

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 had 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 permissible 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 protect, 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 non-acceptance.

- (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 willfully 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 claimant 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.