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## Due Process Requirements in Payment and Termination of Unemployment Compensation Benefits

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## DUE PROCESS REQUIREMENTS IN PAYMENT AND TERMINATION OF UNEMPLOYMENT COMPENSATION BENEFITS

State unemployment compensation programs are largely funded by monies raised<sup>1</sup> and distributed<sup>2</sup> by the federal government. As a result it would be expected that the government would adopt uniform standards governing the administration of such programs, especially in the area dealing with a claimant's procedural due process rights. This, however, is not the case. While the federal government has prescribed minimum standards<sup>3</sup> with which the states must comply in order to qualify for federal funds, it has been deficient in defining what due process safeguards, if any, should be afforded to an unemployment compensation claimant.

The few cases that have dealt with the issue of whether a claimant has a right to a hearing before his unemployment benefits are terminated have failed to yield a definitive statement on the subject. In an attempt to elucidate what hearing procedure must be furnished to an unemployment compensation claimant, this note will examine some recent cases concerned with this problem and discuss their possible effects.

The leading case in this area is *California Department of Human Resources Development v. Java*.<sup>4</sup> The Court's opinion in *Java* deals primarily with the issue of whether unemployment compensation benefits may be withheld from a claimant when an em-

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1. Unemployment compensation funds are raised pursuant to the Federal Unemployment Tax Act. 26 U.S.C. §§ 3301 *et seq.* (Supp. 1973).

2. Funds raised by the Federal Unemployment Tax Act are distributed pursuant to the Social Security Act. 42 U.S.C. § 501 *et seq.* (1969).

3. 42 U.S.C. § 503 (1969).

4. 402 U.S. 121 (1971).

ployer appeals a State's initial determination of eligibility<sup>5</sup> in light of the Social Security Act's requirement that benefits be paid "when due."<sup>6</sup> However, the Court's opinion does incidentally touch upon a claimant's procedural due process rights. In *Java* the claimant filed suit in federal district court and alleged that the suspension of benefits pending an employer's appeal not only violated the Social Security Act,<sup>7</sup> but, that it also violated the claimant's constitutional right to due process of law<sup>8</sup> since such benefits were suspended without a pretermination hearing.<sup>9</sup> The claimant contended this procedure conflicted with the stated goals of unemployment compensation: to reduce "personal hardship as well as society-wide depression in times of increasing unemployment."<sup>10</sup>

The three-judge district court,<sup>11</sup> finding the median period of

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5. *Id.* at 122. The appellees filed a claim for benefits after their employment was terminated and were ruled eligible after an interview. They were paid benefits immediately, but the benefits were suspended pursuant to CAL. UNEMP. INS. CODE § 1335 when the employer filed an appeal to the Department's Review Board.

6. 42 U.S.C. § 503(a) (1) (1969) provides:

- (a) The Secretary of Labor shall make no certification for payment [of federal funds] to any State unless he finds that the law of such State . . . includes provisions for—
- (1) Such methods of administration . . . as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due. . . .

7. *Id.*

8. The plaintiff alleged, and the district court concurred that *Goldberg v. Kelly*, 397 U.S. 254 (1970) required hearings to satisfy constitutional due process requirements in cases where a claimant's benefits were terminated.

9. *Java v. Cal. Dept. of Human Resources*, 317 F. Supp. 875 (N.D. Cal. 1970). For the purposes of this Note, a predetermination interview or hearing is one held prior to the determination of a claimant's initial eligibility. A redetermination interview or hearing is one held after a determination of eligibility has been made. The redetermination interview concerns the issue of original eligibility, e.g., the circumstances surrounding the claimant's separation from his most recent employment. A pretermination interview is held where the claimant is receiving benefits, but has disqualified himself during his claim series, for one reason or another, e.g., no longer available for work. A post-termination hearing is one held after the Department has found a claimant ineligible for benefits. This is usually held by a referee and is the first step of the appellate process for unemployment compensation. Post-termination hearings and appeals from Department decisions are outside the scope of this Note.

Basically, *Java* involved initial determination hearings and appeals from that determination, *Torres v. N.Y. Dept. of Labor* involved redetermination hearings, and *Pregent v. N.H. Dept. of Empl. Security* involved termination hearings.

10. *Id.*

11. Convened under the provisions of 28 U.S.C. § 2281 (1965) which provides:

delay between the employer's appeal and the claimant's resumption of benefits to be seven weeks,<sup>12</sup> held this delay frustrated the intentions of the state and federal unemployment compensation programs.<sup>13</sup> The court also found that the California program was intended to "stave off extreme personal hardship . . . in times of increasing unemployment"<sup>14</sup> and that the congressional intent to "help the jobless when they need it the most"<sup>15</sup> was reflected in the "when due" provision of the Social Security Act.<sup>16</sup> In examining the administrative processes, the court determined that benefits were due the claimant at the time he was determined to be initially eligible. As a result the court concluded that summarily withholding the benefits without a prior hearing constituted constitutional and federal statutory violations.

On appeal,<sup>17</sup> the defendant Department argued that benefits were not "due" until the initial determination of benefits had become final.<sup>18</sup> It also argued that the filing of an appeal cast sufficient doubt on the validity of the initial determination to merit withholding of the benefits until the final determination in order to protect the interests of the State and employers.<sup>19</sup> The Court gave this contention little weight noting that ninety-five to ninety-eight per cent of the ineligible claimants were "weeded out" at the initial determination.<sup>20</sup> Mr. Chief Justice Burger, writing for a unanimous Court, refused<sup>21</sup> to consider the constitutional due process questions raised by the lower court's discussion of the *Goldberg*<sup>22</sup> case. He stated it was unnecessary to reach that issue in light of the Court's decision that the California law<sup>23</sup> conflicted with the Social Security Act's<sup>24</sup> requirement to pay unemployment compensation benefits when due.<sup>25</sup>

The principal question answered by *Java* concerns the time at which unemployment compensation becomes payable. The court

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An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute . . . shall not be granted by any district court or judge thereof upon the ground of unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges. . . .

12. 317 F. Supp. at 878.

13. *Id.*

14. *Id.*

15. *Id.*

16. See note 6 *supra*.

17. 402 U.S. 121 (1971).

18. The initial determination becomes final only if the appeal period, which is usually ten days, expires without an appeal being taken.

19. 402 U.S. at 133.

20. *Id.*

21. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

22. See note 8 *supra*.

23. CAL. UNEMP. INS. CODE § 1335 (West).

24. See note 6 *supra*.

25. 402 U.S. at 124.

stated that benefits must be paid immediately upon an administrative determination of the claimant's eligibility.<sup>26</sup> It made this determination for a number of reasons. First, the Court found that the primary objective of Congress in enacting a federal unemployment insurance program "was to provide a substitute for wages lost during a period of unemployment not the fault of the employee."<sup>27</sup> Therefore benefits are to be paid as close to the claimant's next pay day after his separation from employment as administratively possible<sup>28</sup> Second, since ninety-five to ninety-eight per cent of the ineligible claimants were found ineligible at the time of the initial determination,<sup>29</sup> the Court discounted the Department's contention that there was a sufficient cloud on the claimant's eligible status to warrant a denial of benefits until the final appeal was decided.<sup>30</sup> Third, the Department itself made it a practice of paying benefits promptly upon the initial determination of eligibility. These benefits were paid until an employer's appeal was filed.<sup>31</sup> Thus, it was apparent that even the Department felt this was the logical time to commence payment of benefits. Finally, the court noted that the employer suffered no adverse effects if he ultimately prevailed over the claimant since his reserve amount was not charged and his experience rating<sup>32</sup> was not affected.<sup>33</sup>

The crucial issue of due process hearing requirements in compensation hearings was not resolved in *Java*. The decision indicates that the administrative determination must be the result of a "hearing of which both parties have notice and are permitted to present their respective positions."<sup>34</sup> However the *Java* Court did little to clarify this requirement beyond stating merely the hearing is to be "informal and does not contemplate taking evidence in the traditional judicial sense."<sup>35</sup>

Nor have subsequent decisions<sup>36</sup> contributed much in this re-

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26. *Id.* at 133.

27. *Id.* at 130.

28. *Id.*

29. *Id.* at 133.

30. *Id.*

31. *Id.* at 128.

32. The "employer's experience rating" is directly proportional to the amount of claims filed by his ex-employees during a given year. This rating determines the percentage of his gross payroll which he will have to pay as unemployment tax. Thus the greater number of claims that are paid against the employer's account, the higher his tax rate.

33. 402 U.S. at 135.

34. *Id.* at 133.

35. *Id.* at 134.

36. *Indiana Empl. Security Div. v. Burney*, 409 U.S. 540, *rehearing denied*, 410 U.S. 970 (1973); *and Torres v. N.Y. Dept. of Labor*, 333 F.

gard. The only decision remotely helpful is *Torres v. New York Department of Labor*.<sup>37</sup> In *Torres*, as an example of what it considered to be adequate standards, the Court cited with approval the New York Department of Labor's hearing procedure which "prior to the suspension of benefits involved an interview, at which claimant had an opportunity to present information favorable to his version of the facts or unfavorable to that of his employer, and to answer charges."<sup>38</sup>

The Supreme Court's failure to reach the constitutional issues advanced in *Java* has not precluded the federal district courts from doing so. *Pregent v. New Hampshire Department of Employment Security*<sup>39</sup> deals extensively with a claimant's right to a pre-termination hearing. This decision effectively incorporates the due process hearing requirements enumerated in *Goldberg v. Kelly*<sup>40</sup> into the unemployment compensation field.

*Goldberg* involved welfare claimants who sued New York's Commissioner of Social Services alleging termination of welfare benefits without a prior hearing constituted a violation of the fourteenth amendment's due process clause.<sup>41</sup> The Court found that such procedure constituted state action since it deprived a person of a governmental entitlement without procedural due process.<sup>42</sup> It made no distinction between an entitlement and a property right, noting that "the extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievance loss' . . ."<sup>43</sup> The need for a hearing prior to termination was found because termination of welfare

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Supp. 341 (S.D.N.Y. 1971), *on remand, aff'd without opinion*, 405 U.S. 949 (1972) (three justices dissenting). See notes 37-38 and accompanying text *infra* for a discussion of *Torres*. The issues presented in *Burney* concerned the necessity of a pretermination hearing and the nature of such a hearing. These issues have been posed to the Court as follows:

Must it be a full, adversary, evidentiary hearing, or an informal hearing process by which all interested parties are informed of issues and alleged factor upon which determination of ineligibility would be made, and are allowed to present such information and explanations as they see fit, but without the formal requisites of trial type hearings? 41 U.S.L.W. 3043.

Unfortunately the Court refused to decide these issues, finding that the claim had been mooted by a reversal of the Department's original determination of ineligibility. 409 U.S. at 542. Mr. Justice Marshall dissented noting that a pretermination hearing was never held, the ineligibility decision was made in the post-termination processes and thus the issue of the necessity of a pretermination hearing was not mooted. *Id.*

37. *Id.*

38. 333 F. Supp. at 344. The district court on remand concluded this procedure was "reasonably calculated to insure that benefits are paid when due."

39. 361 F. Supp. 782 (D.N.H. 1973).

40. 397 U.S. 254 (1970).

41. *Id.* at 256.

42. *Id.* at 261.

43. *Id.* at 262-63 citing *Joint Anti Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951).

benefits affects the claimant's only means to live while he waits its adjudication therefore he is forced to concentrate heavily on his ways to exist. This has a decidedly adverse effect on the personal resources he can draw upon to seek redress from the welfare bureaucracy.<sup>44</sup> Receipt of benefits until adjudication also promotes the dignity and well-being of all persons living in the state.<sup>45</sup>

Another factor influencing the extent of procedural due process is a balancing test whereby the recipients interest in avoiding the law must outweigh the government's interest in summary adjudication.<sup>46</sup> The Court found that the claimant's need for uninterrupted benefits and the state's interest that benefits not be erroneously terminated outweighed the state's interest in concerning fiscal and administrative resources because the stakes are too high for the claimant and "the possibility for honest error or irritable misjudgment is too great," and because the state has the ability to minimize the costs by scheduling prompt hearings and skillful use of its resources.<sup>47</sup> There the Court held that the welfare recipients are entitled to a prior due process hearing and enumerated the minimum due process requirements:

(a) Such hearing need not take the form of a judicial or quasi-judicial trial, but the claimant must be provided with timely and adequate notice detailing the reasons for termination, and an effective opportunity to defend by confronting and cross-examining adverse witnesses and by presenting his own arguments and evidence orally before the decision-maker.

(b) Counsel need not be furnished at the pretermination hearing, but the claimant must be allowed to retain an attorney if he so desires.

(c) The decision-maker need not file a full opinion or make formal findings of fact or conclusions of law, but should state in writing the reasons for his determination and indicate the evidence he relied on.

(d) The decision-maker must be impartial, and he shall not have participated in the investigatory or fact-finding stages of the case or in making the determination under review.<sup>48</sup>

In *Pregent* the Department advanced three interrelated arguments which sought to prohibit the extension of the *Goldberg* hearing requirements into the area of unemployment compensation. The Department claimed its present procedures adequately

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44. *Id.* at 264.

45. *Id.* at 263.

46. *Id.* at 265-66.

47. *Id.*

48. As enumerated by the *Pregent* court, 361 F. Supp. at 794.

protected a claimant against arbitrary and unwarranted action.<sup>49</sup> These procedures revealed periodic interviews with the claimant. However, the claimant was not notified that he could have his attorney present at these interviews, or that his benefits were in jeopardy. The court, after noting that constitutionally required procedural due process permits a quality of hearing proportional to the person's stake in the outcome,<sup>50</sup> concluded that the Department's procedures "did not rise to the level of a prior fair hearing" and dismissed the claim that the procedures were adequate.<sup>51</sup>

The Department also contended that the *Goldberg* rationale entitling welfare recipients to pretermination hearings cannot be used to support pretermination hearings for unemployment compensation recipients.<sup>52</sup> Since unemployment compensation was established for the purpose of providing a substitute for wages while an unemployed worker is between jobs,<sup>53</sup> it bears many similarities to both welfare benefits and wages. One factor that these three forms of income share is that they all are used to fulfill the recipient's needs for the basic necessities of life. Since the Supreme Court has found that the recipient of welfare benefits is entitled to a pretermination hearing,<sup>54</sup> and that the recipient of wages is entitled to a pretermination hearing<sup>55</sup> one would logically conclude that a recipient of unemployment benefits is entitled to a pretermination hearing. The *Pregent* court found that "need," as characterized in the *Goldberg* case, is "qualitatively" similar to the need upon which a grant of unemployment compensation is based, even though this grant of benefits is not based on any means test.<sup>56</sup>

Finally, the defendant Department argued that "the public purse would be unduly jeopardized" if pretermination interviews were required.<sup>57</sup> The court weighing this governmental interest against the claimant's constitutional right to a hearing found in favor of the claimant. Closely following *Goldberg*, that court declared that the additional expense of a procedure designed to protect such right "does not justify denying a [prior] hearing meeting the ordinary standards of due process."<sup>58</sup> The court noted that there are two methods by which the Department can minimize

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49. 361 F. Supp. at 788.

50. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1452 (1968).

51. 361 F. Supp. at 790.

52. *Id.* at 788.

53. *Id.* at 791.

54. 397 U.S. at 266-71.

55. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

56. 361 F. Supp. at 791. A means test pits the applicant's income and assets against a minimum living standard which varies from state to state. If the applicant's income is lower, he/she becomes eligible for the benefits.

57. *Id.* at 788.

58. *Kelly v. Wyman*, 294 F. Supp. 893, 901 (S.D.N.Y. 1968), cited in *Goldberg v. Kelly*, 397 U.S. at 261.

the additional cost of pretermination hearings. First, to avoid the expense of payment of benefits to an ineligible claimant while a decision is pending, the Department can provide for recovery of those benefits paid to an ineligible claimant.<sup>59</sup> Second, the Department can apply its administrative expertise to implement procedures for prompt hearings.<sup>60</sup>

After disposing of these three arguments, the *Pregent* court then proceeded to analyze the issue in *Java* of when benefits are "due." The *Pregent* court reasoned that despite the fact that the eligibility of the claimant may be reviewed weekly by the Department, "the concept of when benefits are 'due' . . . does not change from week to week."<sup>61</sup> In short, the *Pregent* court has held that once a claimant has been found initially eligible, he is entitled to benefits until the termination of those benefits has been adjudicated in a *Goldberg* type due process hearing.<sup>62</sup>

In addition to New Hampshire, other jurisdictions have used the *Goldberg* rationale to require due process hearings before the administrative bureau can terminate or withhold unemployment benefits. California and Vermont unemployment compensation authorities were ordered not to terminate benefits prior to a *Goldberg*-type hearing in *Crow v. California Department of Human Resources*<sup>63</sup> and *Wheeler v. Vermont*.<sup>64</sup> A third jurisdiction<sup>55</sup> founded the claimant's right to a pretermination hearing under the Social Security Act<sup>66</sup> rather than on constitutional grounds. In *Hiatt v. Indiana Employment Security Division*<sup>67</sup> the court found that "the concept of when benefits are 'due' . . . does not change from week to week after a claimant has been found eligible and no prior, due process hearing has been held with regard to a subsequent finding of ineligibility."<sup>68</sup> Thus, concluded the court, the purpose of the Social Security Act, to provide for early substitute compen-

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59. 361 F. Supp. at 793.

60. *Id.*

61. 361 F. Supp. at 793.

62. *Id.* at 793-94.

63. 325 F. Supp. 1314 (N.D. Cal. 1970), *cert. denied*, 408 U.S. 924 (1972). This case was decided after *Java* was decided at the district court level, but before the Supreme Court issued its opinion.

64. 335 F. Supp. 856 (D. Vt. 1971).

65. *Hiatt v. Ind. Employment Security Div.*, 347 F. Supp. 218 (D. Ind. 1971), *remanded sub. nom. Indiana Employment Security Division v. Burney*, 409 U.S. 540, *rehearing denied*, 410 U.S. 970 (1973) (remanded to determine mootness of claim). See note 36 *supra*.

66. 42 U.S.C. § 503(a) (1) (1969). See note 6 *supra*.

67. See note 65 *supra*.

68. *Id.* at 223.

sation, would be frustrated if the claimant was not entitled to benefits until a pretermination hearing was provided.<sup>69</sup>

Pennsylvania is also a jurisdiction which recognizes that an evidentiary, due process hearing is constitutionally required. In *Daniels v. Unemployment Compensation Board of Review*,<sup>70</sup> the claimant was charged with a \$208 overpayment which the Bureau sought to recover by withholding three benefit checks which were due the claimant.<sup>71</sup> The court saw no need to distinguish the termination of benefits from the withholding of benefits and relied on *Java*, *Goldberg*, and *Wheeler* to conclude a prior hearing was constitutionally required.<sup>72</sup>

Thus, all the jurisdictions which have dealt with the necessity of pretermination hearings require a *Goldberg* hearing with the exception of New York.<sup>73</sup> However, situations will arise where a claimant's ineligibility is summarily determinable. In such instances, requiring a hearing would unnecessarily extend an ineligible claimant's benefit period thereby creating a needless drain on the unemployment compensation fund. For example, if a claimant appears on his scheduled reporting date with a physician's report certifying him unable to work at any full time job, the claimant is by definition ineligible for unemployment compensation.<sup>74</sup> The question then arises as to whether the claimant is entitled to his benefit check for the past two weeks despite the fact that he is clearly ineligible at the moment. If the claimant alleges he was eligible for the weeks in question, then an application of the federal law discussed above requires the payment of the benefits until a pretermination hearing is held. If the claimant does not allege his eligibility in the face of conclusive evidence of his inability to work, there is no issue for a pretermination hearing to resolve and the administrative bureau should be able to terminate the benefits immediately. The federal case law reviewed herein does not recognize this possibility. This is a costly oversight since only those over-payments made on a claimant's purposeful misrepresentations can be recovered by the bureau.<sup>75</sup> Any payments determined to be undeserved in the pretermination hearing are generally not recoverable if already paid to the claimant.<sup>76</sup>

In conclusion, a reasonable interpretation of federal case law would appear to require de novo *Goldberg* hearings prior to the termination of unemployment compensation benefits in order to

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69. *Id.*

70. 10 Pa. Commonwealth Ct. 241, 309 A.2d 738 (1973).

71. *Id.* at 243, 309 A.2d at 740.

72. *Id.* at 245, 309 A.2d at 741.

73. Even New York requires a fact finding interview where the claimant has an opportunity to be heard. See notes 37-38.

74. See, e.g., 43 PA. STAT. ANN. § 801(d) (Supp. 1973).

75. See, e.g., *Id.* §§ 871-74 (1964).

76. *Id.*

protect the claimant's due process rights. However, where the claimant cannot in good faith certify to his eligibility or dispute a factual issue upon which his eligibility turns, a pretermination hearing should not be required.

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