the Act, it may be well to recall to our minds the changes with respect to the definition of "employment" as heretofore made by the General Assembly.

Since the enactment of the law in 1936, "employment" has been defined as service performed for renumeration or under any contract of hire, written or oral, express or implied. Until 1945, there was a provision in the law defining "employing unit," and contained in Section 96-8 (e), which provided that any employing unit which contracted with or had under it any contractor or subcontractor for any employment which was part of its usual trade or business would be deemed to employ each individual in the employ of such contractor or subcontractor for each day during which the individual was engaged in performing such employment unless the employing unit as well as the contractor or subcontractor were employers by reason of Section 96-8 (f) or had become an employer by voluntary election. It was further provided that the employing unit who paid the contributions on the wages of individuals in the employ of the contractor or subcontractor was permitted to recover the same from the contractor or subcontractor.

In addition to the section referred to, the law contained a provision whereby all services performed by an individual for remuneration were deemed to be employment subject to the chapter unless it was shown to the satisfaction of the Commission that the services met certain conditions set forth in what we generally called the "ABC" provisions of the Act. In order for the services to be excluded from employment, the tests set forth in such section required (A) the individual performing the services must be free from control and direction over the performance of such services both under the contract of service and in fact; and (B) such services must be performed outside the usual course of the business for which the services are performed or that the services be performed outside of all the places of business of the enterprise for which the service is performed; and (C) the individual performing the services must be customarily engaged in an independently established trade, occupation, profession, or business.

On March 13, 1945, Section 96-8 (e), wherein an employing unit was deemed to employ individuals performing services in the course of its business for a contractor or subcontractor, was deleted from the law, and Section 96-8 (f) (8) was inserted into the law at the time of the repeal of the former provision. This section provided when any employing unit contracted with a contractor or subcontractor for employment which was a part of the usual business of the principal employing unit, that each of the parties; that is, the employing unit or contractor, or subcontractor, became employers under the law if the employing unit would be an employer under Section 96-8 (f) (1) if it were deemed to employ those individuals in the employ of the contractor or subcontractor.

On March 18, 1947, this provision was repealed by act of the General Assembly, leaving in the law as a basis of liability of employers the definition of "employment" as contained in 96-8 (g) (1) referred to hereinbefore, and the "ABC" provisions of the law. The contractor's clause as contained in the original act was put into the law for the primary purpose of preventing employers from breaking down their businesses into small units and thereby escaping liability under the law. The later contractor provision under 96-8 (f) (8) shifted the burden to a large extent from the employing unit to the party or individual who entered into the contract for employment which was a part of the usual course of the business of the principal.

These provisions in the law, together with the "ABC" provisions, extended coverage under the law, particularly in view of the fact that the Supreme Court of North Carolina in construing the Act recognized the definitions contained in the law itself as the standards to be applied in any given case in determining whether an employer was subject to its provisions. The Court further stated in the opinion in passing upon the status of certain commission insurance salesmen (U. C. C. w. Jefferson Standard Life Insurance Company, 215 N. C. 479) that employment as defined in the Act did not mean the relationship existing at common law known as master and servant and held the Act extended coverage beyond such relationship and must be construed liberally, keeping in mind the purposes for which the law was passed; that is, to alleviate the evils of unemployment and to pay benefits to individuals out of work through no fault of their own. In applying the "ABC" tests in the case mentioned, the Court ruled in effect that control as referred to in the "A" test did not have to be detail control of the manner in which services were performed, but that general control by the employer was sufficient, and that if general control existed in a given case, the "A" test was not met by the employer. This same doctrine was followed by other jurisdictions and in numerous instances the rule laid down in the North Carolina case was followed.

The 1949 General Assembly repealed the "ABC" provisions of the Act and placed the definition of employment squarely on the basis of the common law doctrine of master and servant and specifically excluded from coverage under the Act the relationship known at common law as independent contractor. The new amendment also contains a provision that an officer of a corporation is considered an employee under the Act. This does not mean an officer is an employee per se, but that he may be an employee if he is performing services for the corporation and is receiving remuneration for such services.

The repeal of the "ABC" provisions of the Act and defining employment relationship under the law as that existing under the common law known as master and servant will not automatically relieve the Commission of all difficulties and troubles in its administration of the law. It is likely that as many close cases will arise in the future under the new amendment as have arisen in the past under the old law. The recent amendment changes the employment definition in the law, effective January 1, 1949. Any services performed prior to January 1, 1949, are within the coverage of the Act if such services are within the definition of "employment" as contained in the Act prior to January 1, 1949. The change in the law reads as follows:

" 'Employment' means service performed prior to January 1, 1949, which was employment as defined in this Chapter prior to such date, and any service performed after December 31, 1948, including service in interstate commerce, except employment as defined in the Railroad Retirement Act and the Railroad Unemployment Insurance Act, performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules."

It is to be noted the definition includes in the term "employee" an officer of a corporation. This language is similar to that contained in the Federal Unemployment Tax Act, and therefore, should be interpreted in accordance with federal rulings pertaining to the status of officers of corporations. Early rulings of the Bureau of Internal Revenue held that corporate officers except honorary officers should be counted as employees for unemployment compensation tax purposes even though such officers received no compensation nor performed any services. This position was maintained by the Bureau until January 4, 1946, when a ruling was issued to the effect that "officers of a corporation, who as such performed no services and received no remuneration in any form, are not to be considered in their capacity as officers as employees of the corporation for employment tax purposes. Similarly officers of a corporation, who as such perform some services of a minor or nominal nature, but without consideration or remuneration in any form and who are not entitled to remuneration, will not be considered as employees of the corporation either because of such services or because of having the status of officers." It was further held that corporate officers who perform services and receive remuneration are to be counted as employees. In interpreting the present amendment, we think the proper interpretation is that adopted by the Bureau of Internal Revenue with respect to the status of officers under the Federal Unemployment Tax Act. We believe the new amendment means that an officer can be an employee. If he meets the test determinative of the ordinary employment relationship, he is an employee, and the fact that he is also an officer of the corporation does not destroy his status as an employee under the law.

An individual performing services for an employing unit to be within the definition of employment under the present law must be in a relationship with such employing unit to a servant and the employing unit must be in the relationship of master. Any individual who is in the status of an independent contractor is excluded from the definition of employment under the Act. Generally speaking, a master is one who exercises personal authority over another and that other is his servant. Master has been defined as "one who stands to another in such relation that he not only controls the results of the work of the other, but also may direct the manner in which such work will be done." Deals v. State Workmen's Insurance Fund, Pa. Super., 200 A. 178, 180.

The distinction between servant or employee and independent contractor has been discussed by the Supreme Court of this state in the case of Hayes v. Elon College, 224 N. C. 11, which was heard in the Spring of 1944. The case came before the Court under a claim for workmen's compensation, and the question presented to the Court was whether certain electricians, including the deceased, were employees or independent contractors. The facts briefly were that the defendant contracted through one Wright with the electricians to rebuild a part of its electric line for a lump sum of $30.00. The electricians agreed to rebuild the line and complete the job if the defendant (Elon College) would furnish a truck and two helpers. A representative of the college suggested that certain of the poles be shortened rather than trim trees to permit the running of the line. The deceased was killed when he untied certain wires in order to set a pole. The work was then temporarily stopped and the other electricians obtained other help and completed the job. The general rule laid down by the Court in that case with respect to whether or not an individual is an independent contractor is as follows:

> "The retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses is decisive, and when this appears it is universally held that the relationship of master and servant or employer and employee is created.
>
> "Conversely, when one, who exercising an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what laborers shall do as it progresses, is clearly an independent contractor.
>
> "The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details."

In the case referred to, the Court set out certain indicia to be looked for in determining whether the relationship of independent contractor existed in a given case. The elements which the Court referred to as ordinarily earmarking a contract creating the relationship of employer and independent contractor, and which should be given weight and emphasis in determining the relationship are: Is the person employed (1) engaged in an independent business, calling, or occupation; (2) to have the independent use of his special skill, knowledge, or training in the execution of the work; (3) doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (4) not subject to discharge because he adopts one method of doing the work rather than another; (5) not in the regular employ of the contracting party; (6) free to use such assistants as he may think proper; (7) has full control over such assistants; and (8) selects his own time.

The Court further stated that the presence of any one of the elements was not controlling; that the presence of all of them was not required to establish the relationship of independent contractor, but that these elements were to be considered along with all other circumstances in determining whether in fact there exists in the one employed that degree of independence necessary to require his classification as an independent contractor rather than an employee.

In addition to the tests enumerated by the Court in the Hayes case, "The Restatement of the Law of Agency" sets out certain other matters of fact to be considered in determining whether one acting for another is a servant or an independent contractor. These are:

1. The skill required in the particular occupation.

In applying this test where one is doing a certain act which requires a highly specialized skill and special training, it is likelier that such person would be in the status of an independent contractor than a person performing menial labor requiring no skill or training.

2. Whether the employer or the workmen supply the instrumentalities, tools, and the place of work for the person doing the work.

3. The length of time for which the person is employed.

Usually an independent contractor is a person who contracts to do a certain specified job and generally within a given time. Permanency of the relationship existing between the person performing services and the employer for whom the services are performed is evidence that the person doing the services is in the employment of the employer.

4. The method of payment, whether by the time or by the job.

Usually a person who is paid wages by the hour is an employee and a servant and not an independent contractor, whereas the payment to a person for services by the job is some evidence that such person is an independent contractor and not a servant.

5. Whether or not the work is a part of the regular business of the employer.

This factor is closely related to the factors set out in number three above, and where a person is performing work which is a part of a regular business of an employer and continually performing such service for an indeterminate and indefinite time is evidence to be considered in determining whether the relationship of master and servant exists.

6. Whether or not the parties believe they are creating the relationship of master and servant.

This factor is not of too much importance. However, it should be given some weight along with the other facts in a given case. What the intentions of the parties were at the time of entering into the arrangement should be considered along with the other facts, and particularly in close cases in order to determine whether or not the service is being performed by a servant or an independent contractor.

In determining the status of an employing unit under Section 96-8 (f) (1), the above conditions or factors should be considered in reaching a determination as to whether a particular individual is or is not within employment under the law for the purpose of being included in the eight or more individuals performing services within twenty different weeks during the calendar year necessary to bring an employing unit within the coverage of the law. It is well to keep in mind that where an individual is an employee of an employing unit all individuals assisting in the per-

formance of the services by such employee are deemed to be employees of the employing unit under Section 96-8 (e) of the Act. The most important factors to be considered in determining whether a person is or is not in employment under the law seem to be:

First, whether the employer has or has not retained the right of control or superintendence over the employee as to details of the manner in which the service is to be performed. In other words, has the employer not only told the individual performing the services what to do, but has he told him how to do it, or has he the right to tell him how to do it.

Second, whether the services are performed in the usual course of business of the employer and the permanency or impermanency of the relation.

Third, whether the person employed is engaged in an independent business, calling, or profession.

Fourth, whether or not the individual is in the regular employ of the contracting party.

Fifth, whether the person employed is to have the independent use of a special skill, knowledge, or training in the execution of his work.

In making a determination as to whether the relationship of master and servant exists, all of the factual conditions must be considered and a conclusion made based on all the facts and circumstances existing in the case under consideration as to whether in fact there exists in the one employed the degree of independence necessary to require his classification as independent contractor rather than employee.

Adopted as an Official Interpretation by the Commission on May 24, 1949.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 87

Opinion of the Attorney General

September 16, 1949

Subject: Employment Security Commission; Collection of Contributions; Taxation; Docketing of Summary Judgment; Authority of Commission to Accept Chattel Mortgages Covering Amount of Contribution or Taxes Due; Statutes, Directory and Mandatory.

You call our attention to G. S. 96-10 (b) dealing with the collection of contributions by means of certification of a summary judgment to the clerk of the Superior Court and the issuance of a duplicate to the sheriff of the county or an agent of the Commission, which duplicate has the force and effect of an execution. You state that in hardship cases, heretofore, an employer has been allowed to execute in favor of the Commission a chattel mortgage payable at a specific time covering the amount of contributions due. You state that this has happened in a few cases, and you have not had good results with this practice and that the legal department of the agency has always been extremely doubtful of the authority of the Commission to accept a mortgage in lieu of judgment being docketed. As a result of these doubts on the part of the legal department, the Commission has adopted a new policy of not accepting or taking further mortgages.

You ask this office to give you, on behalf of the agency, an interpretation in regard to this matter. You further inquire, since it appears that it is not mandatory to docket the judgment, if the Commission is estopped from taking any other road with respect to the collection of the unpaid contributions; namely, the mortgage. I judge by this that you intend to raise the question as to whether or not the Commission has the authority to accept a mortgage in lieu of the contributions. You again refer to the use of the word "may" as to certifying the summary judgment and the word "shall" as to certifying the duplicate by way of execution to the sheriff, and you inquire if this whole section should be construed as mandatory in each instance. If I understand the matter, you would like to know if it is mandatory to certify the summary judgment to the clerk as well as mandatory to certify the certificate to the sheriff or agent by way of execution.

I think first of all, we should discuss the nature of the contributions exacted by the Employment Security Commission from employers. Sums of money collected by the Commission from employers are compulsory, and the sovereign power of the State is used to force collection. By whatever name these compulsory collections are called or designated, the fact remains that contributions are taxes and must be considered and dealt with on that basis. In the case of PRUDENTIAL INSURANCE CO. OF AMERICA v. UNEMPLOYMENT COMPENSATION COMMISSION, 217 N. C. 495, 499, Mr. Justice Barnhill, in discussing contributions, says:

> "The contributions, by whatever name designated, are not voluntary but are compulsory and constitute a tax. Nor does the fact that the Legislature has seen fit to segregate the funds derived from the collection of the contributions assessed in a special fund and for a special

purpose alter this conclusion. It, in its discretion, has the power to so segregate and earmark revenues of the State. It has done so in other instances, signally in respect to the gasoline and automobile license tax revenue."

Since these contributions are taxes, then the rules of law applicable to taxes as to their mode or medium of payment are likewise applicable to contributions. I think it is clear, both from the authorities in this State, the general textbooks, and authorities in other states, that in the absence of a specific statute, no agency or officer authorized to collect and compel the payment of taxes has any right to adopt or accept any medium of payment other than cash, national currency and those media which constitute legal tender.

Cooley on Taxation (4th Edition) Vol. 3, Section 1252;
GUARANTY CO. v. McGOUGAN, 204 N. C. 13, 15;
TAYLORSVILLE v. MOOSE, 212 N. C. 379, 380;
KERNER v. COTTAGE CO., 123 N. C. 294;
CITY OF ENTERPRISE v. RAWLS, 86 So. 374 (Ala.);
SCHEAFER v. McFARLAND, 207 N. W. 982 (S. D.);
AUSTIN v. FOX, 1 S. W. (2d) 601 (Texas).

Attention is also called to the fact, and this is mentioned by way of analogy, that under the provisions of G. S. 105-382, it is said: "Taxes shall be payable in existing national currency. No tax collector shall accept a note of the taxpayer in payment of taxes." The same section provides that a tax collector may accept a check in payment of taxes; but if the check is not honored, the taxes are still deemed to be unpaid, and the collector or agency may still use all remedies available for the enforcement of collection. If it shall be said that this statute applies only to the collection of the revenue taxes of the State and ad valorem taxes and that you are governed by a particular statute which has no such language, then the rule would still be applicable; and in the absence of statute, you have no right to accept anything other than cash or currency amounting to legal tender, and this is well established by the authorities I have cited above.

I think it is unnecessary to quote from these authorities as the proposition is too well established, and I doubt if you will even find a split of authority or a minority view. I conclude, therefore, in answer to your first inquiry that the Employment Security Commission has no authority whatsoever to accept any mortgage, note or any other medium of payment for the purpose of discharging contributions other than cash, national currency and those forms of money which constitute legal tender. There is even good legal authority for the view that any officer, agency or collector accepting any other medium than cash or currency constituting legal tender and the tax is not collected by reason of this acceptance of an invalid medium, then such officer, collector or the members of any board or commission authorizing such an acceptance would be personally liable for the payment of the tax to the State.

As to your last question dealing with the use of the word "may" as to the certification of the summary judgment and the word "shall" as to the certification of the duplicate certificate for execution purposes, of course, the word "may" is usually interpreted in statutory construction in a discretionary or directory sense. There are a few cases where appellate courts have said that when the context of the whole statute is considered, the word "may" must be

interpreted as meaning "shall." I think, however, that in your case, with reference to G. S. 96-10 (b), the word "may," in dealing with the proposition as to whether the Commission shall issued a summary judgment or not, should be construed in a discretionary or directory sense. I say this for the reason that the Employment Security Act does not limit the procedural method for the collection of taxes to the issuance of a summary judgment, which is only one method. Where an employer becomes insolvent and his property is in the custody of the bankruptcy court under the Federal statutes, it would be useless to issue such a summary judgment. The Commission must pursue its remedy in the bankruptcy court. The same would be true in the case of a receiver in the State Court, assuming that no summary judgments had theretofore issued, but even if summary judgment had theretofore issued prior to receivership, the Commission would have to revert to the procedure applicable to a receivership. If an employer dies, the Commission would have to pursue the remedy available for claims in the administration and disposition of estates. Furthermore, the Commission is authorized to bring suits in Court and to be represented by designated attorneys. This authority to bring suit is also cited in G. S. 96-11 (i). It is also provided in G. S. 96-10 (b) that civil actions may be brought to collect contributions, and they shall be heard by the Court at the earliest possible date.

I think it is plain, therefore, that the word "may," as used with reference to a summary judgment, is not mandatory because the Commission may wish to pursue a civil action or other remedy in lieu of the summary judgment. Of course, if the method of issuing a summary judgment is used, then the word "shall" is mandatory. The statute did not intend for a summary judgment to be docketed and the matter left dormant at that stage of the procedure. It intends in mandatory fashion for the duplicate to be issued to the sheriff or the agent as an execution once the summary judgment is docketed. The Commission has a choice of remedies as outlined in the statute for the collection of contributions, but it must use one of these remedies and must pursue the remedy to conclusion. Because the Commission is given a choice of statutory remedies for the collection of contributions, this does not mean that the Commission cannot pursue any remedy at all. It is the legal duty of the Commission to take some appropriate action for the collection of contributions. It may pursue either one or all of such remedies or procedures, but it must do something or else take the risk of neglect of duty, malfeasance or nonfeasance, which terms incidentally are mentioned in the Employment Security Act.

Adopted as an Official Interpretation by the Commission on September 23, 1949.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 88

TO: R. F. Martin, Director

FROM: D. G. Ball, Senior Attorney

RE: Interpretation of Section 96-11 (c) (2) of the Employment Security Law of North Carolina - Voluntary Coverage

The record indicates that the John Doe Mills, in order to satisfy a claimant and a former employee, has filed a supplemental report of the earnings of the claimant for the year 1947 and the first quarter of 1948 while he was performing agricultural labor on a farm owned and/or operated by the John Doe Mills. A check for the amount of contributions "due" on the claimant's wages, plus interest computed to July 31, 1949, was sent to a Field Representative on August 4, 1949, by the attorney for the employer.

We are of the opinion that we cannot accept the contributions so paid or consider the claimant in "employment" because the employer has not filed with the Commission a written elective coverage agreement that all exempt employees performing agricultural labor shall be deemed in employment for all purposes of the Employment Security Law. Moreover, the application for voluntary coverage of the exempt employees must first have the written approval of the Commission for such services to be deemed to constitute employment and shall be effective only from and after the date stated in the approval.

We are of the opinion that the John Doe Mills cannot voluntarily contribute on that portion of the claimant-employee's wages earned from farm labor while other employees of the same mill performing farm labor are not covered.

The Employment Security Commissions of California, Georgia, and Idaho which have similar voluntary coverage provisions in their laws have held that "an elective coverage agreement may be approved which would apply to all or a certain class of services performed at one ranch (establishment) and to none or a different class of service performed at the other ranch (establishment)." (C. C. H. California, paragraph 1325, page 8,043-3.)

The Georgia Unemployment Compensation Commission holds that: "An employer may not elect coverage with respect to some employees in a particular establishment and exclude other employees provided both are employed in the same establishment or place of business." (C. C. H. Georgia, paragraph 1325, page 14,033.)

Adopted as an Official Interpretation by the Commission on October 4, 1949.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 92

Opinion of Attorney General

January 16, 1950

Subject: Employment Security Commission; Proviso of G. S. 96-15 (b); Double Affirmance Clause; Extent of Payment of Benefits Under Double Affirmance Clause.

You call our attention to the proviso at the end of subsection (b) of G. S. 96-15 of the Employment Security Act, which is commonly called the "double affirmance clause," and which reads as follows:

> "Provided further, however, that if an appeal tribunal affirms a decision of a deputy, or the commission affirms a decision of an appeal tribunal, allowing benefits, such benefits shall be paid regardless of any appeal which may thereafter be taken, but if such decision is finally reversed, no employer's reserve account shall be charged with benefits so paid and such payments shall be charged to the pooled account."

You first state a case under the eligibility conditions of the Act. In the case stated, an individual is able and available for work, but a question arises as to whether he is actively seeking work as provided by such eligibility conditions. Upon hearing, the Claims Deputy finds that the claimant has met such conditions and allows benefits without disqualification. The employer appeals to the Appeals Deputy, and the Appeals Deputy likewise finds that this condition has been met, affirms the Claims Deputy's decision, and allows benefits without disqualification. The employer appeals to the full Commission, and upon this hearing, it is established that the claimant has not actively sought work, and the Commission reverses the Claims Deputy. Because of the double affirmance clause, the payment of benefits has been started upon the effective date of the decision of the Appeals Deputy affirming the Claims Deputy.

You inquire if the last proviso in G. S. 96-15 (b) makes it mandatory upon the Commission to pay benefits to such claimant because of the double affirmance clause, irrespective of a reversal by the Commission.

You state that you know that benefits should be paid because of the double affirmance until there is a reversal but that your question is: Upon reversal by the Chairman or the Commission, shall the payment of benefits be stopped from that time on?

You state another question under the disqualification section of the Employment Security Act: An individual voluntarily quits his job, and the Claims Deputy determines that such individual left work with good cause attributable to the employer and that he is entitled to benefits. The Appeals Deputy affirms the decision of the Claims Deputy. Upon the double

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affirmance, you start to pay benefits. The matter is appealed to the Chairman or the Commission, and the Claims Deputy and the Appeals Deputy were reversed on the same statement of facts, the Commission holding that the claimant left work voluntarily without good cause attributable to the employer and imposes a penalty of six weeks.

Assuming that the claimant is still unemployed and his status has not changed, you inquire if you are required to pay the claimant benefits without any disqualification for the full twenty weeks because of the double affirmance clause and irrespective of the reversal and penalty imposed by the Commission. You further inquire if you would be permitted to impose the penalty upon the claimant and deduct from the payments to him an amount equal to six times his benefit amount because of the decision of the Commission.

So far as I have been able to find in the limited time for research, the so-called double affirmance provision appears in many of the Employment Security Acts enacted by the various states. I have been unable to find but five cases dealing with the double affirmance provision by appellate Courts. In 1941, the Michigan Supreme Court criticised this provision (CHRYSLER CORP. v. SMITH, 135 A.L.R. 900), and in the year of 1942, this same Court (CHRYSLER CORP. v. APPEAL BD. OF MICHIGAN U. C. COM'N., 3 N.W. (2d) 302) declared that this provision was unconstitutional as being in violation of the Due Process Clause of the Constitution. However, the Supreme Court of California (ABELLEIRA v. DISTRICT COURT, 132 A.L.R. 715) has declared that this is a proper and remedial provision and that the same is constitutional and valid. The same provision again came before the Supreme Court of California (MATSON TERMINALS v. CALIFORNIA EMPLOYMENT COM'N., 151 Pac. (2d) 202), and the validity of the double affirmance provision was again upheld. We, of course, are not passing on the constitutionality of the Act as incorporated in your Law; but if the matter were presented, I think we would prefer to follow the reasoning and holding of the California Court, and, as a personal opinion, I think the Act is valid.

I do not find any case that defines the precise limitations of this provision and that would give me an exact answer to the questions presented by you. Perhaps the closest interpretation from an appellate Court will be found in the MATSON case, supra, from which I quote as follows:

> "The commission's power to limit the payment of benefits must be considered in the light of where the alternative course would lead. If the interpretation and administration of the act were left to the referee instead of to the commission, any referee would have unrestricted power to distinguish, interpret or even disregard in later cases a controlling decision of the commission or the courts laid down as a precedent to govern future action. Despite any disciplinary action that might be taken against the referee, the commission would be powerless to stop illegal payments until an appeal was filed, brought to a hearing, and decided.
>
> "The second factor that distinguishes this case from the Abelleira case is the final determination by this court that the awards were unauthorized. If the commission's action in

vacating the referee's decision is disregarded, there results the paradox that the claimants should receive payments under section 67, even though they are not entitled under the act to any payments. The claimants contend that the silence of the Legislature in this regard indicates an intention that the payments be made, rightly or wrongly. Under this interpretation, the detailed substantive provisions of the statute would be subordinated to the procedural provisions of section 67, and the award would be based, not on compliance with the terms of the act, but on a successful argument to a referee. Those who convince Referee A would be entitled to unemployment benefits; those who, in a similar situation, fail to convince Referee B would not be entitled to benefits. A legal right to public moneys cannot be based on such a dubious combination of an administrative officer's error and an obscurely worded statutory provision. The right to have payments begin upon a provisional determination of their correctness in no way establishes a right to payments once their impropriety is finally determined. Cf. Baldwin v. Scott County Milling Co., 307 U.S. 478, 59 S.Ct. 943, 83 L.Ed. 1409.

"In accord with the statute as interpreted in the Abelleira case, payments must be made pursuant to the referee's determination. If subsequently, however, by a decision of the commission on appeal or by a court on review, the payments are found to be unauthorized and illegal, section 67 does not make them valid. That section merely prevents a stay; it does not create a substantive right. Since the provision against stay does not create any rights in conflict with the substantive provisions of the statute, there is no ground upon which the illegal awards can be paid."

So far as the application of this provision is concerned, and as to its general principles, I can see no difference if it is invoked in a proceeding involving an eligibility condition or a disqualification. I would say, therefore, in answer to your first questions that in applying the double affirmance clause, it is mandatory that the Commission begin payment of benefits to the claimant, but upon the effective date of a reversal by the Commission, you would stop the payment of benefits from that time on. The Commission is charged with the administration of the Act and is the highest authority inside the agency in making claims determinations. I do not think it was intended for the double affirmance provision to extend beyond an authoritative decision, holding that the two previous decisions are invalid. Upon a reversal by the Chairman or the Commission, the payment of benefits should be stopped, and, of course, would never be reinstated on that particular claim and set of facts unless upon order by a Court of review.

In the second case put by you on the disqualification provision, I would say, in answer to your questions, that you are not required to go ahead and pay the claimant the full twenty weeks without any disqualification because of the double affirmance provision. In my opinion, you would go ahead and impose the penalty determined by the Commission as provided by

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law and make the necessary charges or deductions. I think the double affirmance provision sanctions the payment of benefits so long as its validity lasts, and no further; but when an authoritative decision to the contrary intervenes, then the normal provisions of ineligibility or disqualification become operative. In this connection, it might be pointed out also that there can be a double affirmance when the decision of the Commission affirms a decision of the Appeals Deputy in favor of the claimant. In such a case, the same reasoning set forth above would be applicable. I think it might also be pointed out that, in our opinion, where there is a double affirmance by decisions of the Claims Deputy and Appeals Deputy and a reversal by the Commission, an entry of an appeal by the claimant would not continue the effectiveness or validity of the double affirmance provision. By the same token, if there is a double affirmance made up of a decision of the Appeals Deputy and the Commission, then an entry of appeal from a ruling of the Commission by the employer would not postpone or stay the operation of the double affirmance provision and benefits would continue to be paid. The employer is protected by the provision of the statute which requires that all benefits so paid be charged to the pooled account.

Adopted as an official Interpretation by the Commission on January 17, 1950.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 92 - SUPPLEMENT NO. 1

TO: R. F. Martin, Director

FROM: D. G. Ball, Attorney

RE: Interpretation of Section 96-15 (b) of the Employment Security Law of North Carolina - The Extent of Payment of Benefits under the Double Affirmance Clause

It is our opinion that in a situation where the Appeals Deputy affirms the decision of the Claims Deputy, allowing benefits, and the Appeals Deputy's decision is appealed by an interested party, we shall pay only claims which have a week-ending date prior to the effective date of the decision of the Commission which reverses the decision of the Appeals Deputy. The effective date of the decision of the Commission reversing the Appeals Deputy's determination means the date the decision is made. The same reasoning applies when the Court reverses a double affirmance decision of the Commission.

Adopted as an official Interpretation of the Commission on May 25, 1965.

Cancels and replaces Interpretation No. 92 - Supplement No. 1 adopted on February 2, 1954.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 98

TO: Henry E. Kendall, Chairman

FROM: D. G. Ball, Senior Attorney

RE: Interpretation of General Statute of North Carolina 1-47 - 10-Year Statute of Limitation on Collection of Judgments

This is in answer to an interoffice memorandum, dated August 30, 1950, from Mr. Martin to you.

The machinery for the levying and the collection of the contributions due by the employer is set out in Chapter 96 of the General Statutes. We call your attention especially to Section 96-4 (o) and Section 96-10 (b). The General Assembly passed the act empowering the Commission to collect the Unemployment Compensation contributions in accordance with its provisions.

Section 96-4 (o) in part is as follows:

> "The decision or determination of the commission when docketed in the office of the clerk of the superior court of any county and when properly indexed and cross indexed shall have the same force and effect as a judgment rendered by the superior court * * *."

Section 96-10 (b) provides in part that:

> "* * * if any contribution imposed by this chapter, or any portion thereof, and/or penalties duly provided for the nonpayment thereof shall not be paid within thirty days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the commission under the hand of its chairman, may certify the same in duplicate and forward one copy thereof to the clerk of the superior court of the county in which the delinquent resides or has property and additional copies for each county in which the commission has reason to believe such delinquent has property located, which copy so forwarded to the clerk of the superior court shall be immediately docketed by said clerk and indexed on the cross index of judgment, and from the date of such docketing shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court; * * *"

It will be noted in both sections of the law relative to the docketing of a judgment for contributions by the Commission that the legislature provided that upon the docketing of a judgment it will have "the same force and effect as a judgment rendered by the superior court."

The Statute of Limitation (General Statute 1-47) with respect to bringing an action on a judgment of the superior court is in effect as follows:

> Action must be brought within ten years upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

I have conferred with Mr. Ralph Moody, Assistant Attorney General, in regard to this matter, and we are in accord in our views that our statute is so written that it places our contributions judgment on the same plane as a judgment of the superior court, for the statute plainly sets out that a judgment of the Commission, when properly docketed, will have "the same force and effect as a judgment rendered by the superior court." Since we are of the opinion that this is a proper interpretation, the 10-year Statute of Limitation (section 1-47, supra) would bar any actions on any judgments which have been docketed by the Commission more than 10 years ago. Therefore, we suggest that no action be taken on judgments barred by the Statute of Limitation.

We realize that the Statute of Limitation never applies to the sovereign unless expressly named therein as our Supreme Court has ruled in the case of Wilmington vs. Cronly, 122 N.C. - 389. However, we construe the language of the law as having "expressly" provided for the limitation by giving our judgments the same force and effect of judgments rendered by the Superior Court, to which the 10-year Statute of Limitation applies.

In connection with this matter, we suggest that the Commission, except in unusual cases, refrain from instituting suits on judgments on which the Statute of Limitation almost bars action (for example, judgments that have been docketed for 9 years and 11 months), as any action brought to keep the contribution debt within the limitation would not have the effect of continuing the lien of the original judgment. In other words, another judgment secured from a suit on the original judgment would not continue for another 10-year period the lien of the original judgment. We believe that in the great majority of the cases if we cannot collect our judgments in 10 years, then the chances of collection beyond this period would be almost nil. It would be an almost insurmountable and an extremely costly task to institute suits on all of our "old" judgments.

Adopted by the Commission as an Official Interpretation on September 12, 1950.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 101

TO: R. F. Martin, Director

FROM: R. B. Overton, Senior Attorney

RE: Earnings Reportable and Availability of Claimant Serving on Jury, National Guard, United States Army Reserve Corps, or as Election Official

You have requested by note on memorandum dated January 5, 1951, from Mr. Teague to Mr. John R. Branham that we give you a combined interpretation on the above subject.

The question of jury duty was passed upon by an interpretation rendered by Honorable Adrian J. Newton, Chief Counsel of the Unemployment Compensation Commission, on October 4, 1940. The ideas expressed by Mr. Newton were adopted by the Commission as an official Statement of Policy and are embodied in Statement of Policy No. 43, which I need not repeat herein. This Statement of Policy holds that an individual serving on jury is available for work and that the sums paid him for such service shall not be reported as earnings.

The status of individuals serving in the National Guard or United States Army Reserve Corps was passed upon by Mr. Holoman in memorandum dated July 26, 1947. Nothing has been issued by the Commission or the Legal Department that would countermand or overrule Mr. Holoman's interpretation or ruling to the effect that such individuals would not be deemed totally unemployed during any week in which they perform services in the National Guard or the United States Army Reserve Corps and for which remuneration was payable. We reiterate that ruling. An examination of the rulings of other states sustains us in this position.

As to the status of individuals serving as election officials, it is the conclusion and opinion of the writer that such individuals are engaged in employment and would not be deemed totally unemployed in any week during which they performed services as such officials, either as judge, registrar, or poll holder; and, therefore, such individuals should be required to report earnings received during such weeks or earnings to be received for services rendered during such weeks, and benefits paid accordingly.

Adopted as an Official Interpretation of the Commission on January 30, 1951.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 108

TO: R. F. Martin, Director

FROM: R. B. Overton, Senior Attorney

RE: Interpretation of Section 96-8(g)(1) of the Employment Security Law of North Carolir Since January 1, 1949 - Definition of Employment - Whether Home Workers are in Employment

You submitted a memorandum requesting an interpretation as to whether home workers are in employment under the provisions of the Employment Security Law. This matter was delayed for the reason that it appeared that your questions were answered in Interpretation No. 79, prepared by Mr. Billings soon after the amendments to the Employment Security Law by the Legislature in the 1949 session. Mr. Billings' interpretation was adopted on May 24, 1949. However, after further discussion with you, I will attempt to set forth some general rules as they specifically apply to home workers.

The Supreme Court of North Carolina in the case of Hayes v. Elon College, 224 N. C. 11, in passing upon whether or not individuals performing services for Elon College were in employment or were independent contractors, set forth the general rule to be applied as follows:

> "The retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborers shall do as the work progresses is decisive, and when this appears it is universally held that the relationship of master and servant or employer and employee is created.
>
> "Conversely, when one, who exercising an independent employment, contracts to do a piece of work according to his own judgment and methods, and without being subject to his employer except as to the result of the work, and who has the right to employ and direct the action of the workmen, independently of such employer and freed from any superior authority in him to say how the specified work shall be done or what laborers shall do as it progresses, is clearly an independent contractor.
>
> "The vital test is to be found in the fact that the employer has or has not retained the right of control or superintendence over the contractor or employee as to details."

You will note from the above general rule as enunciated by the Supreme Court it is held that the retention by the employer of the right to control and direct the manner in which the details of the work are to be executed and what the laborer shall do as the work progresses is decisive. The Court said that when it appeared that such rights were retained by the employer, then in that event it was universally held that the relationship of master and servant or employer and employee was created and conversely, it held that where such rights of control were not retained that the status was that of an independent contractor.

The Court further set forth in that opinion certain criteria which should be given weight and emphasis in determining the relationship between the parties, those being: (1) Is the individual laborer engaged in an independent business; (2) Is such individual to have the independent use of his special skill, knowledge, or training in the performance of his work; (3) Is such individual doing a specified piece of work at a fixed price or for a lump sum or upon a quantitative basis; (4) Is such individual not subject to discharge because he adopts one method of doing the work rather than another; (5) Is such individual not in the regular employ of the contracting party; (6) Is such individual free to use such assistants as he may think proper: (7) Does such individual have full control over such assistants; and (8) Does such individual select his own time. All of the above questions are pertinent in deciding whether or not an individual is an employee or an independent contractor. However, the lack of one is not decisive.

Thus, in determining whether or not a home worker is an employee or an independent contractor, it is important that the Field Representative or other agent of the Commission apply the tests as hereinbefore enumerated. If it should appear that the alleged employer does not retain any right to control or direct the manner in which the details of the work are to be executed and what the individual shall do as he works, then it would appear that such individual should be held to be an independent contractor. If the employer does retain such rights, irrespective of whether he exercised those rights, such individual should be held to be an employee. The question as to who owns the machinery or equipment used in connection with the work may be of importance, but the main question is, as above stated, the right to control the details of the performance of the work.

The United States Circuit Court of Appeals in the case of Glenn v. Beard, reported in 141 Federal, (2d), 376, held that home workers not subject to the right of control, except as to result to be accomplished, are independent contractors. Thus, it was held that individuals were not employees of X for purposes of unemployment taxes under the following circumstances: Such individuals were engaged under contract with X to manufacture comforters and quilts on material and in accordance with specifications furnished by X, and, upon delivery of completed comforters and quilts were paid amounts agreed upon. The work was to be done within a designated period but at such time and places as were agreeable to the workers, workers could do the work personally or by agents he selected, and X could not withdraw work while it was being worked upon within the time provided in the contract; no inspections were made on work while in progress, and no supervision was exercised over the work by X. Workers were free to work when they desired, and as they desired, or as their other household or farm duties permitted, and they were free to engage in similar work for other concerns at the same time. The Bureau of Internal Revenue further sets forth that they will accept and abide by the ruling in the above case in all cases of home workers where the circumstances surround the performance of work and do not differ materially from those present in that case.

Therefore, under the law of this State where it is shown that the alleged employer does not in fact retain the right to control the details of the performance of the work as it progresses, such individuals should be held to be independent contractors. However, it must be borne in mind that if it should appear that the alleged employer does retain the right to control the details and methods of employment as the work

progresses—such as the regulation of hours and regular inspection of work, and in those cases where the alleged employer owns the machines or tools and restricts the use thereof to work in its behalf—then that is indicative of control, and such individual would not be an independent contractor but would stand in the relationship of an employee.

Adopted as an Official Interpretation of the Commission on March 24, 1952.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 113

TO: R. F. Martin, Director

FROM: R. B. Overton, Senior Attorney

RE: Interpretation of Section 96-9 (b) (4) (A) of the Employment Security Law of North Carolina - Use of Payrolls in Computing Contribution Rates on Re-established Liability after Computation Date

You submit the following inquiry and request a ruling thereon:

> A, a covered employer, sold his place of business in W on April 1, 1949. The account thereafter was placed in suspense as of that date. On September 1, 1949, A began operation of another place of business in S, North Carolina, and has had a continuous payroll since that time. A did not report to the Commission that he had re-entered business. He was discovered in May, 1952, by a Field Representative. A did not transfer his reserve account to the purchaser of his business in W, and the reserve account was maintained in the name of A. The Accounting Department, in establishing the rate of contributions of A on his operations in S, took into consideration the reserve account of A accumulated at W, North Carolina, on the basis that he had payrolls in all of the fiscal years even though unreported and paid on. This resulted in a reduced contribution rate for all years involved.
>
> Q. Did the Accounting Department correctly determine the rate of A on his operations at S?

It is our conclusion, after studying the statutes on this matter, that the rate of contributions was properly determined in that it appears that upon application of the tests provided in the statutes all provisions or conditions were met, even though this Commission had not been advised thereof. Of course, it is assumed that the Accounting Department did not give credit for any contributions having been paid during this period but only took into consideration the payrolls of the employer; that is, that the reserve balance had not received any additional credits by reason of the fact that no payments had been made during the period beginning September 1, 1949, until May, 1952. It is, therefore, our conclusion that, as above stated, the rate was properly determined.

However, if employer A had been mailed a "Cumulative Reserve Account Statement as of July 31, 1950, and Computation of 1951 Rate," and had not filed an application for review or redetermination prior to May 1, 1951, as provided in Section 96-9 (c) (3) of the Employment Security Law of North Carolina, the rate as established would have been final.

Adopted as an Official Interpretation of the Commission on July 29, 1952.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 114

TO: R. F. Martin - Director

FROM: W. D. Holoman - Chief Counsel

RE: Interpretation of Section 96-8 (g) (2) (3) (4) and (5) of the Employment Security Law of North Carolina - Employment - Services Performed Within and Without This State - Interstate Employment

For the better administration of our Employment Security Program it is felt that an interpretation of the term "employment" should be made in respect to services performed by an individual solely within this state or both within and without this state, as contained in Section 96-8 (g) (2) (3) (4) and (5) of the Employment Security Law.

Interstate employment or work which is performed in two or more states is, of course, subject to the Federal Unemployment Tax Act since it is performed in the United States. The place of contract, the citizenship or residence of an employer or of an employee, are all immaterial if the work is performed in the United States. Alaska, Hawaii, and the District of Columbia are considered as states for the purposes of the Federal Act.

The question of coverage of interstate employment under the state Employment Security Laws is a complicated one. The problem cannot be met by individual state acts alone, and uniformity of treatment is essential in order to avoid duplicate payments and returns, should more than one state claim that an employee is subject to its Employment Security Law.

Modern business structures are seldom confined to operations in one state. Many workers, such as salesmen, persons engaged in interstate transportation, and members of traveling repair crews, are constantly engaged in work of an interstate nature which must be performed in two or more states. It is of utmost importance that an employer know in advance just what his liability may be for such employees under the law of any particular state. This is necessary and important in order that the employer may make the required reports and contribution payments under the proper state laws at the proper time and thus avoid confusion, penalties, and interest charges, and also to insure the proper payment of benefits to his employees. The problem of reporting is more often tied up with the payment of benefits under the various state laws. If an employer is required to report to several different states in which an employee works and is not able to consolidate the contributions on the earnings of that particular employee in a particular state, the employee would be obliged to claim a portion of his benefits from each of several state funds.

Many of the states, therefore, have preferred either to cover all of an employee's employment by one employer or to exclude all of such employment,

the result being that the employer's contributions on wages paid to one employee may be consolidated and paid into a single state fund. As a result, the employer need not be concerned with allocating to the various states the wages earned for employment performed in each state, and his reporting problem is greatly simplified. In turn, the employee is entitled only to benefits from the state fund into which his employer has paid contributions, although interstate agreements between the states have been arranged to enable him to file his claim for benefits through another state. Under such policy, double coverage is eliminated and employers are saved a great deal of expense and inconvenience in making reports to more than one state on the same employee, and thus the administration of the contribution and benefit provisions of the state laws is simplified.

Section 96-8 (g) (2) (3) (4) and (5) are quoted below for a ready reference and a better understanding of the subject being discussed.

> "(2) The term 'employment' shall include an individual's entire service, performed within or both within and without this State if:
>
> "(A) The service is localized in this State; or
>
> "(B) The service is not localized in any state but some of the service is performed in this State, and (i) the base of operations, or, if there is no base of operations, then the place from which such service is directed or controlled, is in this State, or (ii) the base of operations or place from which such service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.
>
> "(3) Services performed within this State but not covered under paragraph (2) of this subsection shall be deemed to be employment subject to this chapter, if contributions are not required and paid with respect to such services under an employment security law of any other state or of the federal government.
>
> "(4) Services not covered under paragraph (2) of this subsection, and performed entirely without this State, with respect to no part of which contributions are required and paid under an employment security law of any other state or of the federal government, shall be deemed to be employment subject to this chapter if the individual performing such service is a resident of this State and the Commission approves the election of the employing unit for whom such services are performed that the entire service of such individual shall be deemed to be employment subject to this chapter, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to subsection (1) of §96-4 shall be deemed to be employment during the effective period of such election.

"(5) Service shall be deemed to be localized within a state if

"(A) The service is performed entirely within such state; or

"(B) The service is performed both within and without such state, but the service performed without such state is incidental to the individual's service within the state; for example, is temporary or transitory in nature or consists of isolated transactions."

Many of the states have adopted similar provisions to those quoted above, there being some slight variations.

An examination of the definition set forth above discloses that this standard definition lists in order the various factors which must be considered in determining employment coverage. The language of the Act as quoted above requires application of the tests in the following prescribed sequence:

(1) Is the individual's service localized in this state or some other state?

(2) If his service is not localized in any state, does he perform some service in the state in which his base of operations is located?

(3) If he does not perform any service in the state in which his base of operations is located, does he perform any service in the state from which his service is directed and controlled?

(4) If he does not perform any service in the state from which his service is directed and controlled, does he perform any service in the state in which he lives (has his residence)?

PLACE WHERE WORK IS LOCALIZED - The chief criterion of coverage is the localization of employment. Where all of the work is performed within this state, it is clearly "localized" in this state and constitutes "employment" under the law of this state. Where a part of the work is performed outside of this state, however, the entire work may still be "localized" within this state if the services which are performed outside of this state are incidental to the services within this state. The term "incidental" includes any service which is temporary or transitory in nature, or which consists of isolated transactions. So long as services are temporary or transitory or consist merely of isolated instances, they will be considered to be incidental to the principal employment in this state and the employee's entire services will be subject to our act. In determining whether the service of a worker is incidental or transitory in nature, some of the factors to be considered are:

1. Is it intended by the employer and the employee that the service be an isolated transaction or a regular part of the employee's work?

2. Does the employee intend to return to the original state upon completion of the work in the other state, or is it his intention to continue to work in the other state?

3. Is the work performed outside the state of the same nature as, or is it different from, the tasks and duties performed within the state?

4. How does the length of service with the employer within the state compare with the length of service outside the state?

Because of the wide variation of facts in each particular situation, no fixed length of time can be used as a yardstick in determining whether the service is incidental or not. The calendar year should, however, be used as a guide, provided that it is applied with some flexibility, taking into consideration the various circumstances under which the work is performed, such as the terms of the contract of hire, whether written or oral.

In some cases it is difficult to determine whether or not services in one state are incidental to services performed in another state. The terms of the contract, if there be one, and also the facts in each case will have to be carefully considered. Even though there be no contract, the facts of employment and the intent will be the determining factors. The amount of time spent or the amount of work performed outside of the state should not be decisive in determining that such work is incidental to work in this state. The weight of authorities indicates that when the "localization test" is used and it is determined that work is localized in this state, then no other factors need be considered; that is, the place of the "base of operations" or the "place from which the service is directed or controlled" or the "location of the employee's residence" is entirely irrelevant. For example, an employee may reside in Ohio, have his base of operations in Pennsylvania, and perform his work in North Carolina, with some incidental work in South Carolina. His work or services will be held to be localized in North Carolina, and his services will be covered by the North Carolina law, provided, of course, that his employer is otherwise subject to our law.

BASE OF OPERATIONS - Only if the service is not localized in any state is any other test necessary. If the service is not localized, it is necessary to determine where the individual's base of operations is and whether he performs any service in that state. The person who makes the coverage determination will have to ask, "Does the individual have his base of operations in this state and does he perform any service here?" If the answer to either question is "No," the next question is, "Is his base of operations in any state in which he performs some service?" If it is, all of his service is covered by the law of that state.

When services are normally or continually performed in two or more states, it cannot be said that the employment in one is incidental to employment in the other. In such case the test of localization discussed above is not applicable, the services cannot be said to be localized in any one state, and the factor of "base of operations" must be considered. Under this test an employee's services may still be entirely covered by the law of a single state, even though they are not localized therein. If an employee's services are not localized in any state and some portion of the services is performed in the state where the "base of operations" is located, such state would be the proper one to receive contributions computed on the individual's entire employment. His residence is not material in determining his "base of operations" as it was under the localization test. For example, if his "base of operations" is North Carolina and his residence is in Kentucky, and if he does some work in both of these states (assuming that his work is not localized in any state), the location of his "base of operations" will be controlling and his services will be subject to the North Carolina law. The "base of operations" is the place or fixed center of more or less permanent nature from which the employee starts work and to which he customarily returns in order to receive instructions from his employer, or communications from his customers or other persons, or to replenish stocks and materials, to repair equipment, or to perform any other functions necessary to the exercise of his trade or profession at some other point or points. The base of operations may be the employee's business office, which may be located at his residence, or the contract of employment may specify a particular place at which the employee is to receive his directions and instructions. This test is applicable principally to employees, such as salesmen, who customarily travel in several states.

In Appeal No. B-44-12-A-112, dated December 5, 1939, the Board of Review of Pennsylvania said:

> "This term has been construed generally to mean the place from which the employee works or the place from which a start is made in his work and to which he customarily returns. It should not be confused with 'place from which service is directed or controlled,' next mentioned . . . as a test for the determination of employment coverage. We are dealing here with two entirely different concepts. The term 'base for operations' . . . is impliedly modified by the phrase 'of the employee'; the expression 'place from which service is directed or controlled' is impliedly modified by the phrase 'by the employer.' Aside from the starting and stopping place, the various elements to be considered in determining the employee's 'base of operations' are the principal point at which he receives instructions as to his work and where communications to his employer are ordinarily prepared, and the place where equipment, supplies, and records are kept or forwarded. In many cases a number of such elements will appear which will establish the 'base for operations.'"

Where "the base of operations" has once been satisfactorily determined, it is only reasonable that such base shall remain unchanged unless some permanent change occurs in the surrounding circumstances. This rule has been adopted by North Carolina. (See Regulation No. 1.211.)

If the service is not localized in any state, but some of the services are performed in North Carolina, then the "base of operations" of the employee (not the employer) is the controlling test. The "base of operations" must precede consideration of the place from which the service is directed or controlled. Only in case there is no "base of operations" do we consider "the place from which such service is directed or controlled." Unless we consider the term "base of operations" as a separate test from the term "place from which the service is directed or controlled," it would seem that the employee could never have an individual "base of operations" apart from the situs of the employer's business or branch office from which the employee is directed. This is important only in those cases where the physical "base of operations" is in one state and the "place of direction and control" is in another, and where some service is performed in each state. It is obvious that if the "base of operations" is in North Carolina and the individual is directed and controlled in North Carolina, then such individual is in employment in North Carolina. On the other hand, if it is determined that the individual's "base of operations" is North Carolina and he is directed and controlled from another state, he is still considered to be in employment in North Carolina, provided, of course, that some of his services are performed in North Carolina as well as the other state or states.

The Pennsylvania Board of Review had a case in which this question was presented, and the Board of Review pointed out that the "base of operations" should not be confused with the "place from which the service is directed and controlled." (Appeal No. B-44-12-A-112, December 5, 1939, supra.)

PLACE FROM WHICH SERVICE IS DIRECTED OR CONTROLLED - In some cases it may be impossible to say that an employee's services are "localized" in any state, and it may also be impossible to find any definite "base of operations" of such services. As an example, a salesman's territory may be so indefinite and so widespread that he will not retain any fixed business office or address, but will receive his orders or instructions by mail or wire, wherever he may happen to be. In such cases, although the work is not localized in any state and although there is no fixed "base of operations," the services may still come under the provisions of a single state law; that is, the law of the state in which is located the "place of direction or control," provided that some of the work is also performed in such state. It is obvious that wherever an employer-employee relationship exists, the location of the place from which direction and control are exercised may be determined, no matter how general the control or how infrequently directions are given.

California has defined the term "the place from which the services are directed and controlled" as follows:

"The third test to be applied, if the localization and the base of operation tests are not applicable and an interstate coverage arrangement is not elected by the employer, is the place from which the employee's services are directed and controlled. This has been defined to mean the place from which the employer directs or controls the activities of the employee. It is the place at which the basic authority exists and from which the general direction and control emanates rather than the place at which a manager or foreman directly supervises the performance of services under general instructions from the place of basic authority. (DE Tax Manual Par. 4020.00.)"

Examples of service which is not localized in any state, where coverage is decided by the place-of-direction-and-control test:

A. A contractor whose main office is in California is regularly engaged in road construction work in California and Nevada. All operations are under direction of a general superintendent whose office is in California. Work in each state is directly supervised by field supervisors working from field offices located in each of the two states. Each field supervisor has the power to hire and fire personnel; however, all requests for manpower must be cleared through the central office. Employees report for work at the field offices. Time cards are sent weekly to the main office in California where the payrolls are prepared. Employees regularly perform services in both California and Nevada. It is determined that neither the localization nor the base-of-operations test applies. Since the basic authority of direction and control emanates from the central office in California, the services of the employees are in employment in California under the place-of-direction-and-control test.

B. A salesman residing in Cleveland, Ohio, works for a concern whose factory and selling office are in Chicago, Illinois. The salesman's territory is Kentucky, Arkansas, Oklahoma, Illinois, and Missouri. He does not use either the Chicago office or his home in Ohio as his base of operations. Since his work is not localized in any state and he has no base of operations, all his service is covered by the Illinois law because his work is directed and controlled from his employer's Chicago office and some of his service is in Illinois.

PLACE OF RESIDENCE - Where none of the enumeration tests results in the coverage of an employee's services under a single state law, then, and only then, will the situs of the employee's residence be determinative; that is, in those cases where the services are not "localized," where no part of the services is performed in either the state where the "base of operations" is located, or in the

state from which the work is directed or controlled, then the employee's residence becomes important and is applicable. In such cases the employee's entire services may be covered by the law of the state in which he resides, provided that some part of his services has been performed in such state. For example, an employee who resides in North Carolina, whose "base of operations" or the place from which his work is controlled is in Indiana, and whose work is performed in North Carolina, Kentucky, West Virginia, and Pennsylvania, would be subject to the North Carolina law rather than to the Indiana law, since some services are performed in North Carolina (the state of residence), and no services are performed in Indiana (the state of the "base of operations" or control). When services are performed within this state but are not covered under any of the above-enumerated tests, then they shall be deemed to be in employment in North Carolina if contributions are not required and paid with respect to the individual's services under an Employment Security Law of any other state or of the federal government. (Section 96-8 (g) (3).)

Where services are not covered under any of the above-enumerated tests and the services are performed entirely outside of this state and contributions are not required and paid under an Employment Security Law of any other state or of the federal government in respect to those services, such services shall be deemed to be employment in North Carolina, provided the individual is a resident of this state and the Commission approves the election of the employing unit to the effect that the entire service of such individual shall be deemed to be employment in North Carolina, and services covered by an election duly approved by the Commission in accordance with an arrangement pursuant to Section 96-4 (1) shall be deemed to be employment during the effective period of such election.

Most of the state laws permit employers to elect coverage for employees whose services are not subject to any state law under any of the above tests; hence, the reason for the provision as set out in Section 96-8 (g) (4) of our act.

An employer could elect coverage in North Carolina for an employee who has his residence in North Carolina, even though he performs no services in this state, provided, of course, contributions are not required by any other state or by the federal government with respect to any of his services.

Reference: Commerce Clearing House Tax Service

Adopted as an Official Interpretation of the Commission on July 29, 1952.

(Cancels and replaces Interpretation No. 105, adopted July 17, 1951.)

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 118

Opinion of the Attorney General

May 12, 1953

Re: Interpretation of Section 96-8 (g) (7) (G) of the Employment Security Law of North Carolina - Employment of Mother and Father by an Administratrix of Son's Estate or by a Partnership Composed of Sons

You [W. D. Holoman, Chief Counsel] refer to Section 96-8 (g) (7) (G) of the Employment Security Law which exempts any service performed by an individual in the employ of his son, daughter, or spouse and likewise exempts service performed by a child under the age of 21 in the employ of his father or mother.

Your question relates to the employment of a mother and a father by an administratrix of a son's estate. You concluded in your Interpretation No. 109 that a father and a mother employed by an administratrix of a son's estate were not engaged in exempt employment and should be reported as employees of the administratrix. I think your ruling is correct. To my mind the statute intended to exempt this family employment as long as the individuals were alive and in close personal relationship with each other. It was not intended to carry this exemption beyond the boundaries of death and over into the field of a symbol or legal fiction such as a personal representative who may or may not be a relative. Your attention is called to the fact that under the provisions of G. S. 96-8 (e) the legal representative of a deceased person is made a separate and distinct employing unit.

I, likewise, do not think that a father and mother working for a partnership composed of two sons create any exempt services for the simple reason that the exemption applies only where the father and mother are employed by a son, and the son is the employing unit. As pointed out, a partnership under G. S. 96-8 (e) is again a separate and distinct employing unit. If the statute had intended for these types of services to be exempt, it could so easily have said so.

Adopted as an Official Interpretation of the Commission on May 19, 1953.

(Cancels and replaces Interpretation No. 109, adopted March 24, 1952.)

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 119

TO: P. F. Martin, Director

FROM: R. B. Overton, Attorney

RE: Interpretation of Section 96-9 (c) (4) of the Employment Security Law of North Carolina - Total or Partial Transfer of Experience Rating Account

You have requested an interpretation of the above section of the law, and in connection therewith we advise as follows:

Before a total or partial transfer of an experience rating account may be effected as provided in Section 96-9 (c) (4) of the Employment Security Law, it must be determined that liability would have been or was established solely due to Section 96-8 (f) (2) of the law. Once it has been determined that liability would have been or was established solely due to Section 96-8 (f) (2), the successor may acquire all or that part of the account of the predecessor which relates to the acquired portion of the business.

Total Transfer

A total transfer of the experience rating account may be made if the successor employer acquired all or substantially all of the assets of the predecessor employer, or acquired all or substantially all of the organization, trade, or business of another employer and was held liable as a successor by reason thereof, or would have been held liable by reason of the acquisition of such organization, trade, or business, or substantially all the assets thereof, if he were not already a covered and liable employer. In other words, if the successor employer was a new employing unit and had not been adjudged a covered employer, his liability would have been effectuated upon the acquisition of all or substantially all of the assets of the predecessor employer, or upon the acquisition of the organization, trade, or business of the predecessor employer. However, if the acquiring or successor employing unit is already an employer by reason of his own operation prior to the acquisition of the assets or substantially all of the assets of the predecessor or prior to the acquisition of the organization, trade, or business of the predecessor, then in that event he would have been determined an employer had he not already been adjudicated as such by reason of his own operations, and he may have the experience rating account transferred in toto.

In both instances above set forth the acquiring employer must continue to operate the business acquired. The effective date of such transfer of the experience rating account will depend upon the date of the application for transfer. If the acquiring employer files application for transfer within sixty days after the Commission notifies him of his right to request such transfer, then the effective date will be the date of acquisition. If the acquiring employer does not make application within the sixty days set forth, the effective date of the transfer will be the first day of the quarter within which such application for transfer was made.

Partial Transfer

When an employing unit acquires a distinct and severable portion of the organization, trade, or business of an employer as provided in Section 96-8 (f) (2), that part of the account of the predecessor employer which relates to the acquired portion of the business may be transferred as of the date of acquisition to the successor employing unit, provided the successor makes application for a transfer within sixty days after the Commission notifies the successor of his right to request such transfer. If the request for transfer is not made within sixty days after the Commission notifies the successor employer of his right to request such transfer, then the effective date of the transfer must be the first day of the calendar quarter in which the application is filed. In this case also the successor employing unit must continue to operate the transferred portion of such organization, trade, or business. We must bear in mind also in connection with the partial transfer of experience rating accounts that no such transfer may be made unless that part transferred is a distinct and severable portion of the organization, trade, or business of another employing unit and that such portion would have been an employer under the provisions of Section 96-8 (f) (1) of the law, if such portion had been all of the organization, trade, or business of the predecessor, as Section 96-9 (c) (4) specifically provides that "Whenever any individual, group of individuals, or employing unit, who or which, in any manner, succeeds to or acquires substantially all or a distinct and severable portion of the organization, trade, or business of another employing unit as provided in Section 96-8, subsection (f), paragraph (2)." Therefore, it becomes necessary that we examine Section 96-8 (f) (2) as it relates to establishing liability by reason of having acquired a part of the organization, trade, or business of another employer. We construe this section to mean that, in determining the status of an employing unit which acquires a part of the organization of another employer, the investigator should look upon the part as if it were the whole and apply the same reasoning and same law that he would apply if the predecessor owned only that part.

For example, A, a covered employer, operates an automobile garage and also an oil distributing business. B purchases the automobile garage. A continues to operate the oil distributing business. C, the investigator for the Commission, in obtaining a status report from B ascertains that B has acquired the garage from A. He thereupon should investigate the payroll records of A, first examining the records for the current year. If it is discovered that the garage part of the business of A employed eight or more people in twenty weeks during the current year, it is not necessary to make further investigation. However, should it appear that the garage did not employ eight individuals in twenty weeks during the current year, the records for the preceding year should be investigated, and so on year for year, continuing back for a period of five years, and if it is discovered that A has employed as many as eight individuals in as many as twenty different weeks in the garage department of his business during any of the preceding five years, B should be reported as a covered and liable employer by reason of Section 96-8 (f) (2). If it appears that during the preceding calendar year prior to the acquisition of that part of the business A did not employ as many as eight individuals in as many as twenty different weeks in that part

and could have terminated his coverage had the part been the whole of his business and had he applied for termination as required by statute, then C should advise B that B has a right to file a written request with the Commission to be relieved of liability as provided in Section 96-8 (f) (2), and that such application must be made within sixty days from the acquisition of the business.

Conclusion

In conclusion we say that before a total or partial transfer of an experience rating account may be effected the following conditions must be met under the law:

(1) In order for the total reserve account to be transferred, the acquiring employer must have acquired substantially all of the assets, or all or substantially all of the organization, trade, or business of another employer; (2) In order to transfer a part of the reserve account the acquiring employer must have acquired a distinct and severable portion of the organization, trade, or business of another, which would have been a covered employer under the provisions of Section 96-8 (f) (1) if such portion had been the whole of the organization, trade, or business of the other; (3) Each such acquiring employer must continue to operate the transferred portion (the whole or part) of such organization, trade, or business acquired.

In investigations to determine status of an employing unit which has acquired a part of the organization, trade, or business of another employer, the investigators may and should, if necessary, cover a period of five years to determine whether or not such part acquired has employed eight or more individuals in twenty different weeks during any of the five calendar years. Also in determining whether or not the acquiring employer may request that the successorship section (Section 96-8 (f) (2)) shall not apply, the investigators should only investigate the payroll records of the part acquired for the preceding calendar year to determine whether or not that part employed as many as eight individuals in as many as twenty different weeks during such preceding year.

Adopted as an Official Interpretation of the Commission on July 28, 1953.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 121

Opinion of Attorney General

Re: Employment Security Commission; Transfer of Reserve Accounts; Notice of Commission to Successor Employer; Refunds

Your inquiry relates to the authority of the Employment Security Commission to make refunds under G. S. 96-10 (e). The inquiry arises because a partnership having the status of an employer under your Act transferred its trade, organization, business and assets to a corporation on June 1, 1950. The corporation paid contributions to the Commission at the rate of 2.7 during the years 1950, 1951, 1952, and to date in 1953. On June 1, 1953, the corporation applied for a transfer of the reserve account of the predecessor partnership, and this request was approved by the Commission. Under the provisions of G. S. 96-9 (c) (4) a reserve account, with certain approvals, can be transferred to the successor employer as of the date of acquisition for use in determining the successor's rate of contributions, "provided application for transfer is made within sixty (60) days after the Commission notifies the successor of his right to request such transfer." I assume that if proper notice is given by the Commission and the request is not timely made, then the effective date of the transfer will be the first day of the calendar quarter in which such application is filed. It happens that in this case for some reason or other the Commission never did notify the successor employer, which is the corporation, as to its right to have a transfer of reserve accounts and a recomputation of rates.

I am advised that had the Commission given notice to this employer of his rights that upon transfer of the predecessor reserve account the successor employer for the year 1951 upon recomputation would have a rate of .20 instead of the rate of 1.8 upon which the employer paid taxes. A recomputation for the rate of 1952 would give the employer a rate of .10 instead of 2.7; and for the year 1953 the difference amounts to .10 instead of 2.5.

You ask us if such payments by the employer, in this instance the successor corporation, are erroneous payments within the contemplation of the refund statute (G. S. 96-10 (e)) and if the Commission is precluded from making any adjustment or refund in this case by virtue of all of the provisions of the refund statute. It seems that the particular provision in the refund statute which is giving you trouble is the fact that it is provided therein that the section cannot be construed as authorizing moneys due and payable under the law and regulations in effect at the time such moneys were paid.

There is before me, also, the quotation from your regulations governing transfers of reserve accounts in cases of succession and the rates to be fixed in case of one predecessor, several predecessors, and the case of a successor who was not an employer prior to the date of acquisition. For lack of time I have had to state this matter in a rather terse fashion, but I hope my statement covers the problem involved.

I think, undoubtedly, that the refund statute warrants an adjustment or credit memorandum in this case, and I feel that it is unnecessary to discuss such angle of the matter. I think the real question is whether a cash refund can be made to this employer under the above-cited statute. The Commission caused G. S. 96-9 (c) (4) to be amended whereby it is assumed the burden of notifying a successor employer of his right to request a transfer of reserve accounts. Any employer very naturally when he knows that a transfer of his reserve account which he has acquired by right of succession will bring about a reduction of his tax rate will proceed to do so as soon as possible. In this case the Commission did not notify the employer at all, and apparently the employer himself found out that he had a right to this transfer and requested it on June 1, 1953, three years after he had acquired the other business. I am of the opinion that the burden is on the Commission to give this notice to a successor employer and that when the notice is not given the employer does not forfeit his rights. It is true that the refund statute says that refunds cannot be made where the moneys paid were due and payable under the law and regulations in effect at the time the money was paid. This statute, however, must be construed in conjunction with the transfer of reserve account statute, and there always lurks in the refund statute the possibility or potentiality that the rate of tax paid by the employer, although proper on its face at the exact time paid, nevertheless it is subject to recomputation and retroactive change because of a lawful recomputation of rates due to reserve account transfers. I do not think the Commission can take advantage of its own neglect, and while it may be true that an employer does not have to request a transfer, it is rather silly to say that an employer would not make such a request when he knows he will obtain a tax reduction. The payroll taxes paid by this employer, although proper at the time under the terms of the refund statute, were always subject to recomputation by the operations of the statute governing the transfer of reserve accounts, and the Commission having not notified the employer until three years later in my opinion is estopped to claim that the initial payment of the employer under the old rate represents the exact amount due and payable under the law and regulations in effect at the time such money was paid.

In my opinion, therefore, in a case like this, you are authorized under the refund statute to make a cash refund. You will understand, of course, that this opinion is strictly limited to the facts in this case or any other cases in which the Commission fails to give the requisite notice to the successor employer that he has a right to such transfer and recomputation.

Adopted as an Official Interpretation of the Commission on October 13, 1953.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 122

TO: R. F. Martin - Director

FROM: R. B. Billings - Attorney

RE: Priority of Federal Liens on Personal Property

We have received a memorandum under date of April 29, 1954, from Field Representative "A" addressed to the Supervisor of Field Representatives, in which he raises the question of priority of federal liens on personal property of a debtor where the Collector of Internal Revenue has filed the assessment list in the office of the Register of Deeds in the county where certain personal property is located. He specifically discusses in the memorandum the case involving employer "B." It appears from the information contained in the memorandum that the Federal Government or Collector of Internal Revenue has filed assessment lists amounting to more than $11,000 against employer "B" in the Register of Deeds' office.

It is our understanding that the lien created by the federal statute arises against both personal and real property at the time the assessment list is filed in the office of the Register of Deeds of the county within which the property subject to the lien is situated. In other words, in the present case if the federal assessment list has been recorded in the Register of Deeds' office, and we assume that this is true from Field Representative "A's" information, such action on the part of the Collector of Internal Revenue perfects a lien against all property, real or personal, belonging to the person against whom the assessment was made. This matter has been discussed by the Supreme Court of North Carolina in the case of Surety Corporation vs. Sharpe, 236 N. C., page 46, and we quote:

> "* * * The statutes now embodied in Sections 3670 and 3671 of Title 26 of the United States Code Annotated, which constitute a revision of the Act of Congress of 13 July, 1866, give the United States a lien for taxes due it. Section 3670 provides that if any person liable to pay a tax to the United States neglects or refuses to pay such tax after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights of property, whether real or personal, belonging to such person. Under Section 3671, the lien for Federal taxes arises at the time the assessment list is received by the collector of internal revenue unless another date is specifically fixed by law, and continues until liability for the tax is satisfied or becomes unenforceable by reason of lapse of time. * * *"

(see reverse side)

The statutes referred to create a priority of federal tax liens even though unrecorded over the rights of all persons except such as are given protection by the subsequently enacted statute which the court also discussed on the same page of the report referred to. This is quoted as follows:

> "* * * Section 3672 of Title 26 of the United States Code Annotated, which is a re-enactment and extension of an Act of Congress of 4 March, 1913, specifies that the federal tax lien created by Sections 3670 and 3671 'shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector (1) in the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or (2) in the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory.' North Carolina has provided by statute that 'notices of liens for internal revenue taxes payable to the United States . . . may be filed in the office of the register of deeds of the county . . . within which the property subject to such lien is situated.'" G. S. 44-65

This means, in our opinion, that where the assessment list for federal taxes has been recorded in the office of the Register of Deeds in a county where real or personal property is located which is owned by the debtor of the government the government is possessed of a tax lien against all property of such person, whether real or personal, and that the lien arises insofar as a judgment creditor is concerned at the time of the registration of the assessment list in the Register of Deeds' office and any levy made under an execution issued on a judgment after the filing of the assessment list by the Federal Government in the Register of Deeds' office as stated hereinbefore would not give a priority superior to the lien of the Federal Government to any judgment creditor who levied under the execution. Therefore, in the present case the question raised by Field Representative "A" with respect to whether the Federal Government has a prior lien on personal property upon a levy by him under execution issued under a judgment docketed by the Commission, it is our opinion that if the federal assessment lists were filed in the proper Register of Deeds' office against employer "B" prior to the levy by the Field Representative on any personal property owned by employer "B," the Federal Government would have a prior lien and the fact that we levied upon the personal property would not in any manner change such priority.

Adopted as an official Interpretation by the Commission on May 25, 1954.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 122 - SUPPLEMENT NO. 1

TO: R. F. Martin, Director

FROM: R. B. Billings, Attorney

RE: Priority of Federal Liens

We have received a memorandum dated July 27, 1954, written by the Supervisor of Field Representatives inquiring concerning priority of federal liens. The question is specifically asked as to whether a federal lien docketed in one county assumes priority over a judgment of the Commission which is docketed in another county where the real or personal property of the judgment creditor is actually located.

We must first keep in mind that the time of docketing these judgments and liens generally controls the order of priority with respect to such liens as they relate to real property. The federal assessments become liens against both real and personal property when docketed in conformity with General Statutes of North Carolina, Section 44-65, which provides that "notices of liens for Internal Revenue Taxes payable to the United States * * * may be filed in the Office of the Register of Deeds of the county * * * within which the property subject to such lien is situated."

Both the federal assessments and the judgments of the Commission must be docketed in the county within which real estate is situated in order to become a lien upon such real estate. As to personal property, the federal assessment becomes a lien upon all personal property of the taxpayer once the notice of assessment has been filed in the Office of the Register of Deeds within the county in which the personal property is located. No levy in order to secure priority under the federal liens is necessary; however, it is necessary in order for the Commission to obtain a lien upon personal property of the judgment creditor to issue an execution and levy on the specific personal property involved. It is our opinion that if a federal assessment is filed and the notice given under General Statutes, Section 44-65, referred to above, this assessment becomes a lien on all personal property and real estate located and situated within the county in which the notice is registered.

It is our further opinion that if personal property is located in a county and the Federal Government files a notice of assessment as required by the North Carolina law within such county and personal property is thereafter removed from the county by the taxpayer, the federal lien would still be attached to such personal property.

(See reverse side)

Summarizing, it may be stated that both federal liens and liens arising under judgments docketed by the Commission, insofar as liens on real estate are concerned, are created against the real estate at the time the assessment notice is filed by the Collector of Internal Revenue within the county in which the real estate is located and at the time when the judgment of the Commission is docketed in the county in which the real estate is located. This is not true with respect to personal property insofar as judgments of the Commission are concerned. A levy must be made as stated hereinbefore in order to perfect a lien under the judgments docketed by the Commission. No levy, however, is necessary in order to create the federal lien on personal property, and the filing of the notice in the county within which the personal property is located creates the lien upon all such personal property of the debtor.

Adopted as an official Interpretation of the Commission on August 17, 1954.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 124

TO: R. F. Martin, Director

FROM: R. B. Overton, Attorney

RE: Status of an Individual Who Renders Service as a Preacher and in Addition Thereto Works During the Week Days in Covered Employment and Who Becomes Separated from His Week-day Employment

Replying to your inquiry of February 15, 1955, pertaining to the status of individuals as above set forth, it is our ruling that such individual would be required to and should be required to report any earnings received for his services as a preacher in the event he should file a claim for unemployment insurance benefits.

Section 96-8 (k) (1) and (2) define total and partial unemployment. An individual is deemed to be totally unemployed in any week with respect to which no wages are payable to him and during which he performs no services. An individual is deemed to be partially unemployed in any week in which, because of lack of work, he worked less than sixty per cent of the customary scheduled full-time hours of the industry or plant in which he is employed and with respect to which the wages payable to him are less than his weekly benefit amount plus $2.00.

Section 96-8 (m) defines wages as all remuneration for services from whatever source.

It is true that under the taxing provisions of the law services performed for a religious institution are not taxable. However, in this instance we are dealing with the eligibility provisions of the statute to determine whether a man is unemployed.

It is our opinion that the remuneration received by the individual from his church for services as a preacher constitutes wages within the meaning of the law in determining whether or not a man is unemployed. We, therefore, conclude that, as above stated, an individual in this status should report on his weekly claims for benefits any sums received for services rendered as a preacher during the period covered by such claim.

Adopted as an official Interpretation of the Commission on February 22, 1955.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 131

TO: R. F. Martin, Director

FROM R. B. Billings, Attorney

RE: Executors and Administrators; Escheats; Disposition of Unemployment Compensation Benefits Where No Administrator Has Qualified and G. S. 28-68 Does Not Apply

Interpretation No. 44 which is an opinion of the Attorney General dated June 24, 1943, dealing with the above subject, is obsolete with respect to the discussion therein of the disposition of "unemployment compensation benefits" accruing before the death of a claimant when no personal representative has been appointed for the estate of the claimant. The above-referred-to opinion of the Attorney General discusses C. S. Section 65 (a). C. S. Section 65 (a) has been superseded by G. S. 28-68, and this is a statewide statute. The old provision referred to in the opinion of the Attorney General was not a statewide statute, and the amount owing to the deceased was limited under that statute to $300.00. Under the new statute the amount is not to exceed $500.00. The opinion also refers to whether any benefits which might have been held as the result of an executor or administrator to qualify would escheat to the University of North Carolina. The part of the opinion relating to escheats is still correct. It is suggested that the above interpretation be revised as follows, and it is submitted for the Commission's approval:

The question has arisen as to what is the proper disposition of unemployment insurance benefits which have accrued before the death of a claimant when no personal representative has been appointed for the estate of the claimant. Under G. S. 28-68 where the amount of payments due a deceased does not exceed $500.00, payment may be made to the Clerk of the Superior Court of the county in which the claimant lived, and disposition may be made as provided in the statute.

Upon the death of a person, title to his personal property passes to his executor or administrator. The next-of-kin of a deceased person have no right to his personal assets until there has been an administration of his estate in the manner provided by law. If no such person is qualified, Section 28-68 now provides that these payments not to exceed $500.00 may be paid to the Clerk of Superior Court. It may be that the total amount of debts owing to a deceased may exceed $500.00 or the amount of benefit payments due to the deceased may exceed $500.00, which would prevent the Clerk from having the authority to distribute the money under the section referred to. In this case the Commission would have to pay the accrued amount to an executor or administrator; and where no executor or administrator qualifies, the Commission would be justified in withholding payments of benefits indefinitely until an executor or administrator has been appointed.

With respect to whether or not these accrued payments would escheat to the University of North Carolina, we refer to the language of the Attorney General in his opinion of June 24, 1943, reading as follows:

"I do not think that benefits which have been held as a result of failure of an executor or administrator to qualify would escheat to the University of North Carolina. The only two statutes under which the funds might be considered to escheat are C. S., Section 5786, and Chapter 22 of the Public Laws of 1939, which is codified as N. C. Code, Ann. (Michie, 1939), Section 5786 (2).

"This office has construed Section 5786 as being inapplicable to unclaimed funds in the hands of the State Treasurer and, of course, the State Treasurer is the custodian of the Unemployment Compensation Fund. The only provisions for escheat of funds in the hands of the State Treasurer contained in Section 5786 (2) are those relating to unclaimed funds of insolvent banks and those moneys in the hands of the Treasurer represented by State warrants. These provisions would probably be construed to apply only to funds held by the State Treasurer on the date of the ratification of the statute in 1939, but, in any event, they would not apply to the unpaid benefits which you mention, for such benefits are not represented by State warrants.

"In addition to the fact that the escheat statutes do not appear to be broad enough to cover the funds which you mention, I am of the opinion that these funds would not escheat for the reason that other provision was made for their disposition in the Unemployment Compensation Act. In N. C. Code, Ann. (Michie, 1939), Section 8052 (9), it is provided that the Commission shall requisition from the State's account in the unemployment trust fund an amount estimated to be necessary for the payment of benefits for a reasonable future period. The funds so requisitioned constitute the benefit account from which benefits are paid. The statute provides that 'Any balance of moneys requisitioned from the unemployment trust fund which remains unclaimed or unpaid in the benefit account after the expiration of the period for which such sums were requisitioned shall either be deducted from estimates for, and may be utilized for the payment of, benefits during the succeeding periods, or, in the discretion of the Commission, shall be redeposited with the Secretary of the Treasury of the United States of America, to the credit of this State's account in the unemployment trust fund, as provided in subsection (b) of this section.'

"In my opinion, this express provision indicates the intent of the Legislature that unclaimed or unpaid benefits of the type which you mention in your letter should not escheat, but that the funds should be held to the credit of the Unemployment Compensation Commission."

Adopted as an official Interpretation of the Commission on February 28, 1956. Cancels and replaces Interpretation No. 44, dated June 24, 1943.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 139

TO: R. F. Martin, Director

FROM: R. B. Billings, Attorney

RE: Eligibility of Individuals Who Are Primarily Self-employed and Others Who Supplement Regular Earnings but Are Not Engaged in Self-employment

The question has arisen as to the benefit status of certain individuals under the Act who are primarily not engaged in self-employment but who work customarily in industry for their main means of livelihood. Such individuals perform some services of personal nature for others during the time they are not working at their regular work. The benefit status as to certain individuals who ordinarily work in industry for a living and who perform some services during off hours on farms has also been raised.

Under the law "self-employment" is not a defined term. It is generally recognized that self-employed individuals are those who engage in a business venture of their own and who by virtue of such venture endeavor to make their chief means of liveli hood in such manner. These self-employed individuals among others include fa rs independent loggers, professional men such as lawyers, doctors, engineers, etc., a well as individuals who have set themselves up in business to serve the public by the performance of personal services or selling of some commodity. It does not, in our opinion, refer to personal or domestic services or non-business activities in which an individual engages for his sole satisfaction, comfort, or convenience. Under the law the only reference made to self-employed individuals is contained in the section relating to disqualification for benefits (Sec. 96-14 (f)), and this provides that an individual shall be disqualified for benefits if the Commission finds that he is customarily self-employed and can reasonably return to self-employment. This specific disqualification applies to that group which the Commission finds from the facts existing in a particular case is customarily self-employed. In other words, an individual may have been engaged in some business venture or as a farmer for a number of years and sufficiently so for the Commissic to find that such individual during the period has been self-employed or has been engaged in some business activity from which he has derived his chief means of livelihood. In such cases if these individuals have temporarily entered into the labor market and have become unemployed and filed claims, the law requires that they be disqualified from receiving benefits if the Commission finds that they can reasonably return to self-employment.

The provision referred to above has been in the law since its passage in 1936. So, where an individual has farmed during the preceding season on a small farm of fifty acres and at the time of filing had harvested all his crop and did not intend to farm the next farming season, and had worked in public work and had not been engaged in farming for a period of eight years prior to the precedin farming season, and had actively sought work and did not intend to farm during the ensuing season, it was held that such individual was not customarily self-employed as a farmer and, therefore, could not reasonably be expected to return

to such self-employment and was found to be available for work. /(Commission Decision No. 1718.) (See also Commission Decisions No. 712 and 876.)/

Those individuals who are customarily self-employed and are primarily engaged in a business enterprise for a livelihood do not cause too much concern or worry with respect to their status, and nothing further will be said with respect to such individuals. The group with which we are chiefly concerned is made up of those workers who for a number of years have been engaged in what we call public work and have worked in industry, business, or commerce and as a result of this employment have derived their chief means of livelihood from their jobs. Some of these individuals, in addition to their regular work, supplement their earnings by performing services for others or in some cases live on a farm and perform some work on the farm. The question then arises during a period of unemployment whether such individuals are eligible for benefits and whether such individuals are in effect unemployed. It must be borne in mind that each of these particular cases must be decided upon the facts existing in the case. If the individual is not customarily self-employed, it seems that the matter comes down to a practical application as to whether such individual is available for work or whether the individual has established himself in the particular activity to such an extent that he would not be available for work and intended to set himself up as a self-employed individual. An illustration as to this particular point may be made by calling attention to a case in which a lawyer who had worked for sixteen years in business as a manager of a company and also during a portion of the time in personnel work was laid off from his employment and shortly thereafter made arrangements to share office space with other attorneys in order to resume the practice of law. He sent out hundreds of notices announcing his return to law practice and held himself out to the public as being in the practice of law. He stated upon filing his claim that he would be willing to give up his law practice or business to accept suitable work in the personnel field or other work which was satisfactory to him. He did not have any reportable earnings during the period of his claim. In this case the facts and circumstances show that this individual was in fact self-employed and was holding himself out as being in business for himself. Under such circumstances he was not entitled to benefits although he did not have any earnings from his business venture during the period of his claim.

In most instances we are concerned with the individual who may be engaged, in addition to his regular work, two or three hours a day and works for instance mowing lawns, as a music teacher, watchmaker, or in the performance of some other personal services for which the individual receives remuneration. In these types of cases it can be said as a general rule that the individuals should report their earnings during the week in question and should be paid benefits under the law if they are available for work and meet the other conditions of eligibility contained in the Act. In this connection it may be said that in our opinion a person who has worked in industry or elsewhere and who is temporarily laid off from his work and during this period of unemployment attends to domestic duties or perhaps does work around his home for his own convenience, if available for work and otherwise eligible under the law, is not to be considered within the category of a self-employed individual and should not be disqualified or declared ineligible for benefits on such ground. It seems that the test under such circumstances would be whether such individual has made a reasonable effort to secure employment and is actually and genuinely in the labor market, willing and able to accept suitable employment.

With respect to those individuals who are customarily employed in industry and who live on farms but are not primarily engaged in farming as a means of livelihood, who may work during some hours of the day on the farm but whose activities are such that they do not interfere with the individuals taking employment, and in those cases where such individuals are seeking work, able to work and willing to accept work, it is our opinion that such individuals as a general rule are not disqualified per se because they live on a farm or have some interest or derive some income by virtue of the ownership of the farm. In the past the Commission has looked at each case and has determined from the facts and circumstances as to whether such individual is entitled to benefits. In numbers of these cases it is found that the individual has made arrangements about the farming activities which do not require his personal services and the activity as stated hereinbefore does not interfere with his taking work. Under such circumstances the Commission has allowed benefits. As a general rule it may be stated that income received by a claimant from the sale of crops would not be wages or earnings with respect to a particular week and, therefore, should not be considered in determining the weekly benefit amount of such claimant.

There are a number of cases in which the questions discussed here have been passed upon by the Commission, and without setting out the facts in each of these cases the numbers of such decisions are set forth here in order that they may be reviewed if found necessary. These are as follows: Decisions No. 712, 876, 877, 884, 1038, 1552, 1635, 1718, 1728, 2313, 2317, 2364, and 2376.

This interpretation cancels and replaces Interpretation No. 136, dated March 27, 1956.

Adopted as an official interpretation of the Commission on July 24, 1956.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 144

TO: R. F. Martin, Director

FROM: R. B. Billings, Attorney

RE: Interpretation of Section 96-8 (g) (7) (I) of the Employment Security Law of North Carolina - Status of Insurance Agents, Solicitors, and Securities Salesmen under the Employment Security Law

Under the Employment Security Law of this state all insurance agents, solicitors, and securities salesmen are within the definition of employment contained in the law excepting those cases in which they are in an independent contractual relationship to the company. These individuals, hereafter called insurance agents, are in employment unless all such services performed by them for the employing unit or employer are performed for remuneration solely by way of commissions. The exemption and conditions under which these insurance agents are excluded from the term employment are contained in Section 96-8 (g) (7) (I) of the act, reading as follows:

> "Service performed on and after March 10, 1941, by an individual for an employing unit or an employer as an insurance agent or as an insurance solicitor or as a securities salesman if all such service performed by such individual for such employing unit or employer is performed for remuneration solely by way of commission;"

The question is raised first, what is meant by commissions, and second, if an agent is not remunerated solely by commissions, for what period are his wages taxable.

Contracts of employment between insurance companies and their agents are customarily complicated and unusual due to the nature of the business itself and the plans of payment which have been adopted by practically all insurance companies. Generally speaking, it will be necessary to submit all contracts between insurance companies and their agents for a determination as to the status of such agents under the act. In addition, it is also necessary to ascertain the facts concerning the relationship between the company and the agents either from information secured directly from the companies themselves or through some member of our field forces. In determining whether the agent is remunerated by way of commissions in such cases, the terms of the contract must be studied and certain principles which have been adhered to by the courts in arriving at what commissions are must be applied. The distinction between commission and salary has been stated as follows:

> "* * * 'Commissions,' when 'used to express compensation for services rendered,' usually denotes 'a percentage on the amount of moneys paid out or received.' Purifoy v. Godfrey, 105 Ala. 142, 16 So. 701, 703."

> "'Salary' is generally defined as 'a fixed annual or periodical payment for services, depending upon the time and not upon the amount of services rendered.' See Benedict v. United States, 176 U. S. 357, 360, 20 S. Ct. 458, 44 L. Ed. 503; in re Information to Discipline Certain Attorneys, 351 Ill. 206, 184 N. E. 332, 359; King v. Western Union Tel. Co., 84 S.C. 73, 65 S.E. 944, 946.
>
> "As is pointed out in Greer v. Hunt County, Tex. Com. App., 249 S.W. 831, 832: 'The controlling element in determining whether the amount to be received is upon a commission or salary basis is whether that amount, by whatever name it may be called, is absolute and fixed regardless of what the lawful commissions may be, or is made contingent upon earning that amount as commissions.' * * *"

The basic guide which the courts have followed as to whether an agent's remuneration is by way of commissions is whether the remuneration paid to the agent varies with the agent's efforts and the business which he produces. If such be true, the courts have held that the agent is remunerated by way of commissions. U. C. C. vs. Union Life Insurance Co., Inc., 34 S.E. (2d) 385. It is true that an agent may have an arrangement or work under a plan whereby he receives both commissions and salary. In such cases he is, of course, not remunerated solely by way of commissions. Usually in applying the following provision, "* * * if all such service performed by such individual for such employing unit or employer is performed for remuneration solely by way of commission," it is held that the agent must actually be paid some type of remuneration other than commissions to be considered in employment, and in those cases where an agent may be guaranteed a fixed sum per week but his actual commissions and the earnings which he produces by his own efforts exceed the amount of the guarantee, such agent would be remunerated solely by way of commissions. There are other types of contracts, however, in which an agent is guaranteed a specified salary per week plus certain commissions on business produced. He, of course, would not come within the exemption since he would not be remunerated solely by way of commissions. In order for the remuneration to be by way of commissions, the remuneration received by him should increase or decrease from week to week or some other specified pay period dependent upon his activities in producing new business, preventing lapsing of existing policies, and the doing of other services required of him by the employer. Under such conditions his remuneration is substantially and closely related to his activities and considered as commissions within the meaning of the act. After applying the principles stated, if it is found that the agent is remunerated solely by way of commissions, he is within the exemption contained in the Act and his services are not "employment."

If it is determined under the contracts and the circumstances under which the insurance agent works that he is not remunerated solely by way of commissions, the second question is during what period of time are contributio payable upon his remuneration. It has been the established policy of the Commission so far as we are able to ascertain since December, 1943, to

hold that where an insurance agent is not remunerated solely by way of commissions his aggregate wages including commissions and salary are taxable during the entire calendar year in which his services are not remunerated solely by way of commissions. The Employment Security Law provides that contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter with respect to wages for employment. This requirement is set forth in Section 96-9 (a) (1) of the act and is as follows:

> "(a) Payment - (1) On and after January first, one thousand nine hundred and thirty-six, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this chapter, with respect to wages for employment (as defined in § 96-8 (g)). * * *"

In other words you look at the entire taxable period and then apply the exception set forth in Section 96-8 (g) (7) (I), and if it is found that during any part of the taxable period; i.e., the calendar year, any of the services performed by the agent are performed for remuneration other than by way of commission, then such agent would not come within the exemption during the taxable period and all of his services would be "employment" and contributions would be payable upon the remuneration received by him for such services including both commissions and other wages.

This interpretation has been followed by the Supreme Court of Virginia in Home Beneficial Life Insurance Company vs. U. C. C., 27 S.E. 159, in which the following language was used by the court:

> "* * * This statement likewise disposes of the appellant's contention that the employment of Prins was exempt after his weekly debit collections had reached $85, and that it did not include his compensation for writing new business. As the italicized extract from the Senate Report on the Federal amendment points out, 'If any part of such remuneration is a fixed salary' the agent is covered, and 'the tax is computed on the basis of his aggregate remuneration'--that is, his 'salary or salary plus commissions.'
>
> "The result, therefore, is that where an agent is compensated during a calendar year partly by a guaranteed minimum salary of $15 per week and partly by a commission on the amount of his weekly collections, as is the case here, he is covered by the Act, and the unemployment tax is to be computed on the basis of his aggregate remuneration for that year."

Although the regulations relating to the Federal Unemployment Tax Act do not specify the period to be considered in determining whether the exemption exists, the Tax Service, CCH explanation with respect to the period to be taxed specifies that the proper period is the entire taxable year. See CCH, Unemployment Insurance Reporter, Unemployment Insurance Law, Federal Para. 3183 (.07), in which the following is stated:

".07 Services must be exempt for entire calendar year.--If all or any part of the remuneration of an employee for services performed as an insurance agent or insurance solicitor is a salary, none of his services is excepted and his total remuneration is included for purposes of computing the unemployment tax. This raises the question as to what period should be used in determining whether or not all of the services of an insurance agent are performed solely by way of commissions. Since the federal tax is on a calendar year basis, it would seem that the agent's services must be performed solely on a commission basis throughout the calendar year in order to meet the requirements of the exemption provision. If the agent's services were not performed solely on a commission basis during any part of the calendar year, it would seem that his services during the entire calendar year would be covered by the law.---CCH."

Adopted as an official Interpretation of the Commission on June 25, 1957
Cancels and replaces Interpretation No. 140, adopted February 12, 1957.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 145

TO: R. F. Martin, Director

FROM: W. D. Holoman, Chief Counsel

RE: Officers of Corporations - Employment - Employees

The question has arisen in numerous instances as to whether or not officers of corporations are employees within the meaning of the Employment Security Law. I might say in the beginning that this interpretation will necessarily have to be in general terms, as so many questions are presented involving different situations that it will be impossible to prepare an interpretation which will cover all shades of the different questions which may arise.

For a proper interpretation it is necessary to quote the sections of the Employment Security Law which are applicable. Section 96-8 (f) (1) defines "employer" to mean any employing unit which in each of twenty different weeks within the current or the preceding calendar year has, or had in employment, four or more individuals; therefore, for an individual to be counted as being an "employee," he must be "in employment" within the meaning of the law.

Section 96-8 (g) (1) of the Employment Security Law defines employment, and I quote below the pertinent portions of that section.

> " 'Employment' means service performed prior to January 1, 1949, which was employment as defined in this chapter prior to such date, and any service performed after December 31, 1948, including service in interstate commerce * * * performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. Provided, however, the term 'employee' includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules. * * *"

When one first reads this definition, it might be interpreted to mean that every officer of a corporation is an employee of the corporation per se, but such is not the case and such was not the intent of that definition. That portion of the definition quoted above in the proviso which deals with the term "employee" is identical with the definition of employee as contained in the Federal Unemployment Tax Act.

At common law an officer of a corporation is not deemed to be an employee under any circumstances. He is deemed to be an agent of the corporation or of the board of directors and has duties to perform as an executive officer which no employee can legally perform. It was felt by the Congress when the original Social Security Act was adopted in 1935 that officers in certain instances should be deemed to be employees and, therefore, under the definition section of the original Act it was provided that the term "employee" included an officer of a corporation. It was not necessary to go beyond this simple statement to express the intent that the usual meaning of "employee" should prevail, except that the term should be taken to mean also "an officer of a corporation." The intention of the Congress that "employee" under the Social Security Act should have the usual meaning under common-law rules realistically constructed was reaffirmed when the Congress made fundamental revisions of the Act in 1939.

When the definition of employment under the Employment Security Law was changed in 1949, at which time the so-called (A) (B) (C) provisions were deleted, the present definition as hereinabove quoted was enacted, for it was the intent of such section, when it was enacted, to make it possible for an officer of a corporation to be an employee. The basic and fundamental test in determining whether one is an employee is whether or not the relationship between such individual and the person for whom he performs services is the legal relationship of employer and employee as recognized at common law. Generally, such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished; that is, an employee is subject to the will and control of the employer, not only as to what shall be done but how it shall be done. In this connection it is not necessary that the employer actually direct or control the manner in which the services are performed, it is sufficient if he has a right to do so.

It is not necessary to elaborate further on this as we already have Interpretation No. 79, which is very full and sets out implicitly the common-law tests which are necessary in determining the employer-employee relationship. Set forth in that interpretation are the tests laid down by the Supreme Court of this state in the case of Hayes v. Elon College, 224 N. C. 11, which are the tests that we use primarily in determining the employer-employee relationship, and those tests must also be used in determining whether or not an officer of a corporation is deemed to be an employee of a corporation for the purposes of determining liability under our act.

The definition of employment quoted above provides that the term "employment" means services performed for wage or under any contract of hire, written or oral, express or implied. Even though an individual may not be drawing wages in the literal sense of the word, he still may be in employment if he is performing services under any contract of hire, either written or oral, express or implied. It is fundamental that a contract of hire presupposes entitlement to remuneration in some form for the services rendered.

Under the definition of employment an officer of a corporation may be an employee. This statute means that an officer may be an employee of the corporation; provided, he comes within the category of the servant or employee under the common-law definition. In other words, the fact that he is an officer of the corporation does not prevent him from also being an employee; provided, he is performing the services of an employee and subject to the same directions and control in the performance of such services as other employees and would have been an employee under the common-law rules.

An executive officer of a corporation performing only executive duties which cannot be delegated and performed by someone other than an officer is not an employee and shall not be counted in determining whether or not the employing unit has a sufficient number of individuals in its employ to become subject to the act, and contributions should not be collected on the earnings of such individuals. In the case of Gassaway v. Gassaway & Owen, Inc., 220 N. C. 694, the Supreme Court of North Carolina stated in part as follows:

> "Executive officers of a corporation are not, as such, its employees in the ordinary sense of the word and as it is used in this act. * * * When the president of a corporation acts only as such, performing the regular executive duties pertaining to his office, he is not an employee within the meaning of the statutory definition.* * *"

The court in that same case which involves the Workmen's Compensation Act further states as follows:

> "We adhere to the dual capacity doctrine under which executive officers of a corporation will not be denied compensation merely because they are executive officers if, as a matter of fact, at the time of the injury they are engaged in performing manual labor or the ordinary duties of a workman. * * *"

Let us not overlook the fact that an executive officer of a corporation is considered the agent of the corporation or of the board of directors, and as such he has duties to perform which no employee can legally perform and, therefore, unless such officer is also acting in the dual capacity as an employee by performing managerial duties or other duties which are not of an executive nature, he is not to be counted as an employee, even though he is performing executive duties for the corporation for remuneration.

Section 55-49 of the General Statutes of North Carolina provides that every corporation shall have a president, secretary, and treasurer to be chosen either by the directors or stockholders, as the by-laws direct, and they shall hold office until others are chosen and qualified in their stead. It is provided that the president shall be chosen from among the directors; the secretary shall record all of the votes of the corporation and the directors in a book to be kept for that purpose and perform such other duties as are assigned to him. The treasurer may be required to give bond for the faithful discharge of his duty in such sum and with such surety as are required by the by-laws. It is also provided that two

of the offices may be held by the same person, if the body electing so determine, and that the corporation may have such other officers and agents who shall be chosen in the manner and hold office for the terms, and upon the conditions prescribed by the by-laws or determined by the board of directors. The statute does not specifically set forth the duties of the officers.

It may be difficult at times to determine which duties are executive duties and which are not. As a general rule, any duties that cannot be delegated to some employee are executive duties. As an example, a president or vice president should preside over the meetings, and only the officers could be authorized by the board of directors to make loans and establish credit for the corporation, as these are duties which could not be delegated. Only officers of the corporation would have the authority to enter into contracts binding the corporation. The only instances in which real estate can be transferred or sold are by the signature of the president and secretary under seal. This authority cannot be delegated to any employee. These are merely examples of functions which are strictly executive and which cannot be delegated.

Listed below are excerpts from certain cases from other jurisdictions which bear upon the subject:

An officer of a corporation who performs no service and receives no compensation is not to be included as an "employee" under the Unemployment Tax Act, but an officer is not excluded as an "employee" if otherwise the relationship of employer-employee exists. Personal Finance Co. of Braddock v. U. S. D. C. Del. 86 F. Supp. 779, 786.

An officer of a corporation is not in the ordinary sense an "employee" of the corporation though he may also be an employee where, in addition to his duties as an officer, he is also employed in a separate capacity for particular purposes. McClayton v. W. B. Cassell Co., D. C. Md. 66 F. Supp. 165, 173.

First vice president in charge of business corporation whose duties were prescribed by by-laws, whose salary was fixed by directors, and who had no contract of employment, was not an "employee" of corporation within statutes providing for re-employment of discharged veterans. McClayton v. W. B. Cassell Co., D. C. Md 66 F. Supp. 165, 173.

Holder of one-third of corporation's stock who was its vice president and also its attorney, who was paid $2,000 a year for legal and management fees, and negotiated with tenants, arranged leases, gave orders to employees and others, visited buildings and president's office every morning, kept payroll book and slips, kept records of rents collected and checked monthly balances, was an "employee" and corporation who employed at least three other employees was, therefore, liable for contributions under the statute relating to unemployment insurance. Claim of Dybdal, 85 N. Y. S. 2d. 657, 658, 274 App. Div. 1084.

President and vice president of corporation who worked in corporation's store and received weekly salaries were properly counted as "employees" in determining whether corporation had eight or more "employees," so as to be subject to the Unemployment Compensation Act. State ex rel. Murphy v. Welch & Brown, 103 P. 2d. 533, 187 Okl. 470.

A nominal officer of a corporation who performs duties and receives compensation on a basis which, apart from his holding of the office, would place him in that category of an employee as generally understood, is an "employee" within contemplation of minimum wage act requirement that employer keep and furnish to Commissioner of Labor on demand a record of hours worked by and wages paid to each employee. Swiss Cleaners v. Danaher, 27 A. 2d 806, 809, 129 Conn. 338.

A non-compensated president of defendant corporation whose acts were only such as were required for maintaining defendant as a corporation, as distinguished from those necessary to management and conduct of defendant's business, was not an "employee" of a corporation for purpose of determining whether corporation was liable for contributions under Unemployment Compensation Act. Unemployment Compensation Division of Workmen's Compensation Bureau v. People's Opinion Printing Co. 295 N. W. 656, 658, 70 N. D. 442.

The provision of the Social Security Act that the term "employee" includes an officer of a corporation means that an officer can be an employee; that is, if he meets the tests determinative of the ordinary employment relationship, he is an employee and the fact that he is also an officer of the corporation does not destroy his status as an employee under the act. Deecy Products Co. v. Welch, C. C. A. Mass., 124 F. 2d 592, 595, 596, 598, 599, 139 A. L. R. 916.

Under the Social Security Act, providing that the term "employee" includes an officer of a corporation, Congress meant to make it clear that all who meet the ordinary employment relationship tests are to be covered by the act whether they are superior or inferior employees and that those who do not meet the tests are not to be covered by the act. Deecy Products Co. v. Welch, C. C. A. Mass., 124 F. 2d 592, 595, 596, 598, 599, 139, A. L. R. 916.

It may be said, therefore, that officers of a corporation who perform no services other than services in a strictly executive capacity, which cannot be delegated or performed by persons other than officers, are not to be counted as employees of the corporation for employment tax purposes even though such officers are paid by the corporation for those executive services. An officer of a corporation who performs no service and receives no remuneration in any form is not to be considered as an "employee" for employment tax purposes.

An officer of a corporation, who performs executive services without consideration or remuneration will not be considered as an employee of the corporation, either because of such services or because of having the status of an officer. When services are performed by an officer which are outside of the usual scope and functions of the executive duties usually required of an officer and when such officer is paid for those additional services, then he is considered as an employee and should be counted in determining whether or not the employer is subject to the act.

An officer of a subsidiary corporation who receives no compensation from the subsidiary corporation for executive duties, but who receives his entire compensation from the parent corporation for whom he also performs only executive duties, shall not be considered an employee of either corporation.

An officer of a parent corporation who is farmed out or loaned to a subsidiary corporation and such individual performs services for the subsidiary corporation which are beyond the scope of the services or duties of an officer, and the subsidiary corporation either controls or has the right to control the manner in which such individual performs those services, shall be considered an employee of the subsidiary corporation, even though all of his remuneration for such additional services is paid by the parent corporation. This is also true where the same individual is an officer of both corporations but performs such additional services or duties beyond the scope of an executive officer for the subsidiary corporation.

In a case of this kind it is only reasonable to assume that the subsidiary corporation is in some way reimbursing the parent corporation for the services rendered by such individual, or that there is some arrangement or charge-back of some kind when a situation such as this exists. In these cases a very careful investigation will be necessary in order to determine which employer shall be taxed for the services performed by such individual. If it should develop that the subsidiary corporation is not reimbursing the parent corporation for the services of such individual, and there are no charge-backs of any kind made by the parent corporation to the subsidiary, then of course we cannot tax the subsidiary for the services performed by that individual, but he would still be counted for the purposes of determining status. In these rare instances the parent corporation would be required to pay the tax.

Under the "loaned servant" rule, a loaned servant does not become the servant of the borrower unless the borrower has exclusive control over him for the period covered. Walter v. Everett School Dist. 24 Wash. 79 P. 2d 689.

As a practical matter, it is felt that in many instances it will be found that officers of corporations are performing services for the corporation which are outside of the usual executive duties generally relating to their offices, and if they are performing such duties which may be delegated to persons other than officers, then they are to be counted as "employees." It is felt that it will be generally found that officers are performing duties other than those generally attributable to executive officers only.

Generally speaking, in those instances where an officer is also in employment, his remuneration is considered as wages.

As stated in the opening paragraph of this interpretation, we cannot answer all of the questions which may arise, for so many different situations will present themselves that it would be impossible to contemplate all of those different situations. It is going to be difficult in some instances to

determine whether or not an officer of a corporation is performing services other than in an executive capacity, and in such cases a thorough investigation should be made to determine the exact nature of the duties performed, and a report on such investigation should be made to the central office so that we in the central office may attempt to reach a proper conclusion.

Adopted as an official Interpretation of the Commission on July 16, 1957.

(Cancels and replaces Interpretation No. 141, adopted February 19, 1957.)

Attach to Interpretation No. 145 as "A"

FORM BM 17 REV 12-49

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTEROFFICE COMMUNICATION

DATE: March 6, 1968

TO: R. F. Martin, Director

FROM: R. B. Billings, Chief Counsel

SUBJECT: Officers' Salaries – Interpretation No. 145 Supp "A"

The question has been raised in a memorandum from the Chief Accountant to the Assistant Director under date of February 26, 1968, whether salaries paid officers of a corporation should, in all cases, be considered taxable unless the records of the corporation show that such remuneration is paid as directors' fees.

It is our opinion that we could not as a matter of law hold that every payment made to an officer as salary and shown as such on the records of the corporation is taxable. [We would, however, suggest in those cases where the records of a corporation disclose that an officer has been paid remuneration as wages that the field representative or auditor should take the position that, nothing else appearing, the officer is in employment.]

In the memorandum written by me on February 16, 1968, it was never intended that we should disregard Interpretation 145 with respect to the status of officers of corporations. It was suggested that we take the position as stated here--that where there is a payment of salary to an officer, nothing else appearing with respect to the services performed by him, we should presume that the officer is in employment and that the burden of proof of showing that he is not in employment should be upon the employer.

Since it appears that the auditors and field representatives would have difficulty in defining what is meant by a "substantial" payment in cases involving officers' salaries, it is suggested where there is any payment, regardless of the amount, that we take the position stated above with respect to officers of corporations. We do not feel, however, that we can disregard the distinction which the Commission has made concerning executive duties of officers of corporations. [The Commission has held since 1950, in numerous Opinions, that if the officer is only performing executive duties and not duties that could ordinarily be performed by an employee, he would not be considered an employee.] If the minutes of a corporation instruct an officer to personally take inventory, make bank deposits daily, or do some other work which is ordinarily performed by an employee of the corporation and not related to the management of the business, it is our opinion such could not be considered executive duties. This is because the Statutes provide that the officers of a corporation shall have authority to perform such duties in the management of the corporation as may be provided by the by-laws of the corporation, or as

determined by action of the board of directors not inconsistent with the by-laws. (G.S. 55-34 (b))

We have studied all of the Opinions of the Commission relating to the status of officers of corporations as employees and find that, generally speaking, there are about five categories in which the Commission has made rulings. They are as follows:

1. Cases in which there have been no services performed by the officers and no remuneration paid to the officers. In such cases the officers are not considered to be in employment. See: In Re Wood and MacDougall Associates, Inc. - Opinion No. 1196.

2. Cases in which the officers of the corporation only attend board meetings and perform no other services and even though officers in such cases are remunerated, the Commission has ruled they are not in employment. This is when the officers did not take any active part in the business or perform any services for the corporation, except the attendance of board meetings. See: In Re Cape Fear Chemicals, Inc. - Opinion No. 997, in which the officer was paid $3,000 for each year for a period of three years and was not considered to be in employment. See also: In Re Commonwealth Hosiery Sales Corporation - Opinion No. 1024, to the same effect.

3. Cases in which the officers are active in the business and perform services other than executive duties and an understanding exists they will be paid for services if the profits of the corporation justify such payment. In such cases they are held to be in employment. See: In Re Stewart Machine Company, Inc. - Opinion No. 967.

4. Cases in which the officers are performing services other than those of executive nature, such as waiting on customers, making collections, etc., and a designated amount agreed upon for payment but no payment made pursuant to the agreement. In these cases the officers are considered in employment. See: In Re Farmer's Furniture Company, Inc. - Opinion No. 980.

5. Cases in which the officers are engaged in performing services other than those of executive nature, such as answering correspondence, writing checks, paying bills,

conferring with salesmen weekly on trips, and transacting other business, and receiving for such services a certain regular monthly amount during a portion of the period involved, but no payment with respect to other periods of time involved. In these cases the Commission held that the officers are employees during all periods of time involved based upon the nature of services performed, and there existed an implied contract between the officers and the corporation that the corporation pay reasonable compensation for the services rendered. See: In Re Rich Plan of the Pee Dee, Inc. - Opinion No. 1036.

The following is a list of Opinions rendered by the Commission in which the status of officers of corporations has been determined. It may be that the auditors and field representatives may desire this list for reference purposes.

In Re

Opinion No. 764 - Coble Sporting Goods Co., Inc.

Opinion No. 912-A - In Re R. W. Norman Co., of Lumberton, Inc.

Opinion No. 967 - In Re Stewart Machine Co., Inc.

Opinion No. 980 - In Re Farmer's Furniture Co., Inc.

Opinion No. 984 - In Re The All Sports Store, Inc.

Opinion No. 996 - In Re Rutherford Equipment Co., Inc.

Opinion No. 997 - In Re Cape Fear Chemicals, Inc.

Opinion No. 1007 - In Re Asheville Coal & Wood Co., Inc.

Opinion No. 1014 - In Re Carolina Company, Inc.

Opinion No. 1024 - In Re Commonwealth Hosiery Sales Corp.

Opinion No. 1031 - In Re Anson Frozen Food Center, Inc.

Opinion No. 1036 - In Re Rich Plan of the Pee Dee, Inc.

Opinion No. 1098 - In Re Playhouse, Inc.

Opinion No. 1123 - In Re H & V Equipment Company, Inc.

Opinion No. 1130 - In Re Production Development Co., Inc.

Opinion No. 1142 - In Re Sandhills Bonded Warehouse, Inc.
Sandhills Enterprises, Inc.)
Richmond Enterprises, Inc.) T/A The O.K.
Lee Enterprises, Inc.) Bowl

In Re

Opinion No. 1195 - Wood & MacDougall Associates, Inc.

Opinion No. 1228 - In Re Atlantic Loan Company

Opinion No. 1236 - In Re Laughinghouse Carpet Service, Inc.

Opinion No. 1240 - In Re Funderburg Equipment Co., Inc.

Opinion No. 1244 - In Re Certified Plating Co., Inc.
Opinion No. 1276 - In Re AAA Business Machines Corp.
Opinion No. 1310 - In Re Stout Construction Co., Inc.
Opinion No. 1317 - In Re Little Colonel Corp., Inc.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 146

TO: R. F Martin, Director

FROM: R. B. Billings, Attorney

RE: Interpretation of Section 96-8 (g) (1) of the Employment Security Law of North Carolina - Status of Bank Directors Required by Statute to Serve on Committees

We have been asked to discuss the status of directors of banks under the Act.

General Statutes, Section 53-78, provides for certain committees to be appointed by the Board of Directors of banks. The first type of committee is designated as an executive committee, and the statute requires that members of this committee shall be directors and shall approve or disapprove all loans and investments of the bank. Another committee which may be appointed by the Board of Directors is called a general loan committee, and among its members it is required that at least three directors be appointed together with such officers of the bank as the directors may appoint. The third type of committee which may be appointed by the directors is known as a loan committee and may be appointed in addition to a general loan committee where a bank has branches. This type of committee is not required to have directors serving thereon, but three of its members must be officers or members of the Board of Managers of the parent bank or branch.

It is our opinion that with respect to the first committees named; that is, the executive committee and the general loan committee, where directors serve on these committees, to the extent required by statute, that they shall not be considered as employees since the statute requires that the directors perform such duties and these duties cannot be delegated to other individuals. Where directors may be serving upon the third type of committee; that is, the loan committee mentioned in the statute, they should be considered as employees, and remuneration paid for services on such committee should be considered as wages. In the last instance the directors could delegate these duties to other individuals ; and when they assume to perform such duties which are not required of them by statute and are not ordinarily the duties of directors, it is our opinion that they are employees under such circumstances.

The question may arise as to whether this changes our former views with respect to the collection of contributions on remuneration paid to directors of Building and Loans for appraisal fees and in other cases where the directors are performing services which may be delegated to others. The difference in the two situations is that in the case of directors serving on executive committees and general loan committees (to a maximum of three) of banks they are performing services which the statute requires them to perform as directors.

Adopted as an official Interpretation of the Commission on October 8, 1957.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 153

TO: R. F. Martin, Director

FROM: W. D. Holoman, Chief Counsel

RE: Interpretation of the Employment Security Law of North Carolina, Section 96-8 (6) b (formerly Section 96-8 (f) (2)) Successor--Section 96-9 (c) (4) b (formerly Section 96-9 (c) (4) (B)) Rate of Successor-- Section 96-11 (a) (No Change) Effective Date of Liability

Several questions have been raised recently in respect to (1) the successor clause, (2) the rate of the successor who becomes an employer solely by virtue of being a successor, (3) the effective date of liability, and (4) the rate of the successor who, subsequent to the date of acquisition and the assignment of the predecessor's rate, becomes liable by reason of any other provision under Chapter 96 of the Employment Security Law.

Interpretation No. 82 - Supplement 2 deals with this subject, but it does not deal with the rates to be assigned; consequently, this Interpretation cancels and replaces Interpretation No. 82 - Supplement 2.

When liability as a successor is established under Section 96-8 (6) b, the section dealing with successorship, and liability is predicated solely upon the provisions of Section 96-8 (6) b, then the date of liability is the date of acquisition. If the successor employer was an employer subject to the Employment Security Law prior to the date of the acquisition of the business, his rate, of course, for the period from such date until the end of the then current contribution year will be the same as his rate which was in effect on the date of such acquisition.

If the successor was not an employer prior to the date of the acquisition of the business, he shall be assigned the standard rate of contributions as provided for in Section 96-9 (c) (4) b for the remainder of the year in which he acquired the business of the predecessor. If such sucessor, however, makes an application for the transfer of the account of the predecessor within sixty days after notification by the Commission of his right to do so and the account is transferred, he shall be assigned, for the remainder of such year, the rate applicable to the predecessor employer, or employers, on the date of the acquisition of the business, provided there was only one predecessor or if more than one and the predecessors had identical rates. In the event the rates of the predecessors were not identical, the rate of the successor shall be the highest rate applicable to any of the predecessor employers on the date of the acquisition of the business. This is so by reason of the provisions under Section 96-9 (c) (4) b of the Employment Security Law.

Reference is again made to Section 96-8 (6) b which is the section dealing with successorship. I quote from that section as follows:

> "* * * The provisions of § 96-11 (a), to the contrary notwithstanding, any employing unit which becomes an employer solely by virtue of the provisions of this paragraph shall not be liable for contributions based on wages paid or payable to individuals with respect to employment performed by such individuals for such employing unit prior to the date of acquisition of the organization, trade, business, or a part thereof as specified herein, or substantially all the assets of another, which at the time of such acquisition was an employer subject to this chapter. This provision shall not be applicable with respect to any employing unit which is an employer by reason of any other provision of this chapter. * * *"(Underscoring ours)

Particular attention should be called to the word "solely" as used in the above-quoted section, and in particular to the underscored sentence.

The acquiring employing unit, which has no employees prior to the acquisition of a covered business, and which becomes an employer solely because of the acquisition of the business, or a part thereof, of the predecessor covered employer, and which acquires the account of the predecessor effective as of the date of the transfer of the business, will take the rate of the predecessor employer for the remainder of the year, Section 96-9 (c) (4) b of the law. The successor employer becomes an employer solely because of the acquisition of the business, or a part thereof, as provided for in Section 96-8 (6) b. If thereafter, during the remainder of the calendar year, such successor employer becomes an employer by reason of any other section of the law, the rate of the predecessor will still be applicable for the remainder of such year.

Consider the acquiring employing unit, not an employer, which has less than the requisite number of individuals in employment to cause it to be liable, which acquires the business, or a part thereof, of a covered employer as provided for in Section 96-8 (6) b. If, after such acquisition, upon combining the employment records of the predecessor and the successor employers, and treating them as a single employing unit, it is shown that there are not a sufficient number of employees during the calendar year to cause liability under Section 96-8 (6) a of the law, or if the employing unit does not become liable by reason of any other provision of the law during such year, such successor employer would be assigned the predecessor's rate for the remainder of the year after the transfer of the predecessor's account. If such successor does not apply for the predecessor's rate, the standard rate will be applicable. In a case of this nature the liability of the successor is based solely upon the acquisition of the business of the predecessor.

Irrespective of the fact that a successor employer may have been assigned the rate of the predecessor employer at any time during the calendar year, if it appears that the combined employment records of both the predecessor and the successor are sufficient at any time during the calendar year to cause liability, the liability date of the successor will be January 1 of that year by reason of Section 96-11 (a) of the law, or the date on which the successor first had individuals in employment in that year; consequently, the successor does not become liable "solely" by reason of successorship.

The successor would, therefore, in a case such as described in the preceding paragraph, be assigned the standard rate from January 1 of such year until the date that it acquired the business. Thereafter, for the remainder of the year the rate of the predecessor would be the applicable rate.

In summarizing, a successor which is not an employer on the date of the acquisition of the business of the predecessor and which has the account of the predecessor transferred to it, shall be assigned the rate of the predecessor effective on the date of the acquisition of the business, and such rate shall remain in effect for the remainder of that year. If the successor at any time during the year becomes liable by reason of any other provision of the law, the standard rate is assigned to be effective from January 1 until the effective date of the transfer of the account. Thereafter, for the remainder of the year, the predecessor's rate will be in effect. In the event the successor does not make application for the transfer of the predecessor's account within sixty days after notification by the Commission of its right to have such account transferred, the successor's rate for the entire year will be the standard rate.

Adopted as an official Interpretation of the Commission on June 9, 1959.

This Interpretation cancels and replaces Interpretation No. 82 - Supplement No. 2, adopted August 30, 1949.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 158

TO: R. F. Martin, Director

FROM: R. B. Billings, Attorney

RE: Interpretation of Section 96-8 g 15 (formerly Section 96-8 (g) (7) (0)) of the Employment Security Law of North Carolina, Defining Casual Labor

Under the Act the provisions of Section 96-18 g 15 provide that the term "employment" shall not include casual labor not in the course of the employing unit's trade or business. Casual labor is not specifically defined in the Act, and as stated by the Supreme Court of Pennsylvania such term is not capable of scientific definition.

In applying the provisions of the North Carolina Act it must be kept in mind that unless the services are performed outside of the course of the employing unit's business it is not exempted because it may be casual labor. In other words, any services performed in the course of the employing unit's business come within the definition of employment even though such services may be casual in nature, it being presumed, of course, that the services are being performed by an employee of the employing unit and are not excluded under any other provision of the Act.

Under the rulings of the authorities by which casual labor is defined and the statutes excluding such labor, it is generally stated that labor which is occasional, incidental, irregular, haphazard, or unplanned, or which may arise out of an emergency, is considered "casual labor."

Casual labor has been discussed by the Supreme Court of North Carolina in the case of Shoup v. American Trust Company, 245 N. C. 682. In this case the court used the following language in the treatment of this subject:

> "In our opinion the foregoing authorities do not support the appellants' contention in light of the facts before us. It is clear that Metcalf v. Sweeney, supra, as well as the textbook authorities cited, support the view that the servant or employee should be excluded where the employment was casual, but included where there was continuity and permanence of employment. Therefore, it becomes pertinent and important to see what is meant by 'casual' in this connection as meaning 'occasional; incidental; happening at uncertain times; not stated or regular.' In the case of Van Nuys v. Levine, 165 A 885, 886, 11 N. J. Misc. 309, the Court defined as 'casual employment,' 'employment for a particular job which is not to be continued at regular or recurring intervals.' In

> Dobrich v. Pittsburgh Terminal Coal Corp., 145 Pa. Super. 87, 20 A. 2d 898, 900, the Court quoted with approval from the cases of Cochrane v. William Penn Hotel, 140 Pa. Super. 323, 13 A. 2d 875, affirmed 339 Pa. 549, 15A. 2d 43, the following: 'Applying it (casual) as practically as possible to the subject of employment, it may be said in general that if a person is employed only occasionally, at comparatively long and irregular intervals, for limited and temporary purposes, the hiring in each instance being a matter of special engagement, such employment is casual in character. On the other hand, even though an employment is not continuous, but only for the performance of occasional jobs, it is not to be considered as casual if the need for the work recurs with a fair degree of frequency and regularity, and, it being thus anticipated, there is an understanding that the employee is to perform such work as the necessity for it may from time to time arise.' Likewise, in Flynn v. Carson, 42 Idaho 141, 243 P. 818, the Court held that regular recurring employment, though only on Saturday nights of an extra bus trip, is not a 'casual employment.' Moreover, the above quotation from Page on Wills contains the statement that a 'gift to employees or servants is a gift to those who are employed with some degree of regularity and continuity."

In another case involving an interpretation of the phrase "casual labor" as used in the Pennsylvania Unemployment Compensation Act, the Supreme Court of Pennsylvania in Flaherty v. Unemployment Compensation Board of Review, 112 A. (2d) 451 (1955), made the following observation:

> "As to what constitutes an employment casual in character, it is obvious that the term 'casual' is not capable of scientific definition. Involved in it are the ideas of fortuitous happening and irregularity of occurrence; it denotes what is occasional, incidental, temporary, haphazard, unplanned. Applying it as practical as possible to the subject of employment, it may be said in general that if a person is employed only occasionally, at comparatively long and irregular intervals, for limited and temporary purposes, that the hiring in each instance being a matter of special engagement, such employment is casual in character * * * (But) Even if there be but a single or special job involved, this does not conclusively stamp the employment as casual. If the work is not of an emergency or incidental nature but represents a planned project, and the tenure of the service necessary to complete it and for which the employment is to continue is of fairly long duration, * * * the employment is not casual."

It is suggested that in dealing with whether services are casual within the meaning of the Act the standards set forth in the two decisions quoted should be applied. In making application of the rule as set forth by the North Carolina Court, it must be decided whether the work is occasional, incidental, temporary, haphazard, and not planned, and whether such work is recurring and whether such service occurs at comparatively long and irregular periods for limited and temporary purposes. If the services are of such nature, it should be found to be casual labor.

It is well to keep in mind that where certain individuals over a given period of time perform services which may or may not be casual, it should be ascertained how often or how frequently the individuals perform the services during the particular period in question. In other words, if an individual, for instance, is working as a carpenter for a given period of time, we should find out how regularly during the period he worked--whether he worked once a day, once a week, once a month, or for only a few hours during the period. This is one of the most important facts to establish.

The provisions of the Federal Unemployment Tax Act concerning casual labor are more specific than the section of the North Carolina law dealing with this exemption. For that reason we are not to be guided by the rulings of the federal authorities, although as a practical matter, it is felt that services which have been held to be casual labor under the Federal Unemployment Tax Act would be considered casual labor in defining such term under the North Carolina Act.

Adopted as an official Interpretation by the Commission on July 28, 1959.

This Interpretation cancels and replaces Interpretation No. 56, adopted April 17, 1945.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 163

TO: R. F. Martin, Director

FROM: R. B. Overton, Attorney

RE: Interpretation of the Employment Security Law of North Carolina -
Section 96-12 (b), Wages Used in Computing Weekly Benefit Amount;
Section 96-8 (18), Base Period;
Section 96-8 (10) a, Total Unemployment;
Section 96-8 (13), Wages -
Effect of Payment of Wages Retroactively for Base Period Purposes and
Effect of Such Payments upon the Eligibility of a Claimant for Benefits with
Respect to the Week for Which Such Retroactive Wages Were Paid

In your memorandum of July 11, 1960, you advised that in certain instances payments are made (1) under ruling of the National Labor Relations Board to require an employer to conform to the Fair Labor Standards Act of 1938, such as back-pay awards, minimum wages, and overtime compensation, and (2) retroactive payments made under supplemental benefit payment plans executed by bargaining agents and employers. You inquired whether such payments should be processed for base period purposes on the basis of when the wages were actually paid or when the wages were earned. You further inquired as to whether such payments made with respect to given weeks would affect the eligibility of a claimant who had been paid benefits by the Employment Security Commission for such weeks.

The answer to the first of the above questions, we think, is contained in Section 96-12 (b) which reads as follows:

> "(b) Each eligible individual whose benefit year begins on and after the first day of the month immediately following June 10, 1957, and who is totally unemployed in any week as defined by § 96-8 (10) a shall be paid benefits with respect to such week or weeks at the rate per week appearing in the following table in Column II opposite which in Column I appear the wages <u>paid</u> to such individual during his base period with respect to employment: * * * . "

You will note that this particular section specifically provides that an individual shall be paid benefits as outlined, based upon wages <u>paid</u> during his base period, and nothing is said concerning payment of benefits based upon wages earned during the base period.

We wish to call to your attention one exception to the above ruling; that is contained in Section 96-8 (13) a which sets forth what shall be included as wages. The pertinent proviso of that section reads as follows:

> "* * * Provided, if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such manner as may by authorized regulations be prescribed. Such regulations shall, so far as possible, secure results reasonably similar to those which would prevail if the individual were paid his wages at regular intervals: * * * ."

The history of this proviso goes back to the 1947 Legislature when the maritime provisions of our law were enacted. At that time it was felt that a seaman who had been on a prolonged cruise of eight to nine months and who received all of his pay for services on such cruise upon his return to his home port should have such wages apportioned to the period of his services so that he could draw unemployment insurance benefits based thereon rather than holding him strictly to the other provisions of the law in which case he would only be entitled to draw benefits based upon the earnings as reported in the quarter in which they were paid.

You will recall that prior to 1941 contributions were payable upon wages payable for services in a given quarter and that the 1941 Legislature amended the law to provide that contributions should be payable upon wages paid in a given quarter, irrespective of the quarter in which such wages were earned. Our answer, therefore, to your first inquiry as to the effect of retroactive payment of awards as set forth above upon benefit years established prior to the payment of such awards is that such payments can only apply to any benefit year based upon the quarters in which the payments are actually made and not with respect to the quarters in which such payments were earned.

The second question is what effect would such payments have upon the eligibility of a claimant who had been paid benefits during a benefit year and who subsequently was paid such payments covering the weeks of the benefit year with respect to which unemployment insurance benefits had been made.

This question, we think, is answered by Section 96-8 (10) a or b, as the case may be, which is the definition of total and partial unemployment. Under this section an individual is deemed to be totally unemployed in any week with respect to which no wages are payable to him and during which he performs no services. An individual is deemed to be partially unemployed in any week in which because of lack of work he worked less than sixty percent of the customary hours of the industry or plant in which he was employed and with respect to which the wages payable to him are less than his weekly benefit amount, etc.

It is our conclusion that under the statute we would be compelled to set up an overpayment against an individual who had been paid unemployment insurance benefits for a given week and who later was paid under a National Labor Relations Board ruling or who later was paid supplemental benefits with respect to the benefit week for which he had been paid unemployment insurance benefits.

Summarizing, you would not recompute a monetary determination based upon retroactive payment or supplemental benefits. However, you would recalculate any benefits that might be due to an individual who had been paid benefits and who subsequently was paid such retroactive payments or supplemental benefits with respect to the same week.

Adopted as an official Interpretation of the Commission on July 19, 1960.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 165

TO: R. F. Martin, Director

FROM: R. B. Overton, Attorney

RE: Interpretation of Section 96-10 (d) of the Employment Security Law of North Carolina -- Liability of Purchaser of Business for Unpaid Contributions of Predecessor

You have requested an interpretation of the provisions of Section 96-10 (d) as it would apply to the following factual situation. A, a covered employer, sells his business to B, who, as of the date of purchase, was not a covered employer under the provisions of the law. A owes contributions to the Commission and is liable during the year in which the sale or transfer is made solely by reason of the fact that he had failed to exercise a right of termination as provided in Section 96-11 (b) of the law. Within the statutory period of sixty days B files a written request with the Commission to be relieved from the provisions of Section 96-8 (5) (b). Such a request is allowed by the Commission.

Question: Is B liable for unpaid contributions owing by A at the time of the transfer of the business?

Section 96-10 (d), in substance, provides that contributions or taxes imposed by Chapter 96 and subsections thereunder of the law shall be a lien upon the assets of any employer subject to the provisions of the law who shall lease, transfer, sell out his business, or shall cease to do business. Such section further provides that such employer (predecessor) shall be required by the next reporting day as prescribed by the Commission to file such reports and pay all contributions due with respect to wages payable for employment up to the date of such lease, transfer, sale, or cessation of business. It further provides that the purchaser, employer-successor, in business shall be required to withhold sufficient of the purchase money to cover the amount of said contributions due until such time as the former owner shall produce a receipt from the Commission showing that contributions have been paid or showing that none are due. It is further provided that if the purchaser of a business or a successor of such employer shall fail to withhold such purchase money or any money due to such employer in consideration of a lease or other transfer and the contributions shall be due and unpaid after the next reporting date, such successor shall be personally liable to the extent of the assets of the business so acquired for the payment of the contributions accrued and unpaid on account of the operation of the business by the former owner or employer.

It is our interpretation of this statute that the purchaser of a business need not necessarily become a successor employer under the provisions of Section 96-8 (5) (b) to effectuate liability for unpaid contributions of the seller. Liability for such unpaid contributions attaches by reason of the provisions of Section 96-10 (d) when the business is sold, leased, or otherwise transferred. It is, therefore, concluded that the purchaser of a business as outlined in your inquiry who is relieved from the operations of the successorship clause of the law; that is, Section 96-8 (5) (b), would be personally liable to the extent of the assets acquired for any contributions remaining unpaid by the predecessor after the next reporting date following the date of transfer.

Adopted as an official Interpretation of the Commission on May 2, 1961.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 167

TO: R. F. Martin, Director

FROM: W. D. Holoman, Chief Counsel

RE: Supplemental Unemployment Benefits

On June 26, 1956, the Commission adopted Interpretation No. 138, Ruling on the Ford Supplemental Unemployment Benefits Plan, which we have followed since that time in respect to Supplemental Unemployment Benefits in general. It was concluded that any sums paid as Supplemental Unemployment Benefits were wages and would be considered as earnings in determining the amount of benefits due a claimant.

On November 1, 1961, the Supreme Court of this state entered its Opinion No. 23 involving certain employees of the Dayco Southern Division of Dayco Corporation in which it held that sums paid to individuals under a Supplemental Unemployment Benefit Plan were not wages within the meaning of the Employment Security Law. We cannot, therefore, consider such Supplemental Unemployment Benefit payments as earnings in determining the amount of benefits due a claimant.

Adopted as an official Interpretation of the Commission on November 28, 1961.

Cancels and replaces Interpretation No. 138 adopted June 26, 1956.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 168

TO: R. F. Martin, Director

FROM: W. D. Holoman, Chief Counsel

RE: Interpretation of Section 96-8 (6) a of the Employment Security Law of North Carolina - Employment, Employer and Employee - On-the-job Training under the Division of Vocational Rehabilitation of the North Carolina Department of Education

The question has arisen as to the status under the Employment Security Law of trainees taking "on-the-job training" under a program carried on by the Division of Vocational Rehabilitation of the North Carolina Department of Education. To be more precise, are these trainees employees of the trainer? To answer this question it must be determined whether the common law relationship of master and servant exists between the trainer and the trainee.

The section of the law that is involved is Section 96-8 (6) a, which defines employment in part as follows:

> "'Employment' means service * * * performed for wage or under any contract of hire, written or oral, express or implied, in which the relationship of the individual performing such service, and the employing unit for which such service is rendered is, as to such service, the legal relationship of employer and employee. * * *"

The common law relationship of master and servant contemplates a contract of hire.

In reviewing this subject, and from the information obtained in respect to the Vocational Rehabilitation program, it appears that the training program is usually from four to eight months, depending upon the particular trade being taught. The courses that are given are usually arranged because the Division does not have regular schools for these subjects in this state. They include such things as radio and television, automobile mechanics, shoe repairing, cleaning and pressing, sewing, et cetera. The Division does not pretend to make a person a first-class mechanic in the short period allowed but tries to get him to the point where he is a first-class apprentice and able to start drawing a wage that would enable him to earn his living while he continues to master the trade.

The Division has two basic tuition contracts; one is a straight contract where the Division pays the trainer or employing unit $20.00 a month. The other is a sliding scale contract under which the Division pays the trainer $60.00 tuition for the first month and the trainer agrees with the Division to pay the trainee $6.00 as spending money. Please note

that the contract or agreement is between the Division and the trainer as distinguished from a contract between the trainer and the trainee. Under the sliding scale contract, the second month the Division reduces its payment to the trainer by $8.00, and the trainer increases his payment in the same amount. In neither case does the Division consider the handicapped person to be employed, and the trainer does not pay a wage. If the trainee needs assistance with his subsistence, the Division pays for it. There may be variations in these two types of contracts. In any case, any sum paid by the trainer to the trainee is considered a gratuity by both the trainer and the Division of Vocational Rehabilitation as there is no obligation, contractually or otherwise, on the part of the trainer to pay the trainee any sum.

There is no contractual relationship between the trainer and trainee, and there must be a legal obligation on the part of the trainer or employing unit to pay remuneration to one for services rendered, or there must be a contract of hire, written or oral, express or implied, before the relationship of employer and employee is created. Such relationship does not exist in the case of these trainees taking on-the-job training under the contract between the Division of Vocational Rehabilitation and the employing unit or trainer. The spending money that is paid by the trainer to the trainee under one type of contract is paid as a result of the contract between the Division and the trainer, and the trainee has nothing to do with such contract and has no contract of hire with the trainer.

Under the circumstances related above, we do not feel that the employer-employee relationship exists between the trainer and the trainee. Any amount paid by the trainer to the trainee outside of the tuition agreement would be purely a gift on the part of the trainer and is not a stated wage agreed to between the trainer and the trainee by negotiation. We are of the opinion that these trainees are not employees in the accepted sense of the relationship as construed by the courts at common law. Anything paid above the tuition agreement is purely a gratuity.

We should not consider trainees under this program as being in employment. Consequently, they should not be counted in determining an employing unit's liability. If the trainer is already an employer, any sums paid by such employer to such trainees would not be wages and, therefore, would not be taxable.

This same interpretation would apply to a similar educational program where there appears to be no contract of hire between the trainer and the trainee and where the governmental agency sponsoring such program pays tuition and provides subsistence to the trainee.

This interpretation is in line with the opinion of the Attorney General on the same subject as expressed in a letter dated January 18, 1960, to the Honorable Charles F. Carroll, Superintendent of the Department of Public Instruction, and the letter from the Attorney General to me under date of December 18, 1961. It is also in line with Interpretation No. 60 which involved veterans taking refresher or training courses under the G. I. Bill of Rights. Since that program is no longer in existence, it appears that this interpretation should cancel and replace Interpretation No. 60.

Adopted as an official Interpretation of the Commission on January 2, 1962.

This Interpretation cancels and replaces Interpretation No. 60, adopted May 29, 1945.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 169

TO: R. F. Martin, Director

FROM: R. B. Billings, Attorney

RE: Interpretation of the Employment Security Law of North Carolina - Covered Employment

I. Section 96-8 (6) f 4, 96-8 (6) g 6, and 96-8 (20) - American Aircraft
II. Section 96-8 (6) g 2 - Federal Instrumentalities
III. Section 96-8 (6) g 8 - Nonprofit, Charitable, Religious, and Educational Organizations
IV. Section 96-8 (6) g 11 - Fraternal Benefit Societies, Orders, or Associations

The 1961 General Assembly amended the Employment Security Law of North Carolina to conform to certain changes enacted by Congress to the Federal Unemployment Tax Act. These changes relate to certain types of coverage effective January 1, 1962. Employer liability brought about by these changes must be based on the general coverage provision of our act which requires the employer to have as many as four or more workers in twenty different weeks. This requirement would be applicable to the calendar year 1962 and any subsequent years. These types of coverage fall into four categories; namely, workers in connection with American aircraft overseas; certain federal instrumentalities; nonprofit organizations; certain types of services formerly exempt and consisting of services performed in connection with the collection of dues or premiums for a fraternal society, order, or association performed away from the home office or which are ritualistic in connection with such society; and services of an individual performed in any calendar quarter for an organization exempt from income tax under Section 501 (a) of the Internal Revenue Code where remuneration for such services is less than $50 in a calendar quarter. These types of organizations will be enumerated in this interpretation in a full discussion of this group later.

I. American Aircraft

With respect to the first category relating to workers performing services in connection with American aircraft overseas, it was necessary that Section 96-8 (6) f 4, Section 96-8 (6) g 6, and Section 96-8 (20) be amended. These changes provided that services in connection with an American aircraft are covered only under a contract which is entered into in the United States, or if during the performance of the services and while the employee is employed on the aircraft it touches at a port in the United States, provided that such individual is employed on or in connection with the aircraft when outside of the United States. The services, in order to be within the definition of employment under the

law, must also be performed on or in connection with the operations of an American aircraft which are regularly supervised, managed, directed, and controlled from an operating office maintained in North Carolina. "American aircraft" is defined as meaning an aircraft registered under the laws of the United States. In connection with this change in the North Carolina law it is out opinion that no individuals will be found who are performing services under the conditions necessary to bring such services within coverage of our law. We do not know of any operating office of any airlines located or doing business in North Carolina from which any overseas activities of an aircraft are regularly supervised, managed, directed, and controlled.

II. Federal Instrumentalities

With respect to the change in the Federal Unemployment Tax Act relating to federal instrumentalities, it was not necessary that any amendment be made during 1961 to the Employment Security Law of this state for the reason that an amendment has previously been enacted into the law which provided for coverage of federal instrumentalities in case the Congress of the United States permitted such coverage. The authority to bring the federal instrumentalities under the coverage of the North Carolina act as permitted by the 1960 amendments of the Federal Unemployment Tax Act is provided in Section 96-8 (6) g 2 of our law. In this section it is provided that federal instrumentalities are brought within coverage to the extent permitted by the Congress. The permission granted by Congress in the 1960 amendments to the Federal Unemployment Tax Act makes applicable all the provisions of the Employment Security Law of North Carolina with respect to the instrumentality to the same extent and on the same terms as to all other employers. The permission granted by Congress in the 1960 amendments does not include any permission for federal instrumentalities to come within the voluntary coverage provisions of the law. These instrumentalities, of course, in order to be within coverage of the North Carolina act, must have had four or more workers in at least twenty different weeks during 1962, or some other calendar year thereafter, in order to establish liability. The instrumentalities which are affected by the amendment are: federal reserve banks, federal home loan banks, federal land banks, federal land bank associations, and federal credit unions. A list of these instrumentalities will be furnished to the field representatives.

III. Nonprofit, Charitable, Religious, and Educational Organizations

Section 96-8 (6) g 8 of the act was amended relating to services performed after January 1, 1962, by individuals in the employ of certain nonprofit, charitable, religious, and educational organizations. The change in the act was made to conform to the change in the Federal Unemployment Tax Act and primarily brings under coverage "feeder organizations" which are formed for the purpose of making profits which in turn are donated to a nonprofit charitable or religious organization, or the other types of organizations of this nature which are exempted under the law.

Before the amendment to the Federal Unemployment Tax Act, services were exempted if performed by an individual in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inured to the benefit of any private shareholder or individual and no substantial part of the activities of which was carrying on propaganda, or otherwise attempting to influence legislation. The Federal Act was changed to provide that services are exempt in the employ of a religious, charitable, educational, or other organization described in Section 501 (c) (3) (Internal Revenue Code, 1954) which is exempt from income taxes under Section 501 (a). The organizations referred to in Section 501 (c) (3) are the same organizations formerly contained in Section 3306 (c) (8), which have been enumerated above. The additional requirement for exemption under the amendment is that the particular type of the organization must also be exempt from income taxes under Section 501 (a) of the Internal Revenue Code, 1954.

In bringing this additional provision for exemption into the Federal Unemployment Tax Act, it brought about the inclusion in the definition of employment services performed in the employ of "feeder organizations." A "feeder organization" is defined in Section 502 of the Internal Revenue Code as "an organization operated for the primary purpose of carrying on a trade or business for profit," and it is further provided that such organization shall not be exempt from income taxes under Section 501 (a) of the Code on the ground that all its profits are payable to one or more organizations exempt from taxation under Section 501 (a). The term "trade or business" shall not include the rental by an organization of its real property (including personal property leased with the real property).

The North Carolina amendment made the same changes as did the federal amendment with respect to the exemption from income taxes under Section 501 (a) of the services performed by an individual in the employ of a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, when no part of the net earnings of such organizations inure to the benefit of any private shareholder or individual.

Ordinarily, in applying the provisions of the new amendment effective January 1, 1962, to these particular types of services, it can be stated that in those cases where there is a separate legal entity organized for profit and which contributes such profits to one of the types of organizations referred to in Section 96-8 (6) g 8 of the North Carolina act, services performed for the separate entity are not exempted from employment because its profits are donated to religious, charitable, educational, scientific, etc., type organizations.

It is to be noted that in order for the services to come within the exemption contained in Section 96-8 (6) g 8, such services must be performed for the particular type organization specifically named and, in addition, the organization must be organized exclusively for one or more of the purposes enumerated; no part of its earnings may inure to the benefit of any private shareholder or individual; and the organization must be exempt from income tax under Section 501 (a) of the Internal Revenue Code.

If the organization or employing unit is engaged in an unrelated trade or business, services performed for such organization would not be exempt under the law. The term "unrelated trade or business" means any trade or business whose conduct is not substantially related, apart from the need of such organization for income, to the performance by an exempt organization of its charitable, educational, or other tax-exempting functions. The term does not apply to any trade or business carried on by a college or university primarily for the convenience of its members, students, patients, officers, or employees. (United States Code Annotated, Title 26, Guide, page 83.)

Therefore, where a college or school or other exempt type organization is operating a store, barbershop, or other business as a convenience for its students, employees, officers, and members as a part of its normal operations, services performed in such businesses would not be taxable and would still fall within the exemption contained in the act. If the school or college, or other exempt type organization (except a church, convention, or association of churches) operates a business not related to its exempt functions; for instance, if a college should operate a business of some type selling merchandise and products at a location removed from its premises and such operation was not primarily for the convenience of its students, members, offices, or employees, and also operated as a commercial enterprise catering to the general public and for the purpose of making profits, the services would not come within the exemption of the law. This is true even though the profits would go to and be used for the purpose for which the exempt organization was formed. A church or convention of churches may operate an unrelated business or activity and still not be brought within coverage of the act by so doing.

Generally speaking, in the administration of the provision after January 1, 1962, relating to services performed in the employ of religious, charitable, and other type organizations named in Section 96-8 (6) g 8, it is felt that the only additional coverage which will result from the change will be the bringing in of any "feeder organizations" which may be operating in North Carolina.

IV. Fraternal Benefit Societies, Orders, or Associations

Prior to January 1, 1962, services performed by individuals in connection with the collection of dues or premiums for a fraternal benefit society, order, or association performed away from the home office, or its ritualistic service in connection with any such society, order, or association were specifically exempted from the definition of employment under the

provisions of Section 96-8 (6) g 11. In conformance with the amendments of the Federal Unemployment Tax Act, this section of the North Carolina law was amended to provide that these types of services are only exempted prior to January 1, 1962; therefore, all such services performed on and after January 1, 1962, are employment under the provisions of the Employment Security Law.

V. Organizations Exempt from Income Tax under Section 501 (a) and Section 521 of the Internal Revenue Code

Amendments to Section 96-8 (6) g were passed which added to the section certain paragraphs, the provisions of which exclude services in the employ of certain organizations exempt from income tax under the provisions of Section 501 (a) or Section 521 of the Internal Revenue Code if the remuneration for such services amounts to less than $50 in any calendar quarter.

The organizations exempt from income tax under Section 501 (a) and Section 521 of the Internal Revenue Code are:

A. Farmers' Cooperatives - Such cooperatives are defined under the income tax law as follows: The farmers' cooperatives exempt from taxation to the extent provided in subsection (a) are farmers', fruit growers', or like associations organized and operated on a cooperative basis for the purpose of marketing the products of members or other producers and turning back to them the proceeds of sales, less the necessary marketing expenses, on the basis of either the quantity or the value of the products furnished by them, or for the purpose of purchasing supplies and equipment to them at actual cost, plus necessary expenses. (Section 521)

B. Corporations organized for the exclusive purpose of holding title to property, collecting income therefrom, and turning over the entire amount thereof, less expenses, to an organization which itself is exempt under this section.

C. Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

D. Labor, agricultural, or horticultural organizations

E. Business leagues, chambers of commerce, real-estate boards, or boards of trade, not organized for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual.

F. Clubs organized and operated exclusively for pleasure, recreation, and other nonprofitable purposes, no part of the net earnigs of which inures to the benefit of any private shareholder.

G. Fraternal beneficiary societies, orders, or associations--

1. operating under the lodge system or for the exclusive benefit of the members of a fraternity itself operating under the lodge system, and

2. providing for the payment of life, sick, accident, or other benefits to the members of such society order, or association or their dependents.

H. Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such associations or their dependents, if--

1. no part of their net earnings inures (other than through such payments) to the benefit of any private shareholder or individual, and

2. 85 per cent or more of the income consists of amounts collected from members and amounts contributed to the association by the employer of the members for the sole purpose of making such payments and meeting expenses.

I. Voluntary employees' beneficiary associations providing for the payment of life, sick, accident, or other benefits to the members of such association or their dependents or their designated beneficiaries, if--

1. admission to membership in such association is limited to individuals who are officers or employees of the United States Government, and

2. no part of the net earnings of such association inures (other than through such payment) to the benefit of any private shareholder or individual.

J. Teachers' retirement fund associations of a purely local character, if--

1. no part of their net earnings inures (other than through payment of retirement benefits) to the benefit of any private shareholder or individual, and

2. the income consists solely of amounts received from public taxation, amounts received from assessments on the teaching salaries of members, and income in respect of investments.

K. Benevolent life insurance associations of a purely local character, mutual ditch or irrigation companies, mutual or cooperative telephone companies, or like organizations; but only if 85 per cent or more of the income consists of amounts collected from members for the sole purpose of meeting losses and expenses.

L. Cemetery companies owned and operated exclusively for the benefit of their members or which are not operated for profit; and any corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not necessarily incident to that purpose, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

M. Credit unions without capital stock organized and operated for mutual purposes and without profit; and corporations or associations without capital stock organized before September 1, 1951, and operated for mutual purposes and without profit for the purpose of providing reserve funds for, and insurance of, shares or deposits in--

1. domestic building and loan associations,

2. cooperative banks without capital stock organized and operated for mutual purposes and without profit, or

3. mutual savings banks not having capital stock represented by shares.

N. Mutual insurance companies or associations other than life or marine (including interinsurers and reciprocal underwriters) if the gross amount received during the taxable year from interest, dividends, rents, and premiums (including deposits and assessments) does not exceed $75,000.

It is important to keep in mind that services performed for the type of organizations hereinbefore listed are only excluded in any calendar quarter if the remuneration for such services is less than $50. If the remuneration for the services of the individual during any calendar quarter is $50 or more, all the services of the individual are included in employment during the quarter unless the organization is one which is specifically exempted by some provision of our act.

VI. Exempt Services Performed by Students

The law now provides, as a result of the 1960 amendment to the Federal Unemployment Tax Act, to which we conform, that services performed by a student who is enrolled and regularly attending classes at a school, college, or university are exempted if such student performs the services in the employ of the school, college, or university at which he is regularly attending classes.

It may be that in some instances it will be difficult for us to interpret the provisions of the income tax laws in order to administer the new provisions of our statute which have been enacted. The above information probably does not cover all situations brought about by the changes in the law, and it may become necessary later to furnish additional information concerning these changes. If this is found to be advisable and necessary, further steps will be taken to give any additional information which comes to our attention in this matter. In some instances we may have to ask the cooperation of the federal Internal Revenue Bureau with respect to interpreting the provisions relating to income taxes. We feel that we shall be able to get the cooperation of this agency if we find it necessary.

Adopted as an official Interpretation of the Commission on January 16, 1962.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

Interpretation No. 172

TO: R. F. Martin, Director

FROM: W. D. Holoman, Chief Counsel

SUBJECT: Interpretation - General Statutes Chapter 59 - Partnerships

Mr. Pearce's memorandum to Mr. Pitman dated November 23, 1960 raised certain questions with respect to partnerships. Chapter 59 is the chapter in the General Statutes dealing with partnerships. The Uniform Partnership Act is Section 59-31 through 59-84.1.

Section 59-59 provides as follows: "The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business." Section 59-60 provides as follows: "On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed." Section 59-61 provides that: "Dissolution is caused: (4) By the death of any partner, unless the partnership agreement provides otherwise; * * *"

Section 59-63 provides, in effect, that except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority for any partner to act for the partnership when the dissolution is by such act, bankruptcy, or death of a partner.

Section 59-66 provides that the dissolution of the partnership does not of itself discharge existing liability of any partner. The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

Section 59-67 provides that, unless otherwise agreed, the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner has the right to wind up the partnership affairs, provided, however, that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.

Section 59-71 deals with the liability of persons continuing the business in certain cases. In effect, this section provides that when a new partner is admitted into an existing partnership or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business. It is also provided in that section that when any partner

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retires or dies and the business of the dissolved partnership is continued with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in the partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

Section 59-74 provides, in effect, that upon the death of any member of a partnership, the surviving partner shall, within thirty days, execute before the Clerk of Superior Court a bond with sufficient surety for the faithful performance of his duties for the settlement of the partnership affairs.

Section 59-76 provides, in effect, that when a member of any partnership dies, the surviving partner, within sixty days after the death of the deceased partner, together with the personal representative of the deceased, shall make a complete inventory of the assets of the partnership, together with a schedule of the debts and liabilities thereof, a copy of which shall be retained by the surviving partner and a copy shall also be furnished to the personal representative of the deceased partner. There are provisions also which provide for the inventory when the surviving partner fails to make such inventory.

Section 59-78 provides, in effect, that every surviving partner, within thirty days after the death of the deceased partner, shall notify all persons having claims against the partnership which were in existence at the time of the death of the deceased partner, to exhibit the same to the surviving partner within twelve months from the date of the first publication of such notice.

There are certain provisions for the purchase by the surviving partner. Then Section 59-82 provides that if the surviving partner does not purchase the interest of the deceased, he shall within twelve months from the date of the first publication of the notice to creditors file with the Clerk of Superior Court an account stating his action as surviving partner and shall come to a settlement with the executor or administrator of the deceased partner.

In answer to Mr. Pearce's memorandum, I will state that the partnership is dissolved immediately upon the death of any partner. The surviving partner then has twelve months within which to settle estate as outlined above. If, by assignment or consent of the personal representative of the deceased partner, the business is continued without liquidation of the partnership affairs by the surviving partner or by a new partnership whereby the surviving partner may take in an additional partner, then the creditors of the first or dissolved partnership are also the creditors of the partnership so continuing the business. Even if there is no assignment by the personal representative of the deceased but with the consent of the personal representative of the deceased for the surviving partner to continue the business, the creditors of the person or partners continuing the business shall be as if such assignment had been made.

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In respect to Mr. Pearce's memorandum, the surviving partner or partners may continue the business without the consent of the personal representative of the deceased or without assignment, but under such circumstances only for the purpose of winding up the estate of the partnership. The surviving partner or partners, when winding up the affairs of the partnership, take possession of the partnership assets solely for the purpose of winding up the partnership, and title to the partnership property vests at once in the surviving partner and not in the personal representative of the deceased. Sherrod vs. Mayo, 156 N.C. 144.

Section 59-66 (d) provides that the individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner, but subject to the prior payment of his separate debts.

In reference to the third paragraph of Mr. Pearce's memorandum, he is correct that the heir of the deceased partner, who may by will inherit the assets of the deceased partner, will not automatically become a partner of the surviving partner or partners. The heir could become a partner by buying into the new partnership and continuing on, but even then that would not relieve the surviving partner or partners of the responsibility of settling with the estate of the deceased partner.

Mr. Pearce is correct in his statement in the fourth paragraph of his memorandum when he states that the administrator or administratrix cannot be considered in the place of the deceased partner as the title to all the property vests into the surviving partner or partners and not in the personal representative of the deceased.

In respect to the fifth paragraph of Mr. Pearce's memorandum where there is a three-way partnership and one partner dies, upon the death of that one partner the partnership is dissolved by Statute. If the surviving partners continue to operate that business only for the purpose of winding up the affairs of the three-way partnership, no new number shall be assigned, and it is not necessary to transfer reserve accounts, and the surviving partners retain the same rate only for the purpose of winding up the business. If, however, there is an assignment by a personal representative of the deceased to the surviving partners and if no assignment but by consent, the personal representative consents for the surviving partners to continue the business, not for the purpose of winding up the affairs, then a new number should be assigned and the transfer of the reserve account may be made in the usual manner. Either one of the surviving partners can sign as the transferring employer and as the acquiring employer as the surviving partner or partners by Statute is vested with the authority to wind up the business of the former three-way partnership.

In other words, if the surviving partner is merely winding up the affairs of the partnership, no new number is necessary and he retains the rate of the former partnership until the business of the partnership is liquidated.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

Interpretation No. 174

TO: R. F. Martin, Director

FROM: R. B. Overton, Attorney

SUBJECT: Interpretation - Decision Which Has Become Final May Be Amended to Correct Clerical Errors or to Make the Decision Express the Intent of the Deputy

We have Mr. Branham's memorandum to you dated October 23, 1961, pertaining to the correction of an apparent error in a decision (docket no. 2592-12). It will be noted that in such decision the Claims Deputy found as a fact that on September 10, 1960, the claimant voluntarily quit his job in order to return to college. He further made a finding that the claimant had finished college and is at this time (June 30, 1961) able and available for work. It will also be noted that the Claims Deputy, under Conclusions, concluded that:

> "This claimant's separation from his last employment was voluntary and without good cause attributable to the employer, Section 96-14 (1) of the law."

Thereafter under the decision the Claims Deputy entered the following:

> "No disqualification for reason of the claimant's separation, from his last employment."

Under the facts as found and the law as written, it is apparent that the decision rendered by the Claims Deputy was inadvertently entered, as an examination of his notes entered at the time of the hearing discloses that it was his intention to disqualify the claimant for four weeks, June 20, 1961, through July 17, 1961, as such notations entered on the notice of the hearing where the deputy made notes as the hearing progressed. Under these facts it is clearly within the prerogative of the deputy to correct his decision, even though the appeal period has expired.

In McIntosh's North Carolina Practice and Procedure it is stated:

> " * * * A final judgment ends the proceeding as to the matter adjudicated and is presumed to be correct, but where there are clerical errors, or the judgment entered does not express correctly the action of the court, it may be corrected to make the record speak the truth. It is the duty of the court to see that the record correctly sets forth the action taken, and this it may do without regard to the effect upon the rights of the parties or of third persons. The correction of such errors is not limited to the term of court, nor within a year, but may be done at any time, upon motion, or the court may of its own motion make the corrections when such defects appear. * * * ."

Justice Connor in the case of Ricaud v. Alderman, 132 N. C. (64) used this language:

> "This motion is properly made, and is a direct attack upon the integrity of the judgment. It is, in fact, a motion to correct the record so that it may speak the truth. This power is inherent in every court, and its exercise has been so frequently approved by this Court that it would seem unnecessary to cite authorities to sustain it in this case. * * * ."

We also find in the case of Cureton v. Garrison, 111 N. C. (271), Justice Burwell in a case where the jury had answered an issue "no" and in which the judge inadvertently entered judgment contrary to the issue as answered by the jury, the Court said:

> "We think that his Honor had power to make the record express truly the ruling of the court and the action taken in the cause, and to hear evidence for the purpose of ascertaining the facts, and if fully satisfied that the rulings of the former judge were not correctly put in writing, and that the record does not truly express his judgment on account of some inadvertence--that he meant to adjudge that the plaintiffs owned what they claimed, to wit, six-sevenths of the tract, and that, by some clerical error, he was made to say that plaintiffs own the entire tract--his Honor had power to so amend the judgment at Fall Term, 1890, as to make it speak the truth. Brooks v. Stephens, 100 N. C., 297, and cases there cited. We think, therefore, that there was error in holding that the matter was res adjudicata, and we remand the cause, that the record may be so amended as to make it truly express the judgment of the court at Fall Term, 1890, if, upon investigation, it is found that there was a mistake made in putting that judgment into writing and on the record."

We, therefore, are of the opinion that the Claims Deputy, upon his own motion, should render a corrected decision in this case, setting forth the amount of disqualification to be imposed by reason of the voluntary separation of the claimant from employment without good cause attributable to the employer, as under the statutes it is mandatory that an individual who voluntarily separates from employment without good cause attributable to his employer must be disqualified for not less than four nor more than twelve weeks.

Adopted as an official Interpretation of the Commission on June 12, 1962.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

Interpretation No. 177

TO: R. F. Martin, Director

FROM: W. D. Holoman, Chief Counsel

RE: Interpretation of Section 96-8 (6) of the Employment Security Law of North Carolina - Services Preformed Under Contract by One Employing Unit for Another Employing Unit

The question has been raised in respect to the proper interpretation to be placed upon services being performed by the employees of one employing unit under contract to furnish services to another employing unit.

Generally speaking, where one employing unit has an oral or written contract, or an agreement with another employing unit whereby it will furnish services to the second employing unit which are necessary to the operations of the second employing unit, and under the contract or agreement the first employing unit agrees to furnish such services and carries the individuals who perform such services on its payroll, and retains the right to direct and control those employees performing the services, such employees should be considered in the employ of the first employing unit which agreed to furnish such services.

This is a general statement and there will be shades of differences in different cases which may arise and each case must stand on its own. It is impossible to give a hard and fast rule in cases of this nature because of the shades of differences which may arise, but what has been said in the preceding paragraph may be used as a guide for our field forces in making liability determinations, as well as determining who shall pay contributions on the earnings of such individuals.

Adopted as an official Interpretation of the Commission on June 26, 1962.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 184

TO: R. F. Martin, Director

FROM: R. B. Billings, Attorney

RE: Interpretation of Section 96-8 (6) g 7 of the Employment Security Law of North Carolina - Employment of Stepson by Stepfather

The question has been raised as to whether a minor stepson in the employ of his stepfather is engaged in exempt employment under Section 96-8 (6) g 7. This provision reads as follows:

> "The term 'employment' shall not include:
>
> > "7. Service performed by an individual in the employ of his son, daughter, or spouse, and service performed by a child under the age of twenty-one in the employ of his father or mother;"

Should the statute be interpreted to mean that the exemption applies only in those cases where a child under the age of 21 is employed by his natural father or mother?

It has been ruled by the Attorney General that the exemption does not apply to services performed by a father or mother employed by an administratrix of a son's estate. In his ruling the Attorney General stated:

> "* * * To my mind the statute intended to exempt this family employment as long as the individuals were alive and in close personal relationship with each other. It was not intended to carry this exemption beyond the boundaries of death and over into the field of a symbol or legal fiction such as a personal representative who may or may not be a relative. * * *" (Interpretation No. 118)

In the present case the exemption is not carried over into a field of a symbol or legal fiction. The administratrix or personal representative in the capacity as such has no family relationship upon which any exempt services could be based. In the ruling referred to it was also pointed out that under the law the legal representative of the deceased person was a distinct employing unit. This was also true with respect to the ruling which was made concerning the case in which the father and mother worked for a partnership composed of two sons. Here the partnership was considered as a separate legal entity and a distinct employing unit, and the exemption was held not to apply in such case.

The services exempted under the section referred to, Section 96-8 (6) g 7, are based upon and are excepted from employment because of the existence of a family relationship between the employee and the individual employing him. In construing the Federal Unemployment Tax Act concerning the same type of exemption contained in the Act, the Bureau of Internal Revenue has held such services to be exempt. We quote from the ruling of the Internal Revenue Bureau as follows:

> "Services performed by a foster parent in the employ of his or her foster child, by a stepparent in the employ of his or her stepchild, and by a child under the age of 21 in the employ of his or her foster parent or stepparent, are excepted." S. S. T. 313 (CB 1938-2, 335).

The Bureau of Internal Revenue has limited the exemption, however, by a ruling, E. M. T.436 (CB 1942-2, 209), with respect to a father's services for the administratrix of his son's estate. Such services were held not exempt from the tax provisions on the principle that, generally, any services by employees after the employer's death are performed in the employ of the employer's estate which is a new employing unit. It does not appear, therefore, that the opinion of the Attorney General, Interpretation No. 118, is in conflict with the ruling of the Internal Revenue Bureau insofar as a father's services for the administratrix of his son's estate are concerned.

The basis of the exemption is that it is a family exemption and intended to allow a parent, foster or otherwise, to engage the services of a child whom he or she as a general rule supports, either voluntarily or by a legal obligation, without the further obligation of paying unemployment compensation contributions for any reimbursement that may be given for the services. This is the view taken by the Montana agency with respect to that type of employment.

The Unemployment Compensation Division in the State of North Dakota in an interpretative opinion relating to the same type of services stated the following:

> "The relationship of a minor stepchild to its stepfather is not essentially different from a relationship of a child to his normal parent. It can be safely assumed that in most cases a stepfather provides support for his stepchild much as he would for a natural child. Under the circumstances, it is proper for him to utilize the services of such stepchild. Services performed by a minor stepchild for his stepfather do not constitute employment under the terms of the statute."

It is our opinion that the services of a stepchild performed for a stepfather should not be considered as employment, and such services, in our opinion, are exempt under Section 96-8 (6) g 7, and that such exemption would also apply to services performed by an adopted child or foster child in the employ of his stepfather or stepmother.

Adopted as an official Interpretation of the Commission on May 21, 1963.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 187

TO: R. F. Martin, Director

FROM: R. B. Billings, Attorney

RE: Interpretation of General Statutes 59-1 to 59-30 Inclusive - Limited Partnerships

We received a memorandum on January 28, 1964, in which it is requested that we give an outline which would assist the field representatives in determining whether a limited partnership exists in certain instances.

Under the provisions of General Statutes 59-1 through 59-30 and various subsections thereunder is set forth the Uniform Limited Partnership Act. It would be unduly burdensome and possibly confusing to attempt to go into every subsection or phase of a limited partnership as set forth in the statutes. We are, therefore, making reference only to certain of the more pertinent provisions.

A limited partnership is defined in the act as follows:

> "A limited partnership is a partnership formed by two or more persons under the provisions of § 59-2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership." (G. S. 59-1)

It can be seen, therefore, that one of the basic characteristics of the limited partner is that he is not bound by the obligations of the partnership and is liable only to the extent of the contributions which he makes to the business. The act further provides that a limited partner's contribution may be cash or other property, but not services. (G. S. 59-4)

G. S. 59-2 relates to the formation of a limited partnership and sets forth the requirements necessary to be fulfilled in order that a limited partnership be brought into existence. This section reads as follows:

> "(a) Two or more persons desiring to form a limited partnership shall
>
> "(1) Sign and swear to a certificate which shall state
>
> a. The name of the partnership,
> b. The character of the business,
> c. The location of the principal place of business,

d. The name and place of residence of each member; general and limited partners being respectively designated,
e. The term for which the partnership is to exist,
f. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,
g. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,
h. The time, if agreed upon, when the contribution of each limited partner is to be returned,
i. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,
j. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,
k. The right, if given, of the partners to admit additional limited partners,
l. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,
m. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement, or insanity of a general partner, and
n. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

"(2) File for record the certificate in the office of the clerk of the superior court of the county where the principal place of business is located according to the statement in such certificate.

"(b) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of subsection (a)."

The act also sets forth the rights of the limited partner. In this connection the limited partner has the same rights as a general partner to (1) have the partnership books kept at the principal place of business of the partnership and at all times to inspect and copy any of them, (2) have on demand true and full information of all things affecting the partnership and a formal account of partnership affairs whenever circumstances render it just and reasonable, and (3) have dissolution and winding up by decree of court.

The limited partner shall also have the right to receive a share of the profits or other compensation by way of income and to the return of his contribution as provided under certain conditions. (G. S. 59-10)

The act further sets forth that a limited partner's interest in the partnership is personal property. (G. S. 59-18)

The law further provides that the surname of a limited partner shall not appear in the partnership name unless it is also the surname of a general partner, or that prior to the time when the limited partner became such, the business had been carried on under a name in which his surname appeared. It is also provided that if a limited partner's name appears in a partnership name contrary to the provisions of the act, he is liable as a general partner to the partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner. (G. S. 59-5)

It is well to call to the attention of the field representatives that one significant characteristic of the limited partner is that he does not have any right to manage, control, or bind the partnership. These functions are those possessed by a general partner. <u>If a limited partner is performing service for remuneration, he is in employment and is an employee.</u>

There are other indicia relating to the creation of limited partnerships. It is felt, however, that the above information may be of some benefit in determining whether a particular relationship is that of a limited partnership. These are the types of cases which are very difficult in some instances to determine. It is suggested, therefore, in all cases where there is any doubt as to the existence of a limited partnership that the facts be assembled and forwarded along with any written contracts to the central office. We than can give the field representatives the benefit of our thinking as to whether there is a limited partnership involved.

Adopted as an official Interpretation of the Commission on February 11, 1964.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 190

TO: R. F. Martin, Director

FROM: W. D. Holoman, Chief Counsel

RE: Interpretation of the Employment Security Law of North Carolina - Section 96-15 (b) (1), Redetermination of an Initial Monetary Determination

With respect to your request for an interpretation of Section 96-15 (b) (1) of the Employment Security Law, it will be noted that it deals only with initial or monetary determinations, and it does not deal with any other kind of determinations; therefore, in answer to the first question, the one-year statute of limitations imposed by Section 96-15 (b) (1) will apply and no redetermination may be made after one year. This is because such initial determination was a monetary determination as is contemplated by such section. Irrespective of this section, and even though a year has expired and no redetermination can be made, and it is determined that we have erroneously or improperly paid a claimant benefits to which he was not entitled, we should not charge such to the employer's account as this section deals only with initial determinations and not with the charging provisions of the law.

In answer to the second question, it appears that the one-year statute of limitations imposed by Section 96-15 (b) (1) would apply to wages erroneously credited to an individual's account as this would be a monetary or initial determination contemplated by such section.

In answer to the third question, the one-year statute of limitations will likewise apply to a monetary determination of eligibility even though the determination of benefit status was made as a result of a non-disclosure or misrepresentation of a material fact as the determination referred to is an initial or monetary determination.

The one-year statute of limitations contained in Section 96-15 (b) (1) will not apply if it appears that a claimant willfully and knowingly made a non-disclosure or misrepresentation of a material fact, as this would constitute fraud. This one-year statute does not apply in cases other than those involving an initial or monetary determination.

Adopted as an official Interpretation of the Commission on December 1, 1964.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 205

TO: R. Fuller Martin, Director

FROM: D. G. Ball, Chief Counsel

RE: Interpretation of Section 96-15 (b) (2) of the Employment Security Law of North Carolina and Sections 1-593 and 103-4 of the General Statutes - Effect of Legal Holidays upon Appeal Period - Interpretation No. 161

We have received a request for an interpretation concerning the computation of time in cases where an appeal is filed late and the last day of the appeal period is a holiday. Reference in the memorandums which we have received has been made to Sections 103-4 and 103-5 of the General Statutes. Section 103-5 is not the provision applicable to computation of time with respect to the filing of appeals under the Employment Security Law. The question is raised primarily with respect to appeals before the Claims Deputy, and for that reason we are referring to Section 96-15 (b) (2) relating to such appeals. It is as follows:

> " * * * Unless the claimant or any such interested party, within five calendar days after such notification was mailed to his last known address, files an appeal from such decision, such decision shall be final and benefits shall be paid or denied in accordance therewith, and for the purpose of this subsection the Commission shall be deemed an interested party: Provided, however, that on claims filed outside of this state, the claimant or such interested party, shall have ten calendar days from the date of mailing such notification to his last known address in which to file notice of appeal. * * *"

It is to be noted that the time within which the appeal is to be made is provided in the statute; therefore, in our opinion, General Statutes, Chapter I, Section 593, is applicable in computing the time within which the appeal shall be filed. This section reads as follows:

> "The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Saturday, Sunday, or a legal holiday, it must be excluded." (Underscoring ours.)

Applying this section to appeals from decisions of the Claims Deputy, it is apparent that the day upon which the decision is mailed to the parties is to be excluded in counting the number of days which have elapsed in the period allowed from the appeal as set forth in the law. If the last day of the period falls on Saturday, Sunday, or is a legal holiday, then it must also be excluded in the computation of the time as well as the first day. This means that an appeal filed on the next day following a Saturday, Sunday, or a legal holiday would be within the time allowed by the statute, provided the Saturday, Sunday, or legal holiday is the last day of the period provided in the statute for filing the appeal.

No difficulty is involved when the last day of the period for filing appeals falls on Saturday or Sunday. There is, however, some difficulty in determining when to permit the filing on the day following a legal holiday for the reason that there is some

confusion as to what is meant by a legal holiday. In our opinion the statute in Section 103-4 specifically sets forth those days which are to be considered legal holidays in this state, and we are of the opinion that these are the days which are to be considered as legal holidays in applying Section 1-593 which has been quoted hereinbefore. Under Section 103-4 it is provided as follows:

" (a) The following are declared to be legal public holidays:
(1) New Year's Day, January 1
(2) Robert E. Lee's birthday, January 19
(3) Washington's birthday, the third Monday in February
(4) Anniversary of signing of Halifax Resolves, April 12
(5) Confederate Memorial Day, May 10 (supplied -- See proviso following (15).)
(6) Anniversary of Mecklenburg Declaration of Independence, May 20
(7) Memorial Day, the last Monday in May (supplied--See proviso following (15).)
(8) Easter Monday (supplied--See proviso following (15).)
(9) Independence Day, July 4
(10) Labor Day, first Monday in September
(11) Columbus Day, the second Monday in October
(12) Veterans Day, the fourth Monday in October
(13) Tuesday after the first Monday in November in years in which a general election is held.
(14) Thanksgiving Day, the fourth Thursday in November
(15) Christmas Day, December 25

"Provided that Easter Monday and Memorial Day, the last Monday in May, shall be a holiday for all state and national banks only.

"(b) Whenever any public holiday shall fall upon Sunday, the Monday following shall be a public holiday."

It is our opinion, therefore, that we should consider any appeals as having been made within the time permitted by the statute if such appeals are made on the day following any of the above-specified days when any of such days is the last day of the period allowed for the filing of the appeal. If the last day within which the appeal is to be made falls on a Saturday, it follows that the next day, Sunday, is also excluded from the computation and that if the appeal is postmarked on the following Monday, it would be within the time permitted by the statute. If the particular Monday is a legal holiday, the appeal, if postmarked on Tuesday, would be within the time permitted by the statute. As to Easter Monday and Memorial Day, the last Monday in May, however, these days shall be considered as legal holidays only in those cases in which state and national banks are involved in the filing of late appeals since the statute specifically provides that as to these particular days they shall be holidays only for all state and national banks.

Adopted as an official Interpretation of the Commission on February 2, 1971.

Cancels and replaces Interpretation No. 161, adopted July 12, 1960.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 207

TO: R. Fuller Martin, Director

FROM: D. G. Ball, Chief Counsel

RE: Interpretation of the Employment Security Law of North Carolina (1) Section 96-13 (3), Commission-Approved Training, and (2) Section 96-18 (f), Larceny and Embezzlement

The 1971 amendments provide that they shall be in full force and effect upon ratification. The laws were ratified on June 25, 1971. Thus this is the effective date of such laws.

In our opinion, any individual now attending a training program or vocational school which has been approved by the Commission and who heretofore has been held unavailable for work where he was receiving a training allowance is eligible for benefits as of June 25, 1971, under section 96-13 (3) (1971 amendment), nothing else appearing. However, any unemployment insurance benefits payable would be reduced by the amount of any such training allowance.

The deletion of the penalty under section 96-18 (f) (also effective June 25, 1971) has the effect or is in the nature of a remedial statute and has a retroactive connotation. Therefore, we are of the opinion that acts of larceny or embezzlement committed prior to the effective date of the amendment do not create an issue after the effective date of the amendment.

I have conferred with Mr. Ralph Moody, Deputy Attorney General, about these matters; and as a result of the conference, I have reached the conclusions set out above.

Adopted as an official Interpretation by the Commission on July 27, 1971.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 220

TO: R. Fuller Martin, Director

FROM: D. G. Ball, Chief Counsel

RE: Interpretation of Sections 96-8 (5) k., and 96-8 (6) g. 17. of the Employment Security Law of North Carolina - Orphanages

Inquiry has been made as to whether an orphanage supported and operated by a religious denomination would be exempt from coverage under the Employment Security Law under the 1971 amendments.

Information as to whether such orphanage was exempt from income tax under Section 501 (a) of the Internal Revenue Code of 1954 was not available.

Subparagraph (i) of Section 96-8 (6) g. 17. provides that the term "employment" shall not include:

> "17. For the purposes of paragraphs j and k (of subdivision (5) of this section), the term 'employment' does not apply to services performed (i) in the employ of a church or convention or association of churches, or an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches;"
>
> "Subparagraph (i) . --As used in this subparagraph, the word 'church' is used in its limited sense and is synonymous with an individual 'house of worship' maintained by a particular congregation. 'Convention' and 'association' refer to formal and informal groups of churches, clergy or laymen, whether of a continuing nature or meeting periodically, whose purpose is primarily concerned with religious and denominational matters of the group or groups represented. Any service by an individual for a church, convention or association of churches is excluded from coverage. However, the exclusion does not apply to service performed for an organization which may be religious in orientation unless it is operated primarily for religious purposes and is operated, supervised, controlled or principally supported by a church (or convention or association of churches). Thus, the service of the janitor of a church is excluded, but the service of a janitor for a separately incorporated college, although it may be church related, is covered. Service for a college devoted primarily to the preparation of students for the ministry is exempt, as is service for a novitiate or a house of study

> training candidates to become members of religious orders. On the other hand, a church related (separately incorporated) charitable organization (such as an orphanage or a home for the aged) is not considered under this subparagraph, to be operated primarily for religious purposes."
> (Reference - Draft Legislation, Public Law 91-373, H. R. 14705, Explanatory Commentary, U. S. Department of Labor, Manpower Administration, Unemployment Insurance Service, page 27)

Thus, it can readily be seen that the orphanage would not be exempt from coverage under the Employment Security Law effective January 1, 1972, in that it is not considered to be operated primarily for religious purposes.

If an orphanage can meet the test as set out in G. S. 96-8 (5) k., then it would be covered if it had as many as four or more individuals in employment for 20 weeks or more in a calendar year. Otherwise, G. S. 96-8 (5) a. would apply making coverage if the employing unit had one or more for 20 weeks, etc. (See Interpretation No. 208.)

Adopted as an official Interpretation of the Commission on November 16, 1971.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 221

TO: R. Fuller Martin, Director

FROM: D. G. Ball, Chief Counsel

RE: Interpretation of Sections 96-8 (5) k, 96-8 (5) a., and 96-8 (6) g. 17. (iv of the Employment Security Law of North Carolina - Vocational Workshop - Rehabilitation Facility

X Corporation, a charitable organization, operates a vocational workshop for the purpose of carrying on a program of rehabilitation for handicapped workers. The corporation provides such individuals with remunerative employment. The corporation has a staff of eleven individuals who operate or administer the rehabilitation program. It appears that the Federal, city, and county governments make funds available to the corporation for its operation besides the money received from sales and contract work.

It is not shown whether the nonprofit corporation is exempt from income tax under Section 501 (a) of the Internal Revenue Code of 1954. However, it appears that this type of operation would be exempt from Federal income tax. If so, liability would be established under G. S. 96-8 (5) k. If not, liability would attach under G. S. 96-8 (5) a., because the corporation has eleven regular employees on which contributions must be paid.

The services performed by the handicapped employees are exempt under G. S. 96-8 (6) g. 17. (iv).

Adopted as an official Interpretation of the Commission on November 23, 1971

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 231

TO: R. F. Martin, Director

FROM: D. G. Ball, Chief Counsel

RE: Interpretation of the Employment Security Law of North Carolina - Nonprofit Organizations: (1) Sections 96-8 (5) a, 96-8 (5) k, and 96-11 (c) (1) - Employer and
(2) Section 96-9 (d) - Method of Financing

1. Question: Can a nonprofit organization held liable under 96-8 (5) a elect to make payments by way of reimbursement in lieu of contributions?

Answer: No. G. S. 96-9 (d) provides that for the purposes of this paragraph a nonprofit organization is an organization described in Section 501 (c) (3) of the Internal Revenue Code of 1954 (see Interpretation 208 for detailed explanation as to coverage). If the nonprofit organization meets the test and is covered under G. S. 96-8 (5) k, then under G. S. 96-9 (d) (1) b, it may elect to make payments by way of reimbursement in lieu of contributions.

If a "nonprofit organization" does not meet the test for coverage under G. S. 96-8 (5) k, then it becomes an "ordinary" employing unit and, under G. S. 96-8 (5) a, has no election and must pay contributions. We are assuming, of course, that the employing unit had within the current or preceding calendar year one or more employees in 20 different calendar weeks or more or had in any calendar quarter in either the current or preceding calendar year paid for services in employment wages of $1,500 or more.

2. Question: Can a nonprofit organization failing to meet the conditions of 96-8 (5) k be held liable under 96-8 (5) a?

Answer: Yes. (See Interpretation No. 208 and answer to No. 1 above.)

3. Question: Can a nonprofit organization which meets the conditions of 96-8 (5) k, but does not have as many as 4 or more individuals in employment in 20 calendar weeks or more voluntarily elect coverage under G. S. 96-11 (c) (1)?

Answer: Yes. A nonprofit organization meeting the conditions of G. S. 96-8 (5) k, but not having as many as 4 or more employees in 20 different weeks in the current or preceding calendar year, may elect coverage under G. S. 96-11 (c) (1) with written approval of such election by the Commission.

It should be noted that under G. S. 96-11 (c) (3) any political subdivision of the state operating a hospital or institution of higher education may elect coverage under the Act without having to have the approval of the Commission. If election is made, the statute requires payments in lieu of

contributions. It should also be noted that all such hospitals or institutions of higher education owned and operated by the political subdivision (city or county) of the state must be covered. For example, a city operating two or more hospitals cannot voluntarily elect to cover just one of its hospitals.

4. Question: Can an employer voluntarily liable under No. 3 above elect to make payments by way of reimbursement?

Answer: No. G. S. 96-11 (c) (1) provides that any employing unit not otherwise subject to the Employment Security Law may elect coverage with the consent of the Commission, and such employing unit becomes an employer subject thereto to the same extent as all other employers. We are of the opinion that this means that the employing unit must pay the contributions at the standard rate in the same manner as "all other employers." Therefore, under this circumstance, there is no choice.

Adopted as an official Interpretation of the Commission on December 21, 1971.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 232

TO: R. F. Martin, Director

FROM: D. G. Ball, Chief Counsel

RE: Interpretation of Sections 96-8 (5) k and 96-8 (6) g 17 (v) of the Employment Security Law of North Carolina - Nonprofit Organization and Exempt Employment

X Corporation is a nonprofit organization as set out in Section 501 (c) (3) and exempt from income tax under the Internal Revenue Code of 1954 (501 (a)). The purpose is to maintain a work-training program for school dropouts, age range 16 to 17. The corporation is funded by the U. S. Department of Labor and started operations in March, 1966. It appears that there are five staff members employed by the corporation to operate or administer the program.

We are of the opinion that the corporation will be subject to the act under G. S. 96-8 (5) k, effective January 1, 1972, if it had four or more employees (administrative staff) in twenty weeks or more in 1971. The individuals being served who receive remuneration for their services in the work-training program are exempt under G. S. 96-8 (6) g 17 (v).

Adopted as an official Interpretation of the Commission on December 28, 1971.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 237

TO: R. FULLER MARTIN, DIRECTOR

FROM: D. G. Ball, Chief Counsel

RE: Interpretation of Sections 96-11 (c) (1) and 96-10 (i) of the Employment Security Law of North Carolina - Request by Employer X Held Liable under the Federal Unemployment Tax Act for Eight Years That He Be Allowed to Volunteer Coverage under the Employment Security Law for All Eight Years in Order to Get Tax Credit Beyond the Five-Year Statute of Limitations

Employer X has had four employees for 20 weeks or more in each year since 1964. It was first "discovered" in 1972 that he was liable. Under the Federal Unemployment Tax Act, the Internal Revenue Service is going back eight years, 1964 through 1971. X had no employees whose services did not constitute employment as defined by the act. X desires to pay the Commission the tax for the years 1964 through 1971 so that he can get credit from the Internal Revenue Service for all eight years. To do this, it is his desire to volunteer coverage for the years 1964, 1965, 1966.

We are constrained to say that employer X cannot volunteer coverage under G. S. 96-11 (c) (1) because this statute provides in part that any employing unit not otherwise subject to this chapter may elect coverage. Since the employer was "otherwise subject to this chapter," he cannot make a voluntary election. Therefore, Regulation 1.213 relative to voluntary elector would not be applicable with respect to an effective date.

By way of observation, G. S. 96-10 (i) is a 5-year statute of limitations with respect to the collection of unpaid contributions or establishment of liability. This section provides that no suit or proceeding for the purpose of establishing liability may be begun with respect to any period occurring more than five years prior to the first day of January of the year in which such suit or proceeding is instituted, in the absence of fraud.

The statute further provides that a proceeding shall have been instituted or begun upon the date of issuance of an order by the Chairman or upon the date that notice and demand for payment is mailed. In interpreting a statute, we look to the intent of the Legislature. We think that the intent was to bar the Commission from any action toward establishing liability or collecting contributions after five years as the case may be.

When employer X has been liable for eight years, if such fact had not been brought to light, it is our thinking that we should not go beyond the 5-year limit with respect to establishing liability or for collecting contributions.

We do not think that X could volunteer coverage and pay the tax for the three years prior to the 5-year limit and have such tax applied for the purpose of

getting tax credit under the Federal Unemployment Tax Act. However, it could make a voluntary contribution under G. S. 96-9 (5) (2) g, but such contribution could not be designated as payment for any particular period.

Adopted as an official Interpretation of the Commission on February 15, 1972.

Cancels and replaces Interpretation No. 236, adopted January 25, 1972.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 239

TO: R. Fuller Martin, Director

FROM: D. G. Ball, Chief Counsel

RE: Interpretation of Section 96-10 (b) (1) of the Employment Security Law of North Carolina - Collection of Contributions Where Employer Does Not Protest or Request a Hearing Within Apt Time

As a result of an investigation by a Field Representative, we administratively held X liable. We notified him by letter on December 20, 1971, that he was liable effective January 1, 1969. On December 31, 1971, we issued a Notice and Demand for Payment of contributions due for 1969 and 1970, which was received by X on January 3, 1972. Expiration date was January 10, 1972. On February 2, 1972, we received a letter from X protesting the tax assessment and requesting a hearing.

Form NCUI 649, Notice and Demand for Payment, sets out that unless a protest in writing or request for hearing is made within 10 days, the assessment shall become final and the Commission will docket a certificate in the office of the Clerk of Superior Court in the county in which X carries on business operations. Not having heard from the employer, we did docket a judgment on January 13, 1972.

G. S. 96-10 (b) (1) provides in part that if any contribution imposed by this chapter, or any portion thereof, and/or penalties duly provided for the non-payment thereof, shall not be paid within 30 days after the same become due and payable, and after due notice and reasonable opportunity for hearing, the Commission, under the hand of its chairman, may certify the same to the clerk of the superior court of the county in which the delinquent resides or has property, and additional copies of said certificate for each county in which the Commission has reason to believe such delinquent has property located. Such certificate and/or copies thereof so forwarded to the clerk of the superior court shall immediately be docketed and indexed on the cross index of judgments, and from the date of such docketing shall constitute a preferred lien upon any property which said delinquent may own in said county, with the same force and effect as a judgment rendered by the superior court.

Contributions in this case were first due and payable on July 31, 1969. The employer was given notice that he could protest the tax assessment and have a hearing to determine his status. Upon his failure we docketed a judgment covering 1969 and 1970 based upon an administrative determination which was not protested in apt time. The certificate so docketed by statute has the same force and effect as a judgment rendered by the Superior Court. Because of the procedure in cases of this nature as set out in the statute, this matter has become final as to the status of the employer during 1969 and 1970.

The employer feels that one of the persons administratively determined by the Commission to be an employee is actually an independent contractor and should not be considered; therefore, he desires a hearing to determine his status. Since the certificate or judgment covers the employer's operations for 1969 and 1970 only, there is a possibility that the status of the individual in question has changed since that time.

When we get a case of this kind in the future, it is suggested that we inform the employer that the matter is final with respect to the years or periods covered by the judgment, but that we will afford him an opportunity for a hearing on future periods or years if he will make his wishes known.

Adopted as an official Interpretation of the Commission on February 22, 1972.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 248

TO: R. Fuller Martin, Director

FROM: Garland D. Crenshaw, Attorney

RE: (ILA) International Longshoremen Association, Guaranteed Annual Income Plan (GAI) - South Atlantic Labor Contract

As part of a labor contract negotiated between the ILA Union and the stevedoring companies within the South Atlantic ILA region, a plan has been devised wherein eligible workers will be guaranteed 1,000 hours work annually (or 1,000 hours of pay if work is not available) beginning February 1, 1973. An eligible member is defined as one who worked as much as 700 hours during the preceding contract year. The minimum hourly pay involved is $5.55 per hour (as of February 1973). The plan is called a Guaranteed Annual Income Plan. Each eligible member would be entitled to a maximum of $5,550 annually which figures out to approximately $106 per week. Certain benefits, including unemployment insurance, are deducted from the amounts to which the eligible members would otherwise be entitled. Also, the "guaranteed" amount can be further reduced under certain prescribed circumstances; for example, failing to report to work when work is available. There are, I believe, about six other such factors. This plan obviously is not a supplemental unemployment benefit plan inasmuch as eligibility for state unemployment insurance benefits is not a condition precedent to the members' entitlement to GAI payments.

The Plan is financed as follows: The stevedoring (shipping) companies are assessed contributions based upon tonnage and type of cargo moved, which contributions are paid over into a trust fund jointly administered by a number of trustees, half of whom represent the companies, half of whom represent the union. The GAI payments are, of course, paid from this trust fund to the eligible members.

As stated heretofore, the plan guarantees 1,000 hours of work (or pay) annually to each eligible member, which breaks down to 250 hours per quarter. The eligible member, upon application, may receive payment of up to 75% of the guaranteed amount at the close of each calendar quarter (or a reasonable time thereafter). The Plan contains a reimbursement provision in case of an overpayment to a member. Final settlement is made at the end of the contract year. In actual practice then, the member receives a GAI payment only four

times a year at the most.

In a memo of February 27, 1973, it was requested that I obtain an IRS ruling on the "Plan." IRS could not, of course, under the law oblige us. They did, however, send us a copy of Revenue Ruling 73-22 as the same appears in Internal Revenue Bulletin 1973-2, page 15. In that case, somewhat similar to the plan in question here, the IRS ruled that the guaranteed annual wage plan in question was not a supplemental unemployment compensation plan as described in Revenue Ruling 56-249, and Revenue Ruling 60-330; that accordingly, GAI payments made to eligible members were held to be "wages" for purposes of FICA, FUTA, and income tax.

It should be pointed out that in Revenue Ruling 73-22, the GAI Plan was administered by an association of employers. In our case, the plan is administered jointly by equal numbers of trustees representing both the union and the shipping companies. I do not believe that the distinction is significant, however, because the basic purpose of the plan in each case is to provide the employees with a guaranteed annual income. The IRS so stated in Revenue Ruling 73-22.

The following specific questions have been posed:

1. Would payments by employers into the trust fund for payments under the plan be taxable?

   I concur with the conclusions that the payments into the fund by the employers are not taxable. It is my opinion that payments from the fund to the employees are taxable as "wages." As stated in the IRS rulings, it matters not that the payments are disbursed by an association of employers rather than individual employers. That the employers have chosen the device of a trust fund administered by trustees representing both themselves and the union to honor the provisions of the labor contract seems not significant. The basic purpose remains that of providing a guaranteed annual income to its employees.

2. Under the plan, would longshoremen be eligible for unemployment insurance benefits since it is my understanding they must report daily and be available for longshore work continuously?

   It is my understanding that they must shape up in the morning just prior to working hours and again after the lunch hour. I do not know whether the "continuous availability" refers to the

making of the twice-daily "shapes" or whether they are required to stand around the docks all day. In either event, it seems to me that if checking in, or making the "shape", prevents his being available to take other work in the area at the time when such workday normally begins, he could not be considered "available for work." However, such would be a finding of fact to be resolved in each case. Certainly, if he is required to stand around the docks all day, he could not be considered "available." It is my understanding that in hearings before the Claims Deputy, some of these individuals have testified that they have to be at "shape" for somewhere between one and two hours each morning.

3. Can we provide New York Shipping Association with the amount of unemployment insurance benefits paid so such benefits may be deducted from payments under the plan?

   The Chairman has previously ruled that we cannot supply such information; the ruling was based not only on the "nondisclosure" provisions of our Law but also because such would not have been administratively feasible or desirable.

Adopted as an Official Interpreation of the Commission on May 1, 1973.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 251

TO: John R. Branham, Assistant Director (UI)

FROM: Garland D. Crenshaw, Attorney

RE: Interpretation of Section 96-8 (13) b of the Employment Security Law of North Carolina - Annuity Plan

> "Wages" shall not include any payment made to, or on behalf of, an employee or his beneficiary from or to a trust which qualifies under the conditions set forth in section 401 (a) (1) and (2) of the Internal Revenue Code of 1954 or under or to an annuity plan which at the time of such payment meets the requirements of section 401 (a) (3), (4), (5), and (6) of such code and exempt from tax under section 501 (a) of such code at the time of such payment, unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as beneficiary of the trust."

We received a letter from Employer "A," dated September 28, 1973, raising several questions relating to the meaning of the subject subsection of the Law.

The writer states that an employer has several classes of workers who have payments deducted from their wages and paid into a section 401 (a) annuity fund, said fund being exempt from income taxes under section 501 (a) of the Internal Revenue Code.

The writer asks if the payments deducted from the workers' wages and paid into the annuity fund as aforesaid are excluded from the definition of "wages" under the provisions of G. S. 96-8 (13) b for the purposes of the North Carolina Employment Security Law. I have concluded that the payments made by the workers cannot be excluded from the definition of "wages," that each worker's full wages are taxable up to the $4200 limitation.

G. S. 96-8 (13) b contemplates that the "payments" to be excludable from "wages" be made <u>by the employer</u> (not an employee) into a trust or an annuity for the benefit of his employees; also that such payments from such an annuity or qualified trust made to an employee shall not be considered "wages" to the beneficiary. The reference in the subsection to a 501 (a) exemption refers to the income tax status of the <u>trust</u> or <u>annuity fund</u> itself, not to the workers' employer's status. For the purposes of G. S. 96-8 (13) b, it would not matter whether the <u>employer</u> was a 501 (c) (3) organization.

The purpose of the General Assembly in enacting G. S. 96-8 (13) b was to bring our state law into conformity with the FUTA.

Section 401 (a) of the Internal Revenue Code of 1954, as amended, (26 USCA 401) describes the requirements for qualified pension, profit-sharing, and stock bonus plans (trusts and annuities). In McClintock-Trunkey Co. v. C. I. R., 217 F. 2d 329, the federal court said that the purpose of this section, establishing requirements to qualify for exemption of contributions of employer to employees' trust or annuity plan, is to insure that profit-sharing plans, etc., be operated for welfare of employees in general. There appears to be no difference between payment to a qualified trust described in section 401 (a) and a plan described in section 403 (a).

The cross references of section 401, "Payments under section not wages for purposes of--Federal Unemployment Tax Act, see section 3306(b)(5) of this title."

Section 3306(b)(5) reads as follows:

> "Wages--For purposes of this chapter, the term'wages' means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include--
>
> "(5) any payment made to, or on behalf of, an employee or his beneficiary--
>
> (A) from or to a trust described in section 401 (a) which is exempt from tax under section 501 (a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust, or
>
> (B) under or to an annuity plan which, at the time of such payment, is a plan described in section 403 (a), or * * *."

Section 403 relates to taxation of employee annuities generally. In my opinion this provides that amounts contributed by a 501(c)(3) employer to a qualified annuity contract for its employees shall be excluded from the gross income of the employee for the taxable year with certain provisions and qualifications. However, in construing this section, the Court said in the case of Llewellyn v. C. I. R., 295 F. 2d 649, that:

> "Provisions of this section dealing with taxation of employee annuities do not apply to amounts paid by employer out of employee's compensation, at employee's direction."

The citation above fully answers the questions raised. Since the employer contributed nothing to the employee's annuity, the employer is not entitled to exclude any amount from the wages of his employees and their total wages must be reflected on Form NCUI 625.

Adopted as an official Interpretation of the Commission on March 5, 1974. Cancels and replaces Interpretation No. 250, adopted October 30, 1973.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 252

TO: Employment Security Commission

FROM: T. S. Whitaker, Acting Chief Counsel

SUBJECT: Interpretations

I have examined all of the interpretations of the Commission and the following interpretations are recommended for retention. All other interpretations should be rescinded.

3	98	146	190
17	101	153	205
18	108	158	207
27	113	163	220
33	114	165	221
46	118	167	231
48	119	168	232
49	121	169	237
55	122 & Supp.	172	239
69	124	173	248
79	131	174	251
87	139	177	
88	144	184	
92 & Supp.	145 & Supp.	187	

It is further recommended that the current practice concerning request for interpretations continue. Any member of the Commission or department head desiring a written interpretation of the Employment Security Commission may make a written request for such.

Interpretations issued by the Chief Counsel on behalf of the Commission will continue to be considered as a written interpretation or legal opinion of the Commission and shall be continued to be considered as a precedent in all issues considered in the written interpretation. Copies of all interpretations should again be made available for our employees and to the public.

I also recommend that the Statements of Policy be rescinded.

Adopted as an official interpretation by the Commission on December 1, 1981.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 253

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUJBECT: Total and Partial Unemployment

We have received inquiries recently on behalf of employers who have elected payments in lieu of contributions pursuant to G.S. 96-9(d). The question raised is whether such a "reimbursement" employer should be charged, and the claimant paid benefits, when the claimant had full-time work with another employer and part-time work with the "reimbursement" employer, and was then laid off from the full-time work with the part-time work unchanged. Since G.S. 96-9(c)(2)b. does not apply to "reimbursement" employers, the "reimbursement" employer will be charged its pro rata share (based on the wages paid in the base period) of the benefits paid even though it is still providing the amount of work it has always provided. The inquiries urge the Commission to consider the total hours worked for both employers in determining whether the claimant worked less than the equivalent of "three customarily scheduled full-time days" in an attempt to render the claimant not unemployed.

The phrases "in the establishment, plant, or industry in which he has payroll attachment..." or "in which he is employed...," G.S. 96-8(10)a.1., b.2., immediately follow the 60 percent formula. These phrases, in our opinion, make it clear that the Commission cannot, the way the law is written, consider the total hours for both employers, but must consider the 60 percent formula with reference to the full-time employer, the employer from whom the lack of work originated and with whom the claimant has payroll attachment or is employed. In other words in the example given, the 60 percent formula applies only to the full-time employer in determining whether there is unemployment, and the earnings from both are considered only for purposes in determining the ineligible amount. Although in this type of situation the "reimbursement" employer is treated differently than a taxpaying employer, such different treatment is the effect of the election the "reimbursement" employer has made, which in most other cases is much more favorable treatment.

Adopted as an official interpretation by the Commission on February 23, 1982.

Billingsley

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

INTERPRETATION NO. 254

DATE: May 17, 1983

TO: Glenn R. Jernigan, Chairman

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Disclosure of Information
Interpretation of Sections 96-4(g)(1), 96-10(b)(2), 96-15(j), 96-18(a), 96-23, of the Employment Security Law, Section 126-22 through 126-29 of the Privacy Act of State Employee Personnel Records, and 5 USC 552(a), 26 USC 3304(16)(a), 42 USC 503(e), and 42 USC 503(d).

One of the major functions of the Employment Security Commission of North Carolina is that of fact-finding and assembling all kinds of information necessary to the effective operation of the Commission and to the fulfillment of the aims and purposes for which the Commission was created. Thus, in an Agency erected to administer the Employment Security Law of North Carolina, the assemblage of information from employers and employees is perhaps one of its most important functions. It must obtain the wage record and employment history of the individual. This requires the individual to divulge many personal facts about himself. In the same manner employers are required to provide information about their operations and payrolls and financial structure. This information also is of a personal nature. The problem created by this necessity of assembling information is obvious: Under what circumstances could or should any or all of this information be divulged? Because an increasing number of requests for information are being served on the Commission, and because of the lack of a uniform policy for responding to such requests, established herein are the policies of the Employment Security Commission governing the disclosure of information and the procedures for carrying out such policies.

I. It is the Policy of the Employment Security Commission of North Carolina to permit disclosure of information from the files and records of the Employment Security Commission of North Carolina:

A. To individual applicants and employers to the extent necessary for the efficient performance of recruitment, placement, employment counseling, and other agency functions.

B. To any properly identified claimant for benefits or payments under a state, territorial, or federal unemployment compensation or readjustment allowance law, or to his duly authorized representative, information which directly

concerns t. claimant and is reasonably necessary for the proper presentation of his claim.

C. To any officer or employee (including law enforcement offices) of any agency of the federal government or of a state or territorial government, lawfully charged with the administration of a federal, state, or territorial law, but only for purposes reasonably necessary for the proper administration of such law and only after receiving a written request for information.

D. To applicants, employers, and the public, general information concerning employment opportunities, employment levels and trends, and labor supply and demand, provided such release or publication does not include information identifiable to individual applicants, employers, or employing establishments.

II. Information Covered by the Policy.

The policies governing disclosure of information apply to all information received from workers, employers, or other persons or groups as an incident to the operation of the Employment Security Commission of North Carolina, and available from records in the custody of the Employment Security Commission of North Carolina. The following items do not deal with all types of information or all situations in which information is disclosed, but only with those points in the policy which are not self-explanatory.

A. Disclosure of Information Concerning Applicants to Employers.

Information concerning an individual applicant which is pertinent to placement may be disclosed, at the time of referral, to an employer who is considering the applicant for a job. Such disclosure should be restricted to information which will indicate whether or not the applicant meets the employer's specifications. This information may include names of previous employers, length of experience, type of experience, reasons for leaving jobs, education, personal qualifications, etc. Care must be taken, however, not to reveal any confidential information which has no bearing on the applicant's qualifications for the job or his ability to meet any legitimate employer specifications.

Employers ordinarily should not be permitted to examine or review application cards. However, when essential to expedite placement, an employer may be permitted to examine applications provided that the cards have been selected beforehand by an interviewer and do not contain any

information which should not be disclosed. Employers are not permitted access to the whole application file, or portions of it, or to other local office records.

Information concerning individual applicants is usually pertinent to placement only at the time the applicant is being considered by the employer for a specific job. The address of a former employee may be disclosed to an employer who wishes to call him back to his job. Other information should not be disclosed to employers who make inquiries concerning their current or past employees who have applications on file in the local office.

B. Disclosure of Unemployment Insurance Claims Information to a Claimant or Employer or Duly Authorized Representative.

A claimant for unemployment insurance benefits or his last employer or a duly authorized representative (See 96-17(b)) shall be given information from agency records which is necessary for the proper presentation of a claim or defense thereto. No person shall be deemed a "duly authorized representative" unless he has been authorized as such by the claimant or employer in writing. A copy of the writing shall be retained by the agency.

C. Disclosure of Information Concerning Labor Market Information.

The Public Information Officer is responsible for the release of all labor market information to the news media. Local offices will be provided with a copy of the releases and are encouraged to supply local application and interpretation of published releases to meet the needs of each community.

Local office managers shall use only published information when discussing employment and unemployment trends for their areas. Local office managers shall not speculate or draw conclusions that are not supported by the information released by the Public Information Office.

D. Disclosure of Information pursuant to the Federal Privacy Act.

The Federal Privacy Act does not apply to the Employment Security Commission of North Carolina. That Act applies only to federal agencies. No information shall be released because of any provisions contained in the Federal Privacy Act.

E. Disclosure of Information to Officers and Employees of a State or Federal Government including Law Enforcement Officers.

Disclosure of information to law enforcement officers of governmental agencies or commissions with enforcement responsibilities is included in the policy stated in section I. C. All requests for information from any officer or employee of a state or federal government shall be made in writing and any release of information shall be in writing except a director, department head or local office manager may authorize a verbal disclosure when:

1. Presented with proper identification; i.e., sheriff's badge, FBI badge; and

2. Verbal release is deemed necessary by the director, department head or local office manager for the proper administration of the law administered or enforced by the public officer; and

3. Verbal disclosure shall be documented by the director, department head or local officer manager who authorizes a verbal disclosure.

III. Referring Special Requests to the State Office.

From time to time requests may be made for the disclosure of information in which special circumstances may appear to justify the disclosure or in which there may be doubt as to whether the information may be disclosed under existing policies. In such a situation, the request shall be referred to the state office (legal department) for approval or rejection. The local office will be notified in writing of the decision.

IV. Disclosure of Information to Courts When a Subpoena is Served.

When any subpoena or other compulsory process is served by a court or other tribunal upon an employee of the Employment Security Commission calling for information from the files and records of the Commission, such information may be disclosed if the disclosure is otherwise permitted under the policy on disclosure of information or interpretations of the policy.

When a subpoena or other compulsory process is served calling for information which may not be disclosed under the policy or interpretations of the policy, the state office (legal department) shall be notified immediately. The legal department will take appropriate steps promptly to insure that a motion to quash the subpoena is made and supported or other appropriate action is taken to protect the agency.

V. Disclosure of Employee Personnel Records.

Every state agency is required to maintain a personnel record of each of its employees. The Employment Security Commission complies with this requirement by maintaining a personnel record for each of its employees. Each employee may examine his own personnel record. The following information with respect to each employee is not confidential and is open for inspection and examination. Any request for inspection must be directed to the Director of Employee Relations who is the custodian of such records.

A. Name
B. Age
C. Date of original employment or appointment to State service
D. Current position and title
E. Current salary
F. Date and amount of most recent increase or decrease in salary
G. Date of most recent promotion, demotion, transfer, suspension, separation or other changes in position classification
H. The office or station to which the employee is currently assigned

All other information contained in a personnel file is confidential and shall not be open for inspection and examination except for the following persons:

A. The employee, applicant for employment, former employee, or his properly authorized agent who may examine his own personnel file in its entirety except for (i) letters of reference solicited prior to employment, or (ii) information concerning a medical disability, mental or physical, that a prudent physician would not divulge to a patient. An employee's medical record may be disclosed to a licensed physician designated in writing by the employee;

B. The supervisor of the employee;

C. Members of the General Assembly who may inspect and examine personnel records under the authority of G.S. 120-19;

D. A party by authority of a proper court order may inspect and examine a particular confidential portion of a state employee's personnel file; and

E. An official of an agency of the federal government, state government or any political subdivision thereof. Such an official may inspect any personnel records when such inspection is deemed by the department head of the employee whose record is to be inspected or, in the case of an

applicant for employment or a former employee, by the department head of the agency in which the record is maintained as necessary and essential to the pursuance of a proper function of said agency; provided, however, that such information shall not be divulged for purposes of assisting in a criminal prosecution, nor for purposes of assisting in a tax investigation.

Any subpoena or proper court order calling for the production or examination of personnel records shall be forwarded to the legal department for review and any appropriate action.

VI. Questions and Answers.

From time to time, various questions concerning the release of information have been received. Listed below are some of the most common questions and their answers.

Q. What information, taken during the fact-finding investigation, may be released and to whom?

A. The claimant, the employer, and the representative for the claimant and employer have the right to see the claim folder at any time there is not a final decision in a matter.

Q. May an FBI agent, a law enforcement agent, a sheriff, deputy sheriff, policeman, etc., be supplied with the name, address, social security numer, etc., of a claimant?

A. If the request is made in the offical performance of duty, the information should be released.

Q. If an agent of Social Services, Housing Authority, etc., requests information on a claimant, can that information be released?

A. The information can be released if the request is made in the official capacity of the agent. The information must, of course, be for official business.

Q. May family members or friends obtain information on behalf of the claimant?

A. No.

Q. A. Since CETA and other manpower-type programs are currently in a state of evolution, do not release any information on CETA or other manpower-type programs; call the legal department in Raleigh at (919) 733-4636.

Q. To whom should a subpoena be directed?

A. If the information is in the local office, it should be directed to the person with custody of the records; i.e., the local office manager, the field tax auditor, the appeals referee. If the information is in the state office, it should be directed to the Commission's process agent.

Q. Now that the law allows for subpoenas to be served by telephone, may an agent of the Commission accept a subpoena by telephone service?

A. No. The Commission will accept only in-person service.

Q. Who is the process agent for the Commission?

A.
T. S. Whitaker
Chief Counsel
P. O. Box 25903
214 W. Jones Street
Raleigh, NC 27611

Q. If a valid request for information is received but the information requested is not readily available or will cause an excessive amount of time or cost to comply, what should be done?

A. Contact the legal department and inform the person making the request that you are doing so.

Adopted as an official Interpretation of the Commission on May 6, 1983.

Rescinds Interpretation No. 202 adopted September 30, 1969, which rescinded Interpretation No. 195 adopted August 8, 1967.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

Interoffice Communication

Date: April 23, 1982

TO: Holders of Interpretation Manual

FROM: Glenn R. Jernigan, Chairman

SUBJECT: Interpretation No. 255

In accordance with Interpretation No. 252, the attached Interpretation No. 255 has been adopted as an official Interpretation by the Commission and shall be distributed to all holders of the Interpretations.

Any questions about this Interpretation should be directed to the office of the Chief Counsel at (919) 733-4636.

Attachment

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 255

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Payments Made to Claimants

Shortly after In re Tyson, 253 N.C. 622, 117 S.E.2d 854 (1961), ruled that separated employees, who are entitled to severance and vacation pay, are not entitled to unemployment benefits until the monies paid as severance and vacation pay have been exhausted by time elapsed at the employee's weekly wage rate, Interpretation No. 182 was issued. Thereafter, Interpretation No. 203 was issued which updated No. 182. In order to make the Commission's application of the law in this area current, this Interpretation is being issued.

The basic definition of "wages" is contained in G.S. 96-8(12), (13)a. and b. By these definitions, "wages" means all remuneration for services from whatever source, including commissions and bonuses, and the cash value of all remuneration in any media other than cash. Regulations 1.25, 1.26 and 1.27 also contain references to "wages" but basically do not add or detract from the substance of the definitions contained in Chapter 96. In determining whether certain payments are "wages," the determination should include, as a general rule, the same treatment of monies paid for purposes of contributions and purposes of claims. In other words, monies paid cannot be wages for purposes of contributions and not earnings for purposes of claims. Any monies paid to persons out of an employer/employee relationship which are required to be reported as income to the Internal Revenue Service, the North Carolina Department of Revenue, or the Commission shall be considered as earnings for unemployment benefit claims. If the monies paid are attributable to particular weeks, for claims purposes, they should be considered earnings for those weeks. If the earnings are not directly attributable by the employer to certain weeks, they normally should be considered earnings only for the week received unless they fit the Tyson situation and G.S. 96-8(10)c. In either case, earnings are taxable only in the calendar quarter in which they are paid.

Although retirement or other similar payments clearly are not "wages" due to specific wording in the definitions, G.S. 96-14(9) modifies the preceding general rule because of its specific wording and requires an effect on claims. Also, Supplemental Unemployment Benefits will not be counted as wages for contribution purposes or earnings for benefit purposes. Bonuses, longevity pay, and other similar types of payments will be counted as wages and earnings.

If a claimant is to receive a payment as contemplated by the Tyson case, but the payment will be made at some future date not associated with the separation date, the payment will be considered attributable to weeks including and immediately following the date on which the payment is actually made rather than to the weeks immediately following the date of separation. Here again, such sums are taxable in the quarter in which they are paid.

Adopted as an official Interpretation by the Commission on April 19, 1982.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

UNEMPLOYMENT INSURANCE DIVISION

Raleigh, North Carolina

July 27, 1982

UI Procedural Letter 35(82)

TO: Directors, Managers, and Supervisors

Special Attention: Local Office Managers

FROM: Warren G. Wittmer, UI Director

RE: Monies Paid To Members Of The State National Guard or Air National Guard

Reference is made to UI Procedural Letter 24(80) dated June 6, 1980, and Interpretation Number 255 adopted by the Commission on April 19, 1982.

Since the extension of coverage to state and local government in 1978, we had considered wages from the State National Guard and/or Air National Guard as not being reportable as earnings nor useable to remove, or assist to remove an indefinite disqualification. The decision not to treat such wages as reportable earnings was based on their exclusion from coverage under our law as base period wages. The same reasoning applied to other types of employment exempt from coverage (e.g., elected officials, legislators, etc.). However, Interpretation Number 255 reverses that procedure. Effective immediately, these wages are to be handled as follows:

1) They must be reported as earnings on continued claims when earned (weekend drill, etc.)

2) They can be used to remove, or assist to remove an indefinite disqualification.

3) They cannot be used as wages in order to establish, or help to establish a claim for benefits, and;

4) They cannot be used as wages to establish, or help to establish the ten times test for subsequent benefit years.

1) and 2) are tied directly to Interpretation 255 because these wages are monies reported to the Internal Revenue Service and the N. C. Department of Revenue. 3) and 4) constitute no change - they are tied directly to Section 96-8 (6) i of the law which lists certain specific government positions which are excluded from the definition of employment.

- Over -

UI Procedural Letter 24(80) also mentions income from a sideline venture. We are now reviewing just what consitutes a sideline venture, and a better interpretation of the term will soon be forthcoming. In the meantime, continue to handle income from sideline ventures just as you have in the past. Use your own judgment, based on your knowledge of the situation and your interpretation of the law.

If you have any questions, clear them through the usual channels.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

Interoffice Communication

Date: January 28, 1986

TO: Holders of Interpretation Manual

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Interpretation No. 255, Supplement No. 1

In accordance with Interpretation No. 252, the attached Interpretation No. 255, Supplement No. 1 has been adopted as an official Interpretation by the Commission replacing the prior Supplement No. 1 and shall be distributed to all holders of the Interpretations. (The legislative amendment to G.S. 96-8(10)c in 1983 supersedes the prior Supplement No. 1, adopted 11-10-82).

Any questions about this Interpretation should be directed to the office of the Chief Counsel at (919) 733-4636.

Attachment

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 255, SUPPLEMENT NO. 1

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: National Guard and Reserve Pay

National Guard Pay is not to be considered as reportable wages or earnings for any purposes under Chapter 96.

G.S. 96-8(6)i(c) specifically declares that such service is not employment. Since it is not employment under Chapter 96, National Guard pay cannot be used as wage credits to establish a benefit year nor is it reportable as wages pursuant to G.S. 96-12(c). It is not work pursuant to G.S. 96-8(24). It also cannot be used to remove a disqualification under G.S. 96-14(10).

G.S. 96-8(10)c, in pertinent part, provides that ..."(s)ums received by any individual for services performed as a member of the N.C. National Guard, as defined in G.S. 127A-3, or as a member of any reserve component of the United States Armed Forces shall not be considered in determining that individual's employment status under this subsection."

Considering the above cited law and G.S. 96-8(6)k.2., only those earnings from federal military service which can be used to establish a UCX (Unemployment Compensation to Ex-Service Personnel) are reportable for any purposes under Chapter 96. (Normally, this requires 180 or more days of consecutive service.) In other words, earnings from federal military service are not to be considered in establishing a valid claim, as earnings reportable pursuant to G.S. 96-12(c), or earnings to remove a disqualification under G.S. 96-14(10) unless those earnings also could be used in establishing a "UCX" claim.

Adopted as an official Interpretation by the Commission on January 28, 1986.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 255, SUPPLEMENT No. 2

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Vacation Payments

The question has been raised whether receipt of vacation pay constitutes earnings for claims purposes when received. The answer is in the affirmative.

An Appeals Referee recently held that vacation pay received during a lay-off did not count as earnings since the vacation had been "saved" and could have been taken during some other time. The claimant filed for weeks ending June 30 and July 7, 1984. During the week ending June 30, 1984, the claimant requested and received 3 weeks of vacation pay. The three weeks of time away from work could be taken after he returned from layoff. The Appeals Referee held that those monies were not to be counted as earnings during the weeks ending June 30 and July 7, 1984, since the claimant was not permanently separated but only temporarily laid off. He misconstrued In re Tyson, 253 N.C. 622, 117 S.E.2d 854 (1961), and did not apply Interpretation No. 255.

If a claimant receives vacation pay for a week claimed, that payment is to be considered earnings for that week. If the payment is for more than that week, it will be prorated. It is immaterial whether or not the claimant elected to receive the payment, already had taken vacation weeks with or without having received pay, was entitled to take vacation weeks in the future with or without pay or was temporarily or totally separated.

Adopted as an official Interpretation by the Commission on January 17, 1986.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

Interoffice Communication

Date: April 23, 1982

TO: Holders of Interpretation Manual

FROM: Glenn R. Jernigan, Chairman

SUBJECT: Interpretation No. 256

In accordance with Interpretation No. 252, the attached Interpretation No. 256 has been adopted as an official Interpretation by the Commission and shall be distributed to all holders of the Interpretations.

Any questions about this Interpretation should be directed to the office of the Chief Counsel at (919) 733-4636.

Attachment

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 256

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Unemployment of Part-Time Claimants

We have received inquiries recently asking whether part-time workers are eligible for unemployment insurance benefits. Interpretation No. 253 concerned a situation in which a claimant had full-time work with one employer and part-time work with another employer. The question to be resolved in this Interpretation is whether a part-time worker is eligible to receive unemployment insurance benefits if his part-time work at the time a claim is filed is substantially the same as it has been contemplated by both the employer and the claimant to be. The mere acceptance of a cut in hours from forty (40) to twenty (20) for a day or a week will not in most cases be sufficient to show a change in the hours contemplated but the acceptance for several months would. The sixty (60) percent formula in determining partial unemployment applies to the particular work and the particular claimant. If a claimant accepted a job for twenty (20) hours per week with an employer, and the employer continues to fulfill its obligations under the contract of employment by continuing to provide twenty (20) hours of work per week, we are of the opinion the claimant is not partially unemployed. If we use the twenty (20) hours per week example, the claimant only would be partially unemployed if he worked fewer than twelve (12) hours per week.

We reach this result because of the specific wording of G.S. 96-8(10)a.1. and b.2. which contains no limitation or definition of what is full-time work. It is our opinion that the Employment Security Law is intended to provide unemployment insurance protection only to those who are unemployed through no fault of their own. Any claimant who worked for a certain number of hours cannot be considered unemployed by any definition unless his hours are reduced to less than sixty (60) percent of those contemplated in the work. Therefore, a claimant is not unemployed and not eligible for unemployment insurance benefits until and unless the work provides him less than sixty (60) percent of the hours contemplated by his normal and usual schedule, whether the hours originally contemplated were forty (40) hours, thirty (30) hours, twenty (20) hours, or even less.

It should be noted that if a claimant had been on a twenty (20) hour schedule and then is totally separated from the work, the claimant in order to be eligible would have to be available for and seek part-time work, full-time work, temporary and permanent work, and not limit his availability to work of twenty (20) hours per week.

Adopted as an official Interpretation by the Commission on April 19, 1982.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 256, SUPPLEMENT 1 REVISED

TO: Employment Security Commission of North Carolina

FROM: C. Coleman Billingsley, Jr., Chief Counsel

SUBJECT: Unemployment of Part-Time Claimants

Since the adoption of this Interpretation on April 19, 1982, there have been numerous questions raised. In general, the questions have been directed to whether the acceptance of part-time work by an individual already in claim status will render him/her ineligible based on this Interpretation. Also, subsequent to the issuance of Supplement 1 on November 29, 1982, there have been law changes. In order to clarify the Interpretation, this Supplement is being revised and adopted.

We are of the opinion that the material question to be answered in any of the examples posed by the many questions is whether the part-time work was intended by the individual to be his/her regular employment on a full-time or permanent basis or merely whether it was intended to be an acceptance of part-time work concurrent with or until full-time employment could be obtained. While this determination necessarily involves a question of the intent of the individual, that same determination is made every day by those who examine the eligibility of individuals for unemployment insurance benefits.

An individual who had been working part-time not concurrent with a full-time job for several months before filing a claim would have a great burden in order to show that his/her acceptance of the part-time employment for such a period was merely a stop-gap measure while he/she sought to obtain full-time work. For an individual already in claim status, the acceptance of part-time work would not render him/her ineligible merely because he/she had accepted it so long as he/she still was seeking full-time work and was willing and able to accept it. In those cases in which the individual chooses to work part-time when full-time work is available, the individual is not eligible or unemployed within the meaning of Chapter 96. In those cases in which the employer had changed the work to fewer hours, the determination as to the intent of the acceptance still is the controlling factor, although certainly this is less likely to indicate the ineligibility for "regular" employment.

Following are some examples:

A. Ordinary Part-time Employment for an Individual Usually Employed Full-time

As contemplated in this paragraph, "ordinary" part-time employment is employment entered into by an otherwise unemployed claimant with the full understanding that it is temporary, stop-gap work of less than the usual full-time hours for that type of job. The following rules of eligibility for part-total unemployment benefits apply:

1. The work must be part-time because the employer cannot furnish full-time work for the claimant. If the claimant is the one who elected to make the job a part-time one, the claimant is not eligible or unemployed.

2. A claimant, whose base period wages were from full-time work, must be able to work full-time, available for full-time work, and actively seeking full-time work each week with other employers. (With the passage of G.S. §96-13(a)(6), effective for claims with an effective date of June 22, 2003 or after, if a claimant's base period wages are predominately from part-time work, the claimant is seeking work under essentially the same conditions, and the claimant imposes no other restrictions and there is a reasonable demand for the part-time work, then the claimant is eligible and qualified for benefits.)

3. The number of hours worked in a part-time week is immaterial, as long as they are less than the full-time hours for that employer for the work being done. If otherwise eligible, earnings of less than the ineligible amount will be the determining factor for payment.

4. If the part-time employment continues on a more or less routine basis as the weeks go by, the claimant's eligibility must be carefully examined after 10 weeks. If there is an indication that the claimant no longer meets the standards set out above, he/she shall be considered to be working full-time and not unemployed.

5. If a claimant quits or is discharged from part-time employment, there is a separation issue. However, if the claimant quits one part-time job for another part-time job with equal or greater earnings, then no separation issue should be raised.

B. Part-time Employment Caused by Reduced Work Schedules

This section has to do with the permanent employee whose hours have been reduced by the employer for the foreseeable future. Assuming such an

individual remains a permanent employee and the reduction in regular hours is caused by lack of work, the individual will be partially unemployed and the employer must prepare Form NCUI 501 for each week the person works less than the equivalent of 3 customary days under the former schedule (or 60% of the former hours).

1. An individual has been working a 5-day 40-hour week. Because of reduced business, the employer decides to reduce the work week to a 4-day 32-hour week for an indefinite period. Until and unless the work week is reduced permanently* by the employer or the reduction is due to something other than lack of work, the 5-day 40-hour week will continue to be considered the customary week for this person.

   *What is meant by "permanently"? All cases are different – use judgment and a reasonable approach.

2. There are industries (usually the out-of-doors type) whose customary work week may vary with the season. In some types of construction, the work day may be 10 hours from mid-spring to mid-fall to take advantage of the longer period of daylight, but reduced to 6 hours for the rest of the year when suitable temperatures and daylight are limited for outdoor work. In situations like this, it is perfectly reasonable and logical to approve the 2 different work schedules for the applicable periods for purposes of determining when 501s are to be prepared by the employer. This is not to say that a new "customary" work schedule can be established for 501 purposes every few weeks or months. It should be done only in situations similar to that described in this paragraph.

3. When an individual's hours of work are reduced because the individual requested the reduction, that person cannot be considered unemployed.

4. When an employer reduces a person's hours of work for a reason other than lack of work, there can be no fixed procedure. Each case must be handled individually in accordance with the basic principles set forth in Interpretation 256 and this Supplement. The factors set forth in G.S. §96-14(1b) must be considered.

C. Last Employment

A claimant's last employer is the individual, company, firm, organization, partnership or whatever for whom he/she worked most recently before applying for benefits. A person who continues to work part-time in secondary employment after losing a primary job is ordinarily part-totally unemployed because of the loss of the primary job. The primary employer must be

considered the last employer. [See G.S. §96-8(24) and ESC Precedent Decision No. 36, In re Bright, for its specific limitation to his interpretation.]

1. Claimant lost a full-time job with R; still has a part-time job with S. He/she is part-totally unemployed. The last employer is R. If separation was for a disqualifying reason, the part-time work may be used to terminate the disqualification. If there is no disqualification, able and available may be an issue. "Part-time" non-charging can, if applicable, be applied to S.

2. Same situation as "1," except that 3 weeks later S fires him/her. If the employment with S was a regularly held part-time job, separation would become an issue with respect to that job. If sporadic, there is no issue. (This is very definitely a matter of judgment.) "Part-time" non-charging is applicable to S.

3. Same situation as "1," except that claimant waits 2 months after losing job with R to file a claim, continuing to work part-time with S in the interim. The job with S is considered full-time, and the person is not unemployed unless the claimant delays filing due to the receipt of separation, vacation, or some other type pay.

4. Claimant worked part-time with S while going to school. Graduated (or left school), got full-time work with R, continued to work part-time with S. Lost job with R after 5 months, filed a claim; S is the only base period employer, continues to work with S. The last employer is R; employer S could be non-charged. [The intent of the law is to provide for relief of charges regardless of whether the primary full-time "occupation" during the base period was employment (as stated in the law), unemployment while seeking full-time work, or school.]

5. Claimant had a full-time job and a regular part-time job. Lost full-time job because of lack of work then, later in the same day, quit the part-time job. The last employer is the one who furnished the part-time job.

6. Claimant worked 2 full-time jobs. Lost one; kept the other. Claimant is not unemployed.

7. Claimant fired from a regular full-time job with R. Got temporary work with T for a few days which ended because of lack of work. Filed a claim. Last employer was R pursuant to G.S. §96-8(24). That the last employer is R is a rebuttable presumption.

In applying this Supplement and the Interpretation, the key is to determine whether the individual who is claiming benefits is unemployed within the words and spirit of

Chapter 96, and whether the individual is fully able and available for part-time, full-time (if applicable), temporary and permanent work. Acceptance of part-time work while in claim status and while still seeking full-time work is, using common sense, much different from filing a claim after a period in which the status quo of part-time work by itself had not changed substantially. In the former case, one would be unemployed, available and eligible; in the latter case, one would not be.

Adopted as an official Interpretation by the Commission on November 29, 1982.

Revision adopted as an official Interpretation by the Commission on April 1, 2004.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 257

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Limited Partnership Agreement

The question has arisen: Where a group of barbers who have executed a written agreement called a "limited partnership agreement" the terms of which provide that the contribution of the limited partners shall only be their "time, knowledge and experience" and which provides for the compensation of both the limited partner and the general partner by a weekly distribution of sixty to seventy percent of the receipts generated by each partner plus a yearly distribution of one percent of the remaining net profits of the partnership to each limited partner and ninety-six percent to the single general partner, whether the barbers named in the agreement as limited partners are employees in the employ of the barber named as the general partner?

N.C.G.S. Chapter 59 provides that in order to form a valid limited partnership, the provisions of the limited partnership act must be substantially complied with in good faith, N.C.G.S. 59-2(b), and further provides that "the contributions of a limited partner may be cash or other property, but not services," N.C.G.S. 59-3.

Additionally, where a third party creditor sued a member of a partnership, characterized by a defective partnership agreement as a limited partner, for a debt owed by the insolvent partnership, it has been held that the effect of the unsuccessful attempt to form a limited partnership is the formation of a general partnership. Atlanta Stoveworks, Inc. v Keel, 55 N.C. 421, 121 S.E.2d 607 (1961).

It is concluded that on the facts stated, the relationship of the barbers is that of general partners. The parties clearly intended to establish a partnership of some kind and just as clearly failed to establish a limited partnership due to the contribution of services as the sole contribution of capital by the "limited partners." The legal effect of their agreement, in light of the Keel case, appears to be the formation of a general partnership with the "general partner" occupying the position of managing partner.

While it is true that a limited partner may also be an employee of the partnership, the parties in the case at hand, by their solemn written undertaking, expressed no intent to form an employer/employee relationship either by or in addition to their partnership relationship.

Additionally, while the relationship that obtains between the parties to this agreement, particularly as regards the powers and duties of the barber named in the agreement as the "general partner," exhibits certain of the common law indicia of employer/employee relationships, many of these powers and duties are not inconsistent with the powers and duties of a managing partner of a general partnership. That being the case, it would appear very difficult to establish that the "limited partner" barbers were in employment as that term is defined in the Employment Security Law.

The conclusion reached herein does not necessarily mean that in every case where a group of persons attempt or claim to form a limited partnership, no employment relationship can be found. For example, an employer/employee relationship might be found where:

(1) The executed agreement provided for the voiding of the agreement if a limited partnership were not formed;

(2) Where the facts and circumstances surrounding the carrying on of the business enterprise showed a employer/employee relationship in addition to the partnership relationship;

(3) Where the right to manage the business or the participation in the profits of the business were so severely limited as to negative any intent that the individual involved be a partner in fact (a state of facts that may have existed in the case at hand if the partnership agreement had limited the income of the "limited" partners to a sum certain);

(4) Where the alleged partnership agreement is not in writing and the common law indicia of employment exists;

(5) Where the ostensible partners, over a substantial course of dealing, have failed to observe the provisions of their claimed agreement.

Therefore, the determination of whether an employment relationship exists where an attempted limited partnership has failed must continue to be made on a case by case basis considering all the facts and circumstances arising therein.

Adopted as an official Interpretation by the Commission on August 27, 1982.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 258

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Separation Payments

Several questions have been raised concerning the treatment of separation pay for claims purposes. After a review of the applicable statutes, court cases, and Commission regulations, it is my opinion that proper procedure in the stated fact situations is as follows.

I

Facts: The claimant has received a large, lump sum payment of severance pay based on his length of service with the employer who has separated the claimant from employment. The claimant has been advised by local office staff that he is not considered unemployed under G.S. 96-8(10)c during the time to which the severance pay applies and the claimant decides, based on this advice, to file no claim for benefits. When the time to which the severance pay applies has run out, the claimant again comes to the local office and applies for benefits. The claimant does not establish a benefit year (or establishes a benefit year at a substantially reduced weekly benefit amount or maximum duration) because the whole amount of the severance pay has been reported in the one calendar quarter in which it was paid. The claimant protests his wage transcript and monetary determination and asks that his severance pay be prorated for claims purposes.

Question: Should the severance pay be prorated?

Answer: Yes. G.S. 96-8(13)a provides that "wages" include "any sums paid to an employee by an employer . . . by private agreement . . . for loss of pay by reason of discharge." This provision has been applied to severance pay by the North Carolina Supreme Court in In re Tyson, 253 N.C. 622, 117 S.E.2d 854 (1961). Additionally, G.S. 96-8(13)a provides that

> "if the remuneration of an individual is not based upon a fixed period or duration of time or if the individual's wages are paid at irregular intervals or in such manner as not to extend regularly over the period of employment, the wages for any week or for any calendar quarter for the purpose of computing an individual's right to unemployment benefits only shall be determined in such a manner as may by authorized regulations be prescribed."

(Emphasis Added)

The Commission has promulgated such a regulation in Regulation 9.15 which says:

> Wages reported in a single quarter which represent bonuses, profits, dividends, commission, or like remuneration awarded annually for services rendered throughout the year may be prorated by the Commission to other applicable quarters for benefit claim purposes only, provided all of the following conditions are met:
>
> (A) The individual to whom the payment was made has claimed benefits;
>
> (B) Either the claimant or the employer has protested the monetary determination on the basis that the wages reported for at least one of the base period quarters are disproportionately great or small in relation to the other quarters because the wages reported in a single quarter within or without the base period were for services rendered in more than one quarter;
>
> (C) The wages as reported have resulted in a monetary determination which is clearly inequitable and causes a distorted result when benefits are determined;
>
> (D) The proration of the wages to the other quarters in which they were earned would result in a monetary determination which, when benefits are determined, would correct the inequity otherwise existing.

While it may not appear on first reading that the above-quoted regulation addresses severance pay, when it is read in context with 96-8(13)a and the Tyson case, severance pay is both sufficiently linked to past services and sufficiently like bonuses, etc. to come within the ambit of the regulation.

Moreover, it is crystal clear that the Commission has implicitly (if not expressly) prorated the lump sum severance pay for one purpose (defining "unemployment" under 96-8(10)a, b & c) and fundamental fairness would seem to require that this same proration be made for other claims purposes.

Therefore, on the facts stated above or in any similar fact situation where severance pay is paid in a lump sum and where the four criteria set out in Regulation 9.15 are met, that severance pay should be prorated for both the purpose of determining whether the claimant is unemployed and, where necessary to avoid clear inequity, for the purpose of establishing a benefit year or maximizing benefits after the separation pay runs out.

Question: What should local offices tell claimants about severance pay?

Answer: It is perfectly permissable to inform prospective claimants that the law deems them to be "not unemployed" while they are receiving severance pay. If there appears to be no conflict between the claimant and the employer concerning the amount or duration of severance pay, it would not be improper for responsible local office staff to give these claimants a date on which they would be unemployed under the law. However, if such a claimant still desires to file a claim or if there is any doubt as to the amount or duration of the severance pay, a claim should be taken and forwarded, properly flagged and documented, for Commission processing and/or adjudication.

When a claimant who has been in severance pay status subsequently files a claim, the local office should process that claim as usual without trying to determine how the severance pay received will affect the claimant's wage transcript and monetary determination. If, upon receipt of the wage transcript and monetary determination, the claimant wishes to protest, the local office should explain that lump sum severance pay may (not will) be prorated if the four criteria in Commission Regulation 9.15 are met. The claimant's wage transcript and monetary determination protest should be processed as usual.

Question: Will the Commission now prorate regular wages earned in the base period but paid outside the base period if such a proration will make it possible for the claimant to establish a benefit year?

Answer: Probably not. Unless these regular wages are in such an amount and of a type as to fall within the provisions of Commission Regulation 9.15, regular wages should not be prorated. Example: a claimant who cannot establish a benefit year because his last base period month's wages were paid and properly reported in the following month, will not be able to get that month's wages reassigned to the base period.

II

Facts: The claimant discloses (or employer information reveals) that the claimant is entitled to severance pay but for some reason chooses not to accept the severance pay.

Question: Is the claimant unemployed for claims purposes?

Answer: G.S. 96-8(10)c provides that separation pay renders a claimant to be not unemployed during any week with respect to which he "is receiving, has received, or will receive" separation pay. G.S. 96-8(13)a has been held to define separation pay as wages. Tyson, supra. Commission Regulation 1.26 defines wages as "constructively paid" when they are freely at the disposal of the employee. Therefore, the answer to this question depends on the reason for the claimant's nonacceptance.

(1) If the claimant refuses to accept the severance pay because the employer requires that the claimant waive all rights of action against the employer arising out of the claimant's separation from work, these monies are not freely at the disposal of the employee and, therefore, have neither been actually or constructively paid nor is there any substantial certainty they will be paid. In cases such as this, a claim should be taken and the matter referred for adjudication. If the facts are found as related above, the claimant should be paid benefits but notified that any subsequent receipt of the severance pay will result in the establishment of overpayments pursuant to G.S. 96-14(8).

(2) If the claimant's reason for refusal is his contention that he is owed more severance pay, the claimant's claim should be taken and referred for adjudication. This adjudication should ordinarily result in a determination that no valid claim has been filed if it appears that the claimant could receive the amount offered by the employer without prejudicing his right to pursue the additional amounts claimed by him.

(3) If the claimant's reason for refusal is some personal consideration (e.g., more favorable income tax treatment through deferring payment) a claim should be taken only if the claimant insists. If the claimant insists, the claim should be referred for adjudication on the issue of valid claim, where the claimant should ordinarily be determined to be "not unemployed" by reason of constructive payment of severance pay.

III

Facts: The claimant filed a claim and neither the claimant nor the employer indicated that the claimant was or would be receiving separation pay. The claimant is paid benefits, and the payment of separation pay either is made retroactively or only then comes to light.

Question: Should the claimant's benefit year be taken down?

Answer: Not ordinarily. In the above fact situation, the claimant may have known about the separation pay and wilfully not disclosed it. In such a case, a fraud investigation would be appropriate. Whether the claimant knew or did not know about severance pay at the time the claim was filed, G.S. 96-14(8), which has been held to apply to separation pay (see Tyson, supra) declares the recipient of such sums to be disqualified for any week with respect to which these sums were paid (assuming that those weekly sums correspond to wages actually lost). While it could be argued that a claimant who received retroactive separation pay was not unemployed in the first instance, the statute does not seem to contemplate taking down the benefit year in such cases (nor should it since a retroactive disqualification under G.S. 96-14(8) will result in an overpayment) and, in the case of fraud, taking down the benefit year would be singularly inappropriate. Additionally, in an analogous situation (retroactive back pay), Commission Interpretation 163 specifically rejects taking down the benefit year.

Summarizing, if, as discussed elsewhere herein, the present (or reasonably certain future) payment of separation pay is known when the claim is filed, the result should ordinarily be a determination that no valid claim has been filed because the claimant is not unemployed as that term is defined in G.S. 96-8(10)a & c. If, however, the separation pay issue is not apparent at the time the initial claim is filed, but the claimant is later paid separation pay, the result would ordinarily be to leave the benefit year in place, to impose a disqualification under G.S. 96-14(8) and, if circumstances warrant, to commence a fraud investigation.

Adopted as an official Interpretation by the Commission on November 12, 1982.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 259

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Voluntary Contributions

G. S. 96-9(b)(3)g permits any employer to make a voluntary contribution in order, in effect, to lower its rate. There is, however, a thirty (30) day limit after the date of mailing by the Commission of the notification of charges and rate. Due to the complexity of some protests to the list of charges, it is impossible for the Commission to resolve them within thirty days. This places employers in a position of not knowing the results of the protests until after the thirty-day period has expired.

In order to interpret the law in a consistent and fair manner, we are of the opinion that the legislature obviously intended the thirty-day period to begin when the notice of charges and rate is mailed or if it is protested, when the resolution of the protest is mailed to the employer. In other words, an employer has thirty days to make a voluntary contribution after the final notification of the charges and rate.

Adopted as an official Interpretation by the Commission on November 23, 1982.

Dillingsley

EMPLOYMENT SECURITY COMMISSION

INTERPRETATION NO. 260

DATE: August 5, 1983

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Referrals to the State Bureau of Investigation

From time to time, various employees of the Commission have contacted the State Bureau of Investigation concerning violation of various criminal laws of the state. G.S. 114-15.1 provides that anyone employed by the state of North Carolina who receives information or evidence of a crime against or misuse of state personal property, buildings, or real property, shall, within three days of receipt of such information or evidence, report such to his immediate supervisor who shall report to the head of the agency who shall make a written report to the Director of the State Bureau of Investigation within ten days.

Any requests for an investigation by the State Bureau of Investigation shall be sent immediately to the legal department. The legal department shall immediately review the request and, if appropriate, immediately prepare the necessary materials to forward the matter under the Chairman's signature to the Director of the State Bureau of Investigation.

Requests for handwriting analysis from the SBI laboratory concerning possible fraudulent cashing of unemployment insurance checks need not be forwarded through the legal department.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 261

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Leaves of Absence; Recission of UI Procedural Letter 33 (81)

The Commission has recently settled a court case challenging the handling of questions involving a separation from employment that occurs during or incident to a leave of absence. Pursuant to that agreement, UI Procedural Letter 33 (81) is hereby rescinded and the following sets forth the Commission's position on these questions.

Nothing contained herein shall be interpreted to conflict with federal and State statutes; specifically, with 26 U.S.C. Section 3304(a)(12) providing that unemployment benefits may not be denied "solely on the basis of pregnancy or termination of pregnancy." Nor is this interpretation intended to conflict with longstanding Commission practice that:

(1) a pregant woman is involuntarily separated from her employment where her employment is terminated solely because her employer does not provide work suitable for her in view of her pregnancy; and

(2) an individual who is discharged solely because she is pregnant is unemployed through no fault of her own.

This interpretation is intended only to be a guide to the adjudication of the issues that may arise where a worker and the employer agree to a leave of absence and the worker, for any reason, including temporary disability, then or thereafter files a claim for unemployment insurance benefits before returning to work.

A leave of absence is defined as a contractual arrangement between the employee and the employer whereby the employer/employee relationship is maintained during a temporary period of non-work. It is immaterial for purposes of this interpretation whether the leave of absence was for a time certain or was dependent upon the occurrence or termination of some particular factor. Set forth below are fact situations which probably will cover most questions that arise.

1. If a leave of absence is granted to an individual because of lack of work, the claim should be handled in the same way as a claim for anyone who is separated because of lack of work. Paragraphs (2), (3), (4), and (5) below would not apply to such individuals. It is interesting to note that leaves of absence of this type are becoming more frequent when employment is curtailed because of lack of work, but the seniority of people for whom no work is available is retained by giving them a leave of absence. It should be understood that individuals unemployed for this reason must be fully available for and seeking other work. State employees, including of course Commission employees, who are affected by the current Reduction in Force fall into this category. They may be considered "On Furlough" or "Leave Without Pay" but it is still a leave of absence and when a claim is filed, the separation should show lack of work.

2. If the leave of absence - except for one caused by lack of work - is still in existence and the reason for the leave of absence still exists in whole or in part, the issue of separation is to be adjudicated. The filing of an unemployment insurance claim alone is not evidence of a voluntary quit. The critical fact to be determined is whether, based on specific facts or circumstances found to exist at or before the filing of the claim, the claimant previously has voluntarily terminated any employment relationship with the employer that granted the leave of absence. If the reason which still exists for the leave of absence gives rise to a question of able and available under G.S. 96-13(a)(3), that issue also shall be adjudicated.

3. If the leave of absence - except for one caused by lack of work - still exists but the reason for the leave has ended completely, the issue of separation is to be adjudicated. The filing of an unemployment claim alone is not evidence of a voluntary quit. The critical facts to be determined are whether the claimant has taken such actions as are reasonable under the circumstances of the individual case to resume work with the employer that granted the leave of absence and, if so, whether the employer provides suitable re-employment. There is no issue of able and available merely because of the leave of absence.

4. If the leave of absence - except for one caused by lack of work - has ended and the reason for the leave still exists in whole or in part, but the individual has not attempted to renegotiate the leave of absence or resume work for the employer, the issue of separation is to be adjudicated. The filing of an unemployment claim alone is not evidence of a voluntary quit.

The critical facts to be determined are whether the claimant has taken such steps as might be reasonable under the circumstances of the individual case (or reasonably omitted to take such steps) to either extend the leave of absence or return to work and, if so, whether the employer granted the extension or provided suitable re-employment, if sought. If the reason for the leave of absence gives rise to an issue of able and available, that issue shall also be adjudicated.

5. If both the leave of absence and the reason therefore have ended completely, the only issue which arises is the claimant's separation from work. Again, the filing of an unemployment claim alone is not evidence of a voluntary quit. The critical facts to be determined are whether the claimant has attempted to return to work and, if so, whether the employer provided suitable re-employment.

Adopted as an official Interpretation by the Commission on January 9, 1984.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 262

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Bona Fide Permanent Employment

Inquiry has been made whether a claimant should be referred on an issue of voluntary leaving under the following circumstances. The claimant has had a non-disqualifying separation and is receiving unemployment insurance benefits and is referred to permanent employment by the Commission or secures it through the claimant's own efforts. The claimant then works between one day but not greater than 30 days and quits. Currently some local offices are not referring such a claimant since the claimant did not work for greater than 30 days as described in G.S. 96-8(24).

G.S. 96-8(24) provides:

> Work, for purposes of this Chapter, means any bona fide permanent employment. For purposes of this definition, "bona fide permanent employment" is presumed to include only those employments of greater than 30 consecutive calendar days duration (regardless of whether work is performed on all those days) provided: (a) the presumption that an employment lasting 30 days or less is not bona fide permanent employment may be rebutted by a finding by the Commission, either on its own motion or upon a clear and convincing showing by an interested party that the application of the presumption would work a substantial injustice in view of the intent of this Chapter; (b) Any decision of the Commission on the question of bona fide employment may be disturbed on judicial review only upon a finding of plain error.

We are of the opinion that a substantial injustice in view of the intent of the Chapter would occur if any claimant were to use this process of accepting the permanent work offered and voluntarily leaving prior to the 30-days duration in order to avoid refusing the offered work and raising an issue under G.S. 96-14(3). If any possible issue of this is apparent to any employee of the Commission or brought to the Commission's attention, it should be raised and adjudicated.

Example 1 - The claimant is on a temporary layoff from the employer and files forms NCUI 501 and thereafter becomes a totally separated claimant. The claimant then is recalled to permanent employment with the prior employer, works between one day but not greater than 30 days and then quits.

The last day the claimant worked during this recall period and left was the last day of work. This period of time was the last bona fide permanent employment, and the claimant should be referred to the Adjudicator on a voluntary leaving issue.

Example 2 - The claimant is on a temporary layoff and files forms NCUI 501 for two weeks without earnings. The claimant is then recalled to the work and quits after working between one day but not greater than 30 days.

The last day the claimant worked during this recall period and then left is the last day worked. This period of time was the last bona fide permanent employment and should be referred to the Adjudicator on a voluntary leaving issue.

Example 3 - The claimant has been totally separated for non-disqualifying reasons, either as determined by adjudication or by permanent layoff; the claimant is then offered the same work on a permanent basis by the last employer, works between one day but not greater than 30 days and then quits.

Again, the last day the claimant worked during this recall period and then left was the last day of work. This period of time was the last bona fide permanent employment and should be referred to the Adjudicator on a voluntary leaving issue.

Example 4 - The claimant has been totally separated for non-disqualifying reasons, either as determined by adjudication or by permanent layoff. The claimant is then referred to work by the local office or secures permanent work through the claimant's own efforts with a different employer than the last one, accepts it but then quits after having worked between one day but not greater than 30 days.

Again, the last day the claimant worked during this period and then left is the last day of work. This period of time was the last bona fide permanent employment and should be referred to the Adjudicator on a voluntary leaving issue.

The main point to remember is that the presumption in G.S. 96-8(24) is rebutted when a clear and convincing showing is made that the presumption would work a substantial injustice in view of the intent of this Chapter. The injustice exists equally whether the claimant otherwise would not receive the benefits due to being unemployed through no fault or otherwise would receive them when not due them.

Adopted as an official Interpretation by the Commission on July 6, 1984.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 262

SUPPLEMENT I

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Bona Fide Permanent Employment

Interpretation No. 262, adopted by the Commission on July 6, 1984, addresses the issue of a claimant who has accepted permanent employment but works between one day but not greater than 30 days, and who then quits and reopens the claim. Prior to Interpretation 262, this employment was not considered as it was not greater than 30 days duration.

Interpretation 262 specifically does not address the situation where a claimant has accepted permanent employment between one day but not greater than 30 days and is discharged. Based on inquiries received subsequent to the adoption of Interpretation 262, if any possible issue of this situation in a discharge context under G.S. 96-14(2) or (2A) is apparent to any employee of the Commission or brought to the Commission's attention, it also should be raised and adjudicated. This Supplement and the prior Interpretation apply to any individual who has established a valid benefit year and also to a case wherein a benefit year ends and the claimant subsequently accepts permanent employment between one day but not greater than 30 days and becomes unemployed with an issue under G.S. 96-14(1), (2) or (2A) before establishing a new benefit year. In the latter situation, this Interpretation and Supplement apply even though the claim is within a new benefit year.

Whether or not the claimant is receiving unemployment insurance benefits when the employment occurs is not material since Commission Regulation 2.14 defines a "claimant" in terms of one who "files a claim" and not one who is receiving benefits.

Adopted as an official Interpretation by the Commission on April 12, 1985. This Supplement I cancels and replaces Supplement I, Interpretation No. 262, adopted on September 21, 1984.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 263

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Between Terms Denial for Educational Personnel

Questions have arisen concerning the interpretation of N.C.G.S. 96-13(b)(1) with regard to the requirements of 26 USC 3304(a)(6). This interpretation is to clarify the meaning of N.C.G.S. 96-13(b)(1) to assure, as required by N.C.G.S. 96-20, that the application of the North Carolina Employment Security Law is compliant with all relevant Federal law, declared by the General Assembly of North Carolina in N.C.G.S. 96-19 to be the purpose of our law.

Question #1 - In view of the provisions of 26 USC 3304(a)(6) can N.C.G.S. 96-13(b)(1) conformably require the retroactive payment of benefits to instructional and principal administrative (professional) personnel in or for educational institutions?

A. The U. S. Department of Labor has interpreted 26 USC 3304(a)(6)(i) to allow the retroactive payment of benefits to professional educational personnel only where the Commission determines that the reasonable assurance upon which the disqualification is based was faulty when given. As of the effective date of this interpretation, N.C.G.S. 96-13(b)(1) is interpreted to allow the retroactive payment of benefits to personnel in instructional, research or principal administrative capacities only upon a redetermination under circumstances allowed by Federal guidelines. (See Supplement #1, Q&A Supplementing Draft Language and Commentary to Implement the Unemployment Compensation Amendments of 1976 - Public Law 94-566, Question 7, Page 20). Any questions regarding retroactive claims payments to professional personnel should be routed directly to the Legal Department.

Question #2 - May non-professional educational workers be disqualified under N.C.G.S. 96-13(b)(1) for periods of leave between non-consecutive school terms, i.e., during leaves of absence or sabbaticals?

A. No. Federal law does not allow such disqualifications. Such non-professional educational workers must be treated as any other worker on leave of absence. Therefore, if a leave of absence is with pay, an issue of whether the worker is unemployed within the meaning of N.C.G.S. 96-8(10) will arise if a claim is filed during the pendancy of the leave. Similarly, unpaid leaves of absence shall be treated in accordance with usual Commission procedures.

Question #3 - Does G.S. 96-13(b)(1) require a disqualification for weeks occurring between terms or years or during a vacation period of professional and non-professional employees of educational service agencies who perform services in an educational institution covered by G.S. 96-13(b)(1)?

A. It does. N.C.G.S. 96-13(b)(1) requires between terms denials for claims "with respect to services in . . . educational institutions." The Commission's interpretation of this language as reaching educational service agencies has recently been approved by the North Carolina Court of Appeals.

Question #4 - Do the provisions of G.S. 96-13(b)(1) require the disqualification of all educational personnel during a vacation period or holiday recess if the individual worked prior to such period and has a reasonable assurance of employment after such period?

A. Such disqualifications are required. The Commission has always interpreted the language of 96-13(b)(1), except as interpreted in Answer #2 above, to comprehend all periods of vacation or recess.

Question #5 - May an individual who has worked in one capacity during one school year, e.g., non-professional, be denied benefits at the beginning of the summer if the employment in the next year for which a reasonable assurance is offered is in another capacity, e.g., professional work? May retroactive benefits be denied if the work offered at the end of the summer is in a different category?

A. The U.S. Department of Labor interprets Federal law to forbid such "crossover" disqualifications. Therefore, if the only assurance of continued employment or the only job offered is in a substantially different capacity, the claimant may not be disqualified between terms or denied retroactive benefits.

Adopted as an offical Interpretation of the Commission effective September 10, 1984.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 263

SUPPLEMENT I

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Between Terms Denial

Recently the General Assembly amended G.S. 96-13(b)(1) by deleting the period at the end of the last sentence and adding the following words and punctuation:

> or who performed such services in an educational institution while in the employ of an educational service agency, and for this purpose the term "educational service agency" means a governmental agency or governmental entity which is established and operated exclusively for the purpose of providing such services to one or more educational institutions.

The amendment applies to all claims weeks beginning on or after March 3, 1985. The effect of this amendment is that individuals who are performing services in an educational institution and who are employed by non-governmental educational service agencies are <u>not</u> denied benefits due to the "between terms" provision. For example, food service workers at a college who are employed by a private caterer are not to be denied benefits while the cafeteria or snack bar is closed at Christmas or Spring Break.

Adopted as an official Interpretation by the Commission on April 12, 1985.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 263, SUPPLEMENT II

TO: Employment Security Commission

FROM: T. S. Whitaker, TSW Chief Counsel

SUBJECT: Public Health Nursing Positions with Schools

An inquiry has been received from a county personnel department whether or not individuals performing services in public health nursing positions with the county's secondary schools are subject to "between terms denial" if such individuals' positions are reduced from 12 months to 10 months, to coincide with the school term.

N.C. Gen. Stat. §96-13(b)(1) provides for what is known as "between terms denial" for individuals performing services for nonprofit organizations, hospitals, State hospitals, State or other institutions of higher education, or secondary schools.

The answer, therefore, is in the affirmative since those in the public health nursing positions are performing ". . . services for . . . secondary schools subject to . . ." the Employment Security Law. N.C. Gen. Stat. §96-13(b)(1), by its specific terms, is not limited to teachers or teaching-related services. The test is whether or not the services are performed for those employing entities listed.

Adopted as an official Interpretation by the Commission on June 1, 1987.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 263

SUPPLEMENT III

TO: EMPLOYMENT SECURITY COMMISSION

FROM: Thomas S. Whitaker, Chief Counsel

REFERENCE: ESC Interpretation No. 263; Supplements I and II

SUBJECT: Between Terms Denial - "REASONABLE ASSURANCES"

N.C.G.S. §96-13(b)(1) requires the ineligibility for unemployment insurance benefits of educational personnel during all periods of vacation or recess if they have reasonable assurance of employment with the educational institution after such periods expire. What constitutes "reasonable assurance" of employment has been a problematic area for adjudicators and appeals referees.

In the majority of cases, the existence of "reasonable assurance" must be determined by considering (1) the historical relationship between the claimant and the educational institution, (2) the educational institution's policies and procedures regarding continuing employment and the claimant's knowledge thereof, (3) the degree of certainty, if any, expressed in the correspondence or discussion between the claimant and the educational institution's authorized representative regarding continuing employment, and (4) what the educational institution intended to convey to the claimant regarding its commitment to furnishing continuing employment and what the claimant understood. The following items, standing alone or combined, will not constitute "reasonable assurance" of employment:

1. Continuing insurance coverage since there are laws which control such matter;

2. The right to carry over unused leave should the claimant be reemployed by the educational institution;

3. A mere statement that the claimant will be considered or eligible for reemployment; and,

4. A possibility of employment contingent on the educational institution's receipt of sufficient funding, or on the educational institution not having to give priority consideration to other individuals.

A letter received by the claimant from the educational institution stating that his/her contract of employment will not be renewed for the period after the vacation or recess is a presumption that there is no "reasonable assurance" of continuing employment. The presumption is not rebutted by a mere showing that the letter contains reference to a possibility of an extension of employment if sufficient funding is received by the educational institution. Evidence that the historical relationship or discussion between the claimant and the educational institution establishes that the letter was a mere formality is sufficient to rebut the presumption of no "reasonable assurance" of continuing employment.

It is imperative that the attached ESC Interpretation No. 263, Supplements I and II be reviewed by all ESC personnel responsible for raising issues and/or adjudicating issues under G.S. §96-13(b)(1). Also, resource personnel should be utilized if questionable situations arise. The Legal Department Staff will assist the resource personnel as much as possible to provide answers.

Attachments

Adopted as an official Interpretation of the Employment Security effective May 27, 1992.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 264

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: N.C.G.S. 96-8(10) - Application of this section in cases where an employer's incentive pay plan results in an employee being paid for more hours than he actually worked

N.C.G.S. 96-8(10)a.1. provides:

> For the purpose of establishing a benefit year, an individual shall be deemed to be unemployed if he has payroll attachment but, because of lack of work during the payroll week for which he is requesting the establishment of a benefit year, he worked less than the equivalent of three customary scheduled full-time days in the establishment, plant, or industry in which he has payroll attachment as a regular employee. If a benefit year is established, it shall begin on the Sunday preceding the payroll week ending date.

N.C.G.S. 96-8(10)b.2. provides:

> For benefit weeks within an established benefit year, a claimant shall be deemed to be partially unemployed, if he has payroll attachment but because of lack of work during the payroll week for which he is requesting benefits he worked less than three customary scheduled full-time days in the establishment, plant, or industry in which he is employed and whose earnings from such employment (including payments defined in subparagraph c below) would qualify him for a reduced payment as prescribed by G.S. 96-12(c).

The wording of these sections requires that the Commission look at the number of hours of work which were available and actually worked by the individual, and is based on a five-day, forty-hour work week. For work weeks which are not set up on a five-day, forty-hour basis, the Commission has interpreted these provisions in terms of percentages, e.g., where an individual works less than 60% of his customary work week, he may be partially unemployed. See Interpretation No. 256.

Based on the wording of the statute and Interpretation No. 256, a decision as to whether an individual is partially unemployed should be based on the number of hours actually available for the individual to work and not upon the number of hours for which the employer elects to pay an individual under the employer's particular incentive pay plan.

Adopted as an official Interpretation by the Commission on November 14, 1984.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 264, SUPPLEMENT I

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Attached Unemployment; N.C. Gen. Stat. §96-8(10).

Interpretation No. 264 prohibits the use of wages from an incentive pay plan in adding to the computation of the number of days or hours worked or paid for the unemployment threshold test as set out in N.C. Gen. Stat. §96-8(10). Although that Interpretation specifically is limited to incentive pay plans, some questions have arisen. An incentive pay plan contemplated under that Interpretation is one in which an employer adds an amount in terms of a portion or percentage of the base hourly wage to the employee's pay due to the employee's meeting or exceeding a certain production or performance standard. The situation then under study involved an employer's request to divide the total wages paid, including the incentive pay, by the base hourly wage to determine the number of hours "effectively" paid during the week in question. All that Interpretation intended was to prohibit an employer's attempt to raise the number of hours for the unemployment threshold test by using such plan.

For example, an employee who actually had worked twenty hours had been paid more than the sum determined by multiplying the twenty hours worked by the base hourly wage because of incentive or production pay. The amount actually paid might have been equal to 24 hours times the base hourly wage, and the employer was attempting to have 24 hours used as the number of hours for determining "unemployment" for purposes of N.C. Gen. Stat. §96-8(10). Interpretation No. 264 holds to the contrary. It does not address or hold that other pay should be ignored.

N.C. Gen. Stat. §96-8(10) a.1. and b.2. limit unemployment for attached individuals to instances in which an individual works or is paid "less than three customary scheduled full-time days" or 60% of the customary scheduled full-time hours. See, Interpretation No. 256. Some have concluded from Interpretion No. 264 that unless an attached individual actually works at least the three days or 60% threshold, that individual is unemployed even if paid for more than the regular or customary amount of wages for three days or 60%. The thrust behind Interpretation 264, however, is that an employer cannot use an incentive or production pay plan in adding to the total used for determining the threshold. Any other wages or pay including bonus, vacation pay, etc., however, must be applied in determining whether the three days or 60% has been met.

N.C. Gen. Stat. §96-8(6)a. provides in pertinent part that "[a]n employee who is on paid vacation or is on paid leave of absence due to illness or other reason shall be deemed to be in employment irrespective of the failure of such individual to perform services for the employing unit during such period." A "leave of absence" is not defined in the Employment Security Law and must therefore be given its customary meaning; that is, leave or permission to the employee from the employer to be absent from work. If the employer pays the

employee the regular or customary wages for that period of absence, then that employee is "in employment" and therefore not "unemployed." For example, an employee who works three days (or 60%), is paid vacation or holiday pay for these three days (or 60%), or any combination thereof equalling three days (or 60%), is not within the threshold test for "unemployment."

In determining what wages count, the first consideration is what wage rate the employer customarily uses when it pays its employees for sick leave, holiday pay, vacation pay, etc. This rate must be at least the applicable minimum wage; if not, that applicable minimum wage rate will be used. Next and only for purposes of the three days or 60% test, any incentive or production pay is subtracted from the total pay for the week. It is immaterial what the employer calls the incentive or production pay. For purposes of this Interpretation and Supplement, incentive or production pay means additional wages due to meeting or exceeding any production standard during the period in which the employer calculates the earnings for that period for the employee. Vacation, bonus or any other pay is not subtracted. That sum then is divided by the customary hourly wage rate or applicable mimimum wage. If the quotient is at least the equivalent of "three customary full-time days" or 60% of the customary scheduled full-time hours, the employee does not meet the threshold test for "unemployment."

Vacation wages already paid prior to the week in question but attributed by the employer to the week in question also must be used in this determination, unless those wages already have been considered as wages in a test for "unemployment" in a prior week or used as earnings for purposes of N.C. Gen. Stat. §96-12(c). For example, if vacation pay for two days had been paid several months prior to the week under consideration, but that vacation pay had been used either by the employer or the Commission in determining whether or not the employee then met the test for "unemployment", that vacation pay or wages again cannot be considered or used.

Adopted as an official Interpretation by the Commission on June 9, 1987.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA
UNEMPLOYMENT INSURANCE DIVISION
RALEIGH, NORTH CAROLINA

June 16, 1987

UI Bulletin No. 11 (87)

TO: UI Management Staff and Outstationed Personnel

Special Attention: Local Office Managers

FROM: Preston L. Johnson, UI Director PLJ

SUBJECT: Eligibility for Attached Unemployment

Please Refer to Interpretation No. 264, Supplement 1, dated June 9, 1987.

The Employment Security Law, Section 96-8 (10) limits unemployment for payroll attached individuals to instances in which an individual works or is paid "less than three customary scheduled full-time days" or 60% of the customary scheduled full-time hours. The intent of Interpretation No. 264 is to prevent an employer from using incentive or production pay in determining the number of hours "effectively" paid during a given week. However, any other wages or pay including bonus, vacation pay, holiday pay, etc..., must be applied in determining whether the three days or 60% threshold has been met.

This bulletin supersedes UI Bulletin 1 (85) which is now obsolete.

EXPIRATION DATE: Indefinite

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 265

TO: Employment Security Commission

FROM: T. S. Whitaker, TSW Chief Counsel

SUBJECT: Seasonal Pursuits, N.C. Gen. Stat. §96-16.

Inquiry has been made whether any federal employment can be determined a "seasonal pursuit" under this section of the Employment Security Law. Pursuant to 5 U.S.C. §§8501 et seq., and 20 C.F.R. §§609.1 et seq., wages from services performed in federal civilian service are assigned under applicable State law for determination and payment of unemployment insurance benefits. North Carolina, of course, by agreement with the U.S. Secretary of Labor, is a recipient of such assignment of wages and pays unemployment insurance benefits on this "UCFE" (unemployment compensation for federal employees) type of claim.

20 C.F.R. §609.9 sets forth the provisions of any State law applicable to UCFE claims. While claims, information, notices, decisions, eligibility requirement, disqualifications, wage combining, and other procedural requirements are applicable, no mention is made of "seasonal pursuits" applied for by any "federal agency," as defined in 20 C.F.R. §609.2(e). From this omission in federal law and regulations, we conclude that benefit claims and payments are under North Carolina law, but employee coverage is not. This conclusion is supported by 20 C.F.R §609.2(f) which defines "federal civilian service."

To determine such service as a "seasonal pursuit" under N.C. Gen. Stat. §96-16, this Commission would have to make such determination in terms of "Pursuit," which is defined as ". . . an employer or branch of an employer." N.C. Gen. Stat. §96-16(j)(1). Federal law and regulations prohibit this State from making such determination.

In summary, no "seasonal pursuit" determination on federal civilian service can be made by this Commission pursuant to N.C. Gen. Stat. §96-16, although, presumably, the Congress or the U.S. Secretary of Labor could amend the law and regulations to provide for such determination to be considered. No such application has been received from any federal agency for such determination, and none is under consideration. If any application is received, it will be denied by this Commission based on current federal law and regulation.

Adopted as an official Interpretation by the Commission on March 31, 1987.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 266 ~~265~~

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Authority to Reconsider State UI Claims

In order to implement their revised interpretation of the effective date of Section 1430(a) of the Omnibus Trade and Competitiveness Act (OTCA) of 1988 (the 1988 Amendments), the United States Department of Labor has required by Section 5.b. of General Administration Letter No. 15-90 the North Carolina Employment Security Commission to review the authority contained in the North Carolina Employment Security Law (Chapter 96 of the North Carolina General Statute) to redetermine or reconsider unemployment insurance benefit claims. The United States Department of Labor has also required the State to apply such authority to Trade Readjustment Allowances (TRA) and Trade Adjustment Assistance (TAA) claims under the same conditions that are applied to State unemployment insurance benefit claims.

A review of the North Carolina Employment Security Law reveals that North Carolina General Statute 96-15 (b) (1) provides, inter alia, that at any time within one year from the date of the making of an initial determination, the Employment Security Commission on its own initiative may reconsider such determination if it finds that an error in computation or identity has occurred in connection therewith or that additional wages pertinent to a claimant benefit status have become available, or if such determination of benefit status was made as a result of a nondisclosure or misrepresentation of a material fact. There are no other provisions in the North Carolina Employment Security Law providing for any authority to redetermine or reconsider unemployment insurance benefit claims.

This Interpretation is issued to clarify the authority contained in the Employment Security Law to redetermine and reconsider unemployment insurance benefits and to serve as the certification required in General Administration Letter No. 15-90.

Adopted as an official Interpretation by the Commission on March 1, 1991.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 267

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Disability Pension Offset Requirements

The Federal Unemployment Tax Act (FUTA), 26 U.S.C. §3304(a)(15), requires that the amount of unemployment compensation payable to an individual for any week during which the individual is receiving a governmental or other pension, retirement or retired pay, annuity, or any other similar periodic payment which is based on the previous work of such individual shall be reduced (but not below zero) by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment which is reasonably attributable to such week, provided that such payment is under a plan maintained (or contributed to) by a base period or chargeable employer. N.C. Gen. Stat. §96-14(9) adopted such federal requirement.

Inquiry has been made whether this subsection of North Carolina law applies to disability retirements. Due to the clear similarity with federal law, and persuaded by the U.S. Department of Labor's Unemployment Insurance Program Letter No. 22-87, expiration date 4-30-88, we are of the opinion it does.

Since the law specifies that this reduction in unemployment insurance benefits must occur for retirement payments based on the previous work of such individual, it applies only to retirement income collected by the person who actually earned this income. It does not apply, for example, to a survivor's or widow's or widower's benefit that is payable to a survivor, and is not based on the previous work of that survivor. Likewise, temporary disability insurance payments and worker's compensation (including Black Lung benefits), which are not payable as retirement or pension benefits are not deductible under this subsection, although they may be under N.C. Gen. Stat. §96-13(a)(4). No exhaustive list of all the kinds of payments that are deductible is available. Payments provided for under the plans or programs listed below are subject to the pension offset requirements:

* 1. Primary social security old age and disability retirements, including those based on self-employment;

2. State and local government pensions of all types;

3. Federal Civil Service pensions, including disability pensions;

4. Private for-profit employer pensions;

5. Non-profit employer pensions;

** 6. Military retirement pensions and disability retirement pensions;

7. Railroad Retirement annuities;

8. Benefits derived from Individual Retirement Accounts; and

9. Benefits based on Keogh plans.

* Except for Item 1 above, all are deductible only if the base period employer(s) contributed in whole or part to the plan on the individual's behalf.

** If an ex-service person is receiving a retirement pension based on length of service, or disability, from the branch of military service in which served, this pension is deductible; however, if the disability payment is from the Veteran's Administration, the disability payment is not deductible.

In contrast to N.C. Gen. Stat. §96-8(10)c., unless the claimant or the employer specifies otherwise, lump-sum retirement payments are to be deducted only in the week received.

Adopted as an Official Interpretation by the Commission on September 11, 1987.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

RALEIGH, NORTH CAROLINA

October 15, 1991

TO: Holders of Interpretation Manual

FROM: Ann Q. Duncan, Chairman AQD

SUBJECT: Interpretation No. 268

In accordance with Interpretation No. 252, the attached Interpretation No. 268 has been adopted as an official Interpretation by the Employment Security Commission and shall be distributed to all holders of the Interpretations.

Interpretation No. 265 issued March 1, 1991 is renumbered as Interpretation 266. Please make the appropriate changes on your copy.

Any questions about this Interpretation should be directed to the Office of the Chief Counsel at (919) 733-4636.

Attachment

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 268

TO: Employment Security Commission

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Extended Benefits
Charging of Benefits

REQUESTED BY: Preston L. Johnson, Director
Unemployment Insurance Division

QUESTION:

(1) Does Section 96-9(c)(2)b apply to the state portion of the extended benefits paid?

(2) Does Section 96-9(c)(2)a apply to the state portion of the extended benefits paid?

CONCLUSION: (1) Yes.
(2) Yes.

N.C.G.S. §96-12(e)G, in pertinent part, provides as follows:

> On or after January 1, 1978, the federal portion of any extended benefits shall not be charged to the account of any employer who pays taxes as required by this Chapter but the State portion of such extended benefits shall be charged to the account of such employer. All state portions of the extended benefits paid shall be charged to the account of governmental entities or other employers not liable for FUTA taxes who are the base period employers. (Emphasis added.)

This provision mandates the charging of the State portion of extended benefits to experienced rated and reimbursement base period employers. It does not define what charging method or scheme the State should use to allocate the extended benefits payments to the accounts of the base period employers. Furthermore, it does not, expressedly or impliedly, limit the applicability of any provision of G.S. §96-9(c)(2).

The above provision is consistent with the Federal Unemployment Tax Act (FUTA) 26 U.S.C. 3301-3311, and Federal Regulations. Regulation 20 CFR 615.10(a) reads as follows:

> (a) Charging contributing employers. Section 3303(a)(1) of the Internal Revenue Code of 1954 (26 U.S.C. 3303(a)(1)), does not require that Extended Benefits paid to an individual be charged to the experience rating accounts of employers. A State law may, however, consistently with Section 3303(a)(1), require the charging of Extended Benefits paid to an individual, and if it does, it may provide for charging all or any portion of such compensation paid. Sharable regular compensation must be charged as all other regular compensation is charged under the State law.

Accordingly, North Carolina has the right to choose whether or not to charge extended benefits to employers' unemployment insurance tax accounts.

The North Carolina General Assembly has provided a standard statutory scheme for charging benefit payments. That scheme is set forth in G.S. §96-9(c)(2)a which provides as follows:

> Benefits paid shall be allocated to the account of each base period employer in the proportion that the base period wages paid to an eligible individual in any calendar quarter by each such employer bears to the total wages paid by all base period employers during the base period, except as hereinafter provided in paragraphs b, c, and d of this subdivision, G.S. 96-9(d)(2)c, and 96-12(e)G. The amount so allocated shall be multiplied by one hundred twenty percent (120%) and charged to that employer's account. Benefits paid shall be charged to the employers' accounts upon the basis of benefits paid to claimants whose benefit years have expired.

This subsection contains no language from which it may be concluded that the charging method or scheme set forth therein is limited to the charging of <u>regular</u> benefit payments, and not applicable to <u>extended</u> benefit payments. The "except as hereinafter provided in . . . 96-12(e)G" language is included to exclude from the definition of "benefits paid" the federal portion of extended benefits which "shall not be charged to the account of any employer who pay taxes as required by this Chapter . . ." G.S. §96-12(e)G. This is a reasonable interpretation of this "except" language because all other statutory provisions referenced provide for the "non-charging" or exclusion of specific benefit payments.

For extended benefit payments made prior to January 1, 1978, the Legislature specifically stated that G.S. §96-9(c)(2)b was not to be applied to the charging of extended benefit payment. No such language is contained in the pertinent part of G.S. §96-12(e)G, as set out above, which addresses extended benefit payments made after January 1, 1978. By its specific language, G.S. §96-9(c)(2)a makes G.S. §96-9(c)(2)b applicable to the charging of benefit payments. In view of the exclusionary language used by the Legislature as to extended benefit payments made prior to January 1, 1978, it is reasonable to assume, and it is concluded, that the inapplicability of G.S. §96-9(c)(2)b must be specifically stated in order for it not to be applied to the charging of any benefit payments.

In sum, the statutory charging scheme of benefit payments set forth in G.S. §96-9(c)(2), paragraphs a and b included, is applicable to the charging of the State portion of extended benefits to the accounts of base period employers.

Adopted as an official Interpretation by the Commission on October 14, 1991.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

Interoffice Communication

Date: February 28, 1992

TO: Holders of Interpretation Manual

FROM: T. S. Whitaker, Chief Counsel

SUBJECT: Interpretation No. 269

In accordance with Interpretation No. 252, the attached Interpretation No. 269 has been adopted as an official interpretation by the Commission and shall be distributed to all holders of the Interpretations. Also attached is a current index.

You also should make a pen and ink correction to Interpretation No. 265 "Authority to Reconsider State UI Claims" to make it Interpretation No. 266.

Any questions about this Interpretation should be directed to the office of the Chief Counsel at (919) 733-4636.

Attachments

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION 269

TO: The Employment Security Commission

FROM: T. S. Whitaker, TSW Chief Counsel

SUBJECT: Who May Appeal and/or Protest an Unemployment Tax Rate Assignment, an Unemployment Tax Assessment and Demand for Payment, or an Employer's Status and/or Liability

The Tax Department of the Unemployment Insurance Division has asked who may appeal an Unemployment Tax Rate Assignment, an Unemployment Tax Assessment and Demand for Payment, or an employer's status and/or liability.

An appeal or protest of an Unemployment Tax Assessment and Demand for Payment, an Unemployment Tax Rate Assignment, or an employer's status and/or liability pursuant to N.C.G.S. 96-4(m) must be made in writing by the following appropriate individual. For a sole proprietorship, the sole proprietor must enter the appeal or protest. For a partnership, any partner may enter the appeal or protest. For a corporation, a corporate officer may enter the appeal or protest. An employee of a corporation may appeal for the corporation provided the employee shows that he has been delegated the authority by the corporate officers or the Board of Directors. Proof of such delegation would be a copy of the minutes so delegating, an affidavit, or some other document equally worthy of proof. The appeal or protest from this employee shall be accepted contingent upon the corporation providing the proper proof. An appeal or protest may be entered for any entity by an attorney representing the entity. An appeal or protest may be entered by a non-attorney who is supervised by an attorney pursuant to N.C.G.S. 96-17(b). The attorney who supervises a non-attorney must provide written verification of this supervision with each appeal or protest.

The authority granted by a power of attorney is governed by N.C.G.S. 32A-2(12). If the power of attorney grants the power to act in tax matters generally without restriction, the individual or corporation holding the power of attorney may prepare, execute, verify, and file in the name of the principal and on behalf of the principal any and all types of tax returns or amended returns. It may file reports and applications for corrections. Also, said individual or corporation may obtain an attorney to institute and carry on any proceeding that would constitute a "legal proceeding." It has no authority to institute or carry on such proceeding without an attorney.

A semantics problem has evolved from the Commission interchangeably using the terms appeal, protest, appeal and request for a hearing, and protest and request for a hearing. If an individual or corporation with a power of attorney enters a document that is labelled or uses the words appeal, protest, appeal and request for a hearing, or protest and request for a hearing, it should be accepted and acknowledged as a request for information to which a response is made. Therefore, any documents so labelled shall not be treated as an appeal or protest that would lead to a hearing and will not toll the running of the time to enter an appeal or protest that will lead to the hearing. The individual or corporation filing said document shall be so notified. However, it should be treated as an inquiry concerning the tax rate, tax assessment, status, or liability to which a reply is to be made. If any error is found, the correction shall be made.

Adopted as an official Interpretation by the Commission on February 28, 1992

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 270

TO: The Employment Security Commission

FROM: Thomas S. Whitaker, Chief Counsel

SUBJECT: **Temporary Help/Services Agencies**
(1) Job Listings Requirement
(2) Fee-Charging Restriction

QUESTION #1:

Does the Vietnam Era Veterans Readjustment Act of 1974 require temporary help/services agencies who have subcontracts with Federal contractors to list all suitable employment openings with the Employment Security Commission?

ANSWER: Yes

DISCUSSION:

In a letter dated March 25, 1992, the Regional Director of the U.S. Department of Labor Employment Standards Administration Office of Federal Contract Compliance Programs responded to this and similar questions posed by the General Counsel of the National Association of Temporary Services, Incorporated. The following is a verbatim excerpt from that letter which supports the foregoing answer:

> The Act does require temporary help firms/agencies that have subcontracts with Federal contractors to list all suitable employment openings received from customers with the State Employment Service including those occurring at an establishment of the subcontractor other than at the establishment at which the contract work is being performed.
>
> Even though the temporary help firm regularly maintains a list of qualified temporary employees previously screened or hired, it is not exempt from the requirements to list the opening with the State Employment Security Commission upon receipt of the job orders. The interpretation that customer orders filled from within the temporary agency's own organization is within the meaning of the regulatory requirements is incorrect. The temporary agency is not filling job openings within its organization; it is filling orders for the Federal contractors. The regulations at 60 CFR 250.4(b)(3) should not be interpreted in a manner to circumvent the intent of the requirements under the Act.

In addition, when a Federal contractor uses an employment agency to recruit, screen, and refer potential employees, both the temporary agency and the Federal contractor may be liable if there is any violation of the Job Listing Requirements.

In summary, the focus is targeted at job opportunities and the emphasis placed on proceeding with good faith efforts toward making job opportunities available to covered veterans where there is federal contract coverage.

QUESTION #2:

Is 29 U.S.C. §49(l)(b)(1) applicable if an individual who is referred by a Job Service Office to a temporary help agency is required as a condition of his/her employment with the temporary help agency to sign a contract specifying that the applicant will become an applicant of the fee-charging unit of the temporary help agency beginning when the applicant obtains permanent employment with a client of the temporary help agency?

ANSWER: Yes.

DISCUSSION:

29 U.S.C. §49(l)(b(1) provides as follows:

> Nothing in this chapter shall be construed to prohibit the referral of any applicant to private agencies **as long as the applicant is not charged a fee.** (Emphasis added.)

This provision permits a Job Service Office to refer an applicant to a temporary help agency who will employ the applicant as its own employee and assign him/her to perform various jobs for fee paying clients of the temporary help agency. Even though the temporary help unit may be a part of or attached to an applicant fee-charging agency, 29 U.S.C. §49(l)(b)(1) will still permit a Job Service Office to refer the applicant to the temporary help unit provided it is made clear to the dual-unit agency that only its temporary help unit is being served by the Job Service Office. Furthermore, the applicant must be made aware at the time of referral that the referral is to the temporary help unit, and that the temporary help unit is a part of or attached to an applicant fee-charging agency.

The foregoing presumes, however, that the two (2) units of the dual agency operate independently to the extent that the applicant's employment with the temporary help unit is not dependent on his/her either becoming or potentially becoming an applicant of the fee-charging unit. If the Job Service Office knows or have reason to believe that as a condition of employment with the temporary help unit, the referred applicant will be <u>required</u> to contract to become

an applicant of the fee-charging unit and be liable for a fee upon the occurrence of a specific event, the referral by the Job Service Office is to the temporary help unit and the fee-charging unit. That the fee would only become due and owing if the applicant obtains permanent employment with a temporary help unit's client does not alter the fact that the applicant must contract to pay this fee to the fee-charging unit in order to obtain employment with the temporary help unit.

In summary, 29 U.S.C. §49(l)(b)(1) would prohibit a Job Service Office from referring an applicant to a temporary help agency that would require, as a condition of employment, the applicant to sign a contract to become an applicant of its fee-charging operations.

Adopted as an official Interpretation by the Commission on June 2, 1992.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

INTERPRETATION NO. 270

SUPPLEMENT I

TO: The Employment Security Commission

FROM: Thomas S. Whitaker, Chief Counsel (TW)

SUBJECT: **Temporary Help/Services Agencies**
Fee-Charging Restriction

QUESTION (submitted by Taylor Temporary Services, Incorporated in a letter dated February 7, 1994):

Does the restriction on fee-charging of applicants referred by the Employment Security Commission to temporary help/services agencies prohibit such agencies requiring these applicants, after being hired, to pay for charges for work-related items such as drug tests, safety equipment, tools, and other similar items, incurred after employment commences?

ANSWER: No

DISCUSSION:

29 U.S.C. §49(l)(b(l) provides as follows:

> Nothing in this chapter shall be construed to prohibit the referral of any applicant to private agencies as long as the applicant is not charged a fee. (Emphasis added.)

This provision permits a Job Service Office to refer an applicant to a temporary help agency who will employ the applicant as its own employee and assign him/her to perform various jobs for fee paying clients of the temporary help agency. As stated in Interpretation No. 270, adopted by the Employment Security Commission on June 2, 1992, a temporary help/services agency hiring of an applicant may not be premised on the willingness of the applicant to pay a fee to the agency, before or after hiring. This fee-charging restriction also extends to any requirement that an applicant, prior to being employed by the agency, be charged for work related items that may be required by the agency.

After the applicant becomes an employee of the temporary agency, the fee-charging restriction is not applicable to charges for required drug tests, safety equipment, tools, and similar work-related items incurred after employment commences. Non-temporary help/services agency employers may require payment for such charges by its employees and referrals to these employers by the Employment Security Commission are not terminated or limited because of this requirement. To restrict temporary agency employers who have hired applicants referred by the Employment Security Commission in this manner, but not non-temporary agency employers, would result in different treatment without a justifiable basis.

As with any other employer, a Job Service Office must inquire of the temporary help/services agency whether an applicant, after being hired, may be required to pay charges for work-related items, as described above, incurred after employment commences. This information must be noted on the job order and shared with the applicant by the Job Service Office at the time of referral.

SUMMARY:

Neither 29 U.S.C. §49(1)(b)(1) nor Interpretation No. 270 would prohibit a temporary help/services agency employer from requiring an employee, hired after referral by the Employment Security Commission, to pay charges for drug tests, safety equipment, tools, and similar work-related items incurred after employment commences. To ensure that the applicant knowledgeably accepts employment and any conditions applicable thereto, the Job Service Office must obtain this information from the temporary help/services agencies, as well as other employing entities, at the time the job order is submitted, and share this information with the applicant at the time of referral.

Adopted as an official Interpretation by the Employment Security Commission on February 25, 1994.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

Interoffice Communication

TO: Holders of ESC Interpretation Manual

FROM: Harry E. Payne, Jr., Chairman

SUBJECT: ESC Interpretation No. 271

DATE: December 14, 2005

In accordance with ESC Interpretation No. 252, the attached ESC Interpretation No. 271 has been adopted as an ESC official interpretation and shall be distributed to all holders of the ESC Interpretation Manual. Also attached is a new page 7 for the current index.

Any questions about this ESC Interpretation should be directed to the office of the Acting Chief Counsel at (919) 733-4636.

Attachments

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

ESC INTERPRETATION NO. 271

TO: Employment Security Commission

FROM: David L. Clegg, Acting Chief Counsel

SUBJECT: *Raising Separation from Employment Issues: Reduction in Force Plan - Separation Determined by Employer*

QUESTION:

If an employee offers to be included in his/her employer's established reduction-in-force plan (1) that extended to employees with high-level of seniority an opportunity to be *separated from employment due to lack of available work* in order for the employer to avoid separating other employees with less seniority, (2) under which the employer expressly retained the right to accept or reject the offer and (3) under which the employee could not revoke the offer after it was accepted by the employer, (a) who determines if a separation from employment will occur and, (b) must ESC raise and adjudicate a separation from employment issue when the employer accepts the offer of the employee and he/she subsequently files a claim for unemployment insurance benefits?

ANSWER: (a) **Employer; (b) No.**

DISCUSSION:

The Commission stated in ESC Precedent No. 15, *In re Vaughn* (1984) that we must look at whose, the employer's or the employee's, "act effected the" separation from employment. Under N.C.G.S. §96-14, an issue of separation from employment is raised and adjudicated only if the employee became unemployed through his/her own fault or that of his/her employer.

In the question as presented, under the employer's reduction-in-force plan, the employer expressly and specifically retained the right to accept or reject the offer made by the employee. The offering employee's separation from employment was not automatic or conclusively determined because she/he offered to be included in the employer's reduction-in-force plan. The "act that effected" the employee's separation from employment had to be the employer's decision to accept the employee's offer, which precluded the employee from revoking the offer. Thus, under the employer's reduction-in-force plan if the employer accepted the employee's offer the employee would be separated from employment due to a lack of available work because the remaining work was only available to employees with less seniority.

SUMMARY:

Unemployment due to a lack of available work does not establish an issue of separation from employment that must be raised and adjudicated under G.S. §96-14. If the information received from a claimant and employer established similar circumstances as described herein, no issue of separation from employment should raised. If the issue is raised, inadvertently or as a result of incomplete information received, subsequent adjudication should conclude that there was no at-fault separation from employment.

Adopted as an official Interpretation by the Employment Security Commission on November 16, 2005.

EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA

ESC INTERPRETATION NO. 272

TO: Employment Security Commission

FROM: Thomas H. Hodges, Jr., Chief Counsel

SUBJECT: Application of the Provision under N.C.G.S. §96-14(1)
Relating to Separations Due to Disability or Other Health Reasons

Since the 2009 amendment of the statutory provision relating to separations due to disability or other health reasons under N.C.G.S. §96-14(1), several questions have been received as to its applicability. In a question/answer format, this Interpretation provides guidance to those ESC employees who are authorized to raise and decide issues pursuant to G.S. §96-15.

STATUTORY PROVISION:

> Where an individual is discharged or leaves work due solely to a disability incurred or other health condition, whether or not related to the work, he shall not be disqualified for benefits if the individual shows:
> a. That, at the time of leaving, an adequate disability or health condition of the employee, of a minor child who is in the legally recognized custody of the individual, of an aged or disabled parent of the individual, or of a disabled member of the individual's immediate family, either medically diagnosed or otherwise shown by competent evidence, existed to justify the leaving; and
> b. That, at a reasonable time prior to leaving, the individual gave the employer notice of the disability or health condition.

QUESTION:
Who is "a member of the individual's "immediate family"?

ANSWER:
G.S. §96-8(27) defines "immediate family" as follows:

> "Immediate family" means an individual's wife, husband, mother, father, brother, sister, son, daughter, grandmother, grandfather, grandson, granddaughter, whether the relationship is a biological, step-, half-, or in-law relationship.

QUESTION:
Does "is in the legally recognized custody," mean that the individual maintains "*legal physical custody"* of the minor child?

ANSWER:
No. The individual merely has to show that a legal relationship exists between the individual and the minor child and the individual provides care to the minor child.

QUESTION:
How broadly and/or liberally shall the terms "disability" and "disabled" be defined and applied?

ANSWER:
Because the purpose of this provision is to hold an employee not disqualified from receiving unemployment insurance benefits when he/she separates from employment because a necessity exists to provide care to a member of his/her immediate family, "disability" and "disabled" are broadly defined and must be applied liberally. That is, "disability" and "disabled" include any physical or mental disorder or impairment that impairs an individual's ability to perform a major life activity. A major life activity includes, but is not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, working, and the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. ***Neither the physical nor mental disorder or impairment nor the resulting disability is required to be total or permanent***.

QUESTION:
Does "adequate . . . other health condition, . . . either medically diagnosed or otherwise shown by competent evidence," apply to a parent who is not "aged"?

ANSWER:
Yes. This provision must be applied when an employee must separate from employment because a necessity exists to provide care, temporarily or permanently, to any member of the employee's immediate family. ***The "other health condition" is not required to be permanent***.

QUESTION:
Is an individual required to exhaust all available paid employment-related leave before leaving work under the above statutory provision to avoid being disqualified from receiving unemployment insurance benefits?

ANSWER:
Yes.

QUESTION:
Is an individual required to exhaust all available unpaid employment-related leave before leaving work under the above statutory provision to avoid being disqualified from receiving unemployment insurance benefits?

ANSWER:
Yes and No. **Yes**, if the individual would be able to return to work on or before the expiration of the available leave. **No**, if the individual conclusively shows that unpaid leave would be insufficient to cover the length of his/her required absence from work and the employer would not excuse absences beyond the unpaid leave expiration date or grant additional leave, and there is no other available and suitable work with the employer. As to the latter, although the Commission encourages an individual to maintain an employment relationship whenever possible, it does not require an individual to act futilely.

QUESTION:

Should an individual be disqualified from receiving unemployment insurance benefits if he/she failed to give the employer notice of the disability or health condition "at a reasonable time prior to leaving" employment?

ANSWER:
Consistent with the ESC precedent decisions and North Carolina court cases addressing the existence of good cause for not providing notice of an absence from scheduled work when deciding whether an individual was discharged from work due to misconduct or substantial fault, Yes and No. **Yes**, the individual should be disqualified if the evidence establishes that it was possible for the individual to do so and he/she did not have good cause for not giving prior notice. **No**, the individual should not be disqualified if he/she had good cause for not giving prior notice, but did provide notice as soon as reasonably possible. In determining the existence of good cause, the test to be applied is whether the individual has acted as a person of ordinary prudence under the existing circumstances.

SUMMARY:
If the information received from a claimant and employer established all the elements required under this statutory provision, subsequent adjudication should conclude that there was a non-disqualifying separation from employment. The employer's account will not be charged the benefits paid to the claimant.

Adopted as an official Interpretation by the Employment Security Commission on October 2010.