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Robert W. Corbin

June 15, 1979

Mr. Bill Jamieson, Jr., Director
State Dept. of Economic Security
P.O. Box 6123
Phoenix, Arizona 85005

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ARIZONA ATTORNEY GENERAL**

Re: I79-165 (R79-105)

Dear Mr. Jamieson:

You have requested this office's opinion on a number of questions concerning the application of A.R.S. § 23-791 to claimants for unemployment benefits who are receiving retirement payments.

Your first question is whether A.R.S. § 23-791 excludes from "base period wages" wages paid to a person by that person's employer if that person is receiving a retirement payment which is calculated in such a manner as not to be dependent upon any of the previous work for that employer. A.R.S. § 23-791 provides:

Wages paid by a base-period employer to an individual whose benefit year begins after December 31, 1978 and who at the time of claiming or receiving benefits is receiving any payment on account of retirement which is based on any previous work for such base-period employer shall not be considered "wages for insured work" within the meaning of paragraph 6 of § 23-771 and §§ 23-607 and 23-779.

Thus, this provision excludes from base period wages, and hence either reduces or eliminates the unemployment compensation to which a person might otherwise be entitled, wages paid to that person by that person's employer if that person is receiving any retirement payment which is "based on" any previous work for such employer.

Under most, if not all, private retirement systems, the amount of a person's retirement benefit obviously will be "based on" at least some work for the employer which partially or wholly funded the benefit. This is so, because usually both the entitlement to and amount of the benefit will be directly related to the duration of that work and the wages paid for the work. However, under the social security system, it is possible for a person to work for an employer, for that employer to make contributions to the system on account of that person, and for that person's entitlement to social security retirement benefits to be calculated in a manner such that the amount of those benefits is not dependent upon the work performed by that person for, or the wages paid to that person by, the contributing employer. The question then arises whether, under A.R.S. § 23-791, a retirement benefit is "based on" work for an employer who has contributed to the system which funds the benefits even though the amount of the benefits is computed in a fashion such as to be totally independent of the work for, or wages paid by, that employer.

We cannot determine from the statutory language exactly what the Legislature intended. On the one hand, it is possible to take the position that the Legislature intended to eliminate payments made on behalf of the same person by the same employer to two different systems providing benefits to that person at the same time. Thus, the social security retirement payments received by a person may be loosely viewed as being based upon contributions made by an employer on behalf of that person in the sense that the contributions are deposited in the same fund out of which the benefits are paid.

On the other hand, if this is what the Legislature intended, it much more clearly could have expressed this desired result by inserting the language "from a fund to which such base period employer has contributed on behalf of such individual" in place of the clause "which is based on any previous work for such base-period employer." By using the phrase "based on," the Legislature has suggested, however, that the calculation of the amount of the retirement benefit has to depend in some fashion on the previous work.¹ The Legislature may have desired this result as a form of rough justice under which the entitlement to or amount of unemployment compensation will not be affected unless the

1. We understand that the Department may have real administrative difficulty in determining whether particular social security retirement benefits depend upon particular work performed by the recipients.

amount of the retirement payment received by a person is at least affected by work for the contributing employer.²

As a consequence, we are unable to determine which result the Legislature desired. You therefore have the discretion administratively to interpret the statute in a reasonable fashion.

You next asked whether the phrase "is receiving" as used in A.R.S. § 23-791 with respect to retirement benefits may be interpreted to mean, in effect, "has received, applied for or become entitled to." We think that phrase cannot be given such a broad meaning, as it appears to be plain and unambiguous. Padilla v. Industrial Commission, 113 Ariz. 104, 106, 546 P.2d 1135 (1976). Moreover, while a few states do disqualify claimants for unemployment benefits who have applied for or are entitled to retirement benefits but who have not yet begun to receive such benefits, that is because the unemployment acts of those states specifically so provide. Cf. Illinois Unemployment Insurance Act, Sec. 611.A.1. We also note, in this regard, that the Legislature, in A.R.S. § 23-791, used the phrase "at the time of claiming or receiving benefits" with respect to the unemployment compensation benefits, and yet limited the language to "receiving" with respect to retirement benefits. We therefore do not think it possible to interpret the word "receiving" as having any meaning other than its usual one -- which is, "getting" as evidenced by having in hand.³

You last asked whether the phrase "any payment on account of retirement" as used in A.R.S. § 23-791 might include payments on account of disability. Once again, we do not think the Legislature, by using the plain and unambiguous word "retirement," meant to include "disability" within it. Padilla v. Industrial Commission, supra. Moreover, though at one time the Legislature precluded persons who received workmen's compensation for certain temporary disabilities from simultaneously receiving unemployment compensation, the Legislature deleted that preclusion in 1941 (Laws 1941, Ch. 124,

2. This would only be "rough justice," because the receipt of one dollar of retirement benefits which is "based on" previous work for the base-period employer may and will likely result, under A.R.S. § 23-791, in the loss of many more dollars in unemployment compensation.

3. This means having in hand the first of the retirement payments with no justifiable reason to think that the payments will not continue.

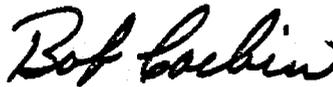
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§ 5; Parise v. Industrial Commission, 16 Ariz.App. 177, 492 P.2d 426 (1971), and we think it inappropriate to read such a preclusion back into the law without a specific direction to that effect from the Legislature.

We recognize, however, that there may be some administrative difficulty in distinguishing between payments on account of retirement and payments on account of disability. If it appears to the Department that a payment is made on account of retirement, but the unemployment compensation claimant takes the position that all or a portion of the payment is on account of disability, then the claimant should have the burden of establishing that fact.

If you have any further questions concerning this subject, please let us know.

Sincerely,



BOB CORBIN
Attorney General

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