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Miscellaneous—Unemployment Insurance

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of absence became effective, during which time petitioner was not under the obligations of an active policeman, the Court held the dismissal to be unwarranted.

The Court pointed out that pension rights by their nature are compensation for past services[3] and ought not be withheld without legal cause, and the immediate leave of absence provision, enacted to protect policemen from last minute forfeitures, does not preclude the police department's conducting an investigation of prior misconduct during the thirty day statutory waiting period. The waiting period was enacted in 1951 to provide an opportunity to determine if there is any prior conduct which warrants the denial of a pension and to prevent retirement in the face of pending or expected charges, once possible under previous charters.[4]

THE CHARTER OF THE CITY OF BUFFALO provides that the pension board shall retire any member upon his application who has completed twenty-five years of actual service.[5] But no pension shall be granted to a member against whom any charge of dereliction of duty has been preferred and remains undetermined, or to a member charged with the commission of a crime.[6] There is, however, no statutory waiting period or provision for immediate leave of absence.

Unemployment Insurance

The Unemployment Insurance Law[7] was enacted for the benefit of persons unemployed through no fault of their own, and was not intended to confer benefits on every person out of employment.[8] Persons who do not fit within the prescribed category are not barred completely from benefits but their rights are suspended for certain periods. Thus the rights of strikers and other claimants involved in "industrial controversy" are suspended for seven weeks.[9] If employment is terminated voluntarily and without good cause, the claimant is barred for forty-two days.[10] The obvious problems involved in determining "voluntariness" and "good cause" have been recognized and are under legislative consideration, but no solution has been suggested.[11] The cases, however, present the attempts of the courts to discover a rational and workable view of the field.

3. *Giannettino v. McGoldrick*, 295 N. Y. 208, 66 N. E. 2d 57 (1946).
4. *Pierne v. Valentine*, 291 N. Y. 333, 52 N. E. 2d 57 (1946); *Rogalin v. New York City Teachers' Retirement Board*, 290 N. Y. 664, 49 N. E. 2d 623 (1943); *People ex rel Fitzpatrick v. Greene*, 181 N. Y. 308, 78 N. E. 1111 (1905).
5. THE CHARTER OF THE CITY OF BUFFALO §464 (1950).
6. Id §469.
7. N. Y. LABOR LAW §§ 500-643.
8. *In re Waterman*, 285 App. Div. 1106, 139 N.Y.S. 2d 529 (3d Dep't 1955); *Claim of Palmieri*, 276 App. Div. 417, 95 N.Y.S. 2d 716 (3d Dep't 1950).
9. N. Y. LABOR LAW §592.
10. N. Y. LABOR LAW §593.
11. *Report of Joint Legislative Committee on Unemployment Insurance*, 1955 N. Y. STATE LEGISLATIVE ANNUAL 335.

(1) If pursuant to a contract between the union and employer the plant is shut down for vacations, even those employees without sufficient seniority to be paid during this period are barred from unemployment benefits.[12] The reason advanced is that the employees have voluntarily temporarily taken themselves out of the labor market. The will of the union is considered that of the employees.[13]

(2) Where the claimant notified his employer that he would be quitting in three weeks and was immediately discharged, he was deemed not to have voluntarily terminated his employment. *Claim of Baida.*[14] The termination was involuntary even though for good cause. Such does not bar the rights of the employee to unemployment benefits.[15]

(3) The claimant was hired under a provision of limited membership rights in the union, allowing such new employees to continue working for the longer of sixty days or one voyage. Discharge of the employee pursuant to this provision at the expiration of the period was held not necessarily for good cause. *Claim of Fiol.*[16] Whether the claimant was entitled to benefits depended upon whether he left for good cause, which in turn depended upon whether the regulation limiting the term of employment was justified; whether "the nature of the industry, the state of the labor market, and other relevant considerations furnished reasonable basis in fact for that regulation."[17] Otherwise the union could arbitrarily determine good cause by adopting any regulation it wished. The court did not question the existence of voluntariness, apparently transferring such to the claimant from the union.[18]

(4) In the recent case of *In re Malaspina's Claim,*[19] the employee failed to join the union within sixty days as required under the union shop provision in the contract, and was accordingly discharged. His claim for benefits was denied. The termination was held voluntary. His only reason for not joining—that he couldn't afford the nominal initiation fee—was held to be unreasonable under the circumstances and not good cause. The sixty day requirement is, of course, within the test of *Fiol,* but *Baida* is distinguishable on the ground that no volun-

12. *In re Graziandeis' Claim,* 286 App. Div. 911, 142 N.Y.S. 2d 380 (3d Dep't 1955); *Naylor v. Schuron Optical Co.,* 281 App. Div. 721, 117 N.Y.S. 2d 775 (3d Dep't 1953), *aff'd,* 306 N.Y. 794, 118 N.E. 2d 816 (1953); *In re Mullen,* 277 App. Div. 1073, 100 N.Y.S. 2d 706 (3d Dep't 1950). This appears to be the majority view. Annot. 30 A.L.R. 2d 366, 374 (1953).

13. Cases cited note 12 *supra.*

14. 282 App. Div. 975, 125 N.Y.S. 2d 514 (3d Dep't 1953).

15. "An employee is entitled to unemployment insurance benefits upon his discharge from employment, even though the discharge was for good cause or otherwise provoked by the employee." *Claim of Baida, supra* note 14. But not if the employee is guilty of misconduct. N. Y. LABOR LAW §592(2).

16. 305 N. Y. 264, 112 N.E. 2d 281 (1955).

17. *Claim of Fiol, supra* at 266, 112 N.E. 2d at 282.

18. See cases cited note 12.

19. 309 N.Y. 413, 131 N.E. 2d 790 (1956).

tariness in claimant's having his employment terminated was involved there. Discharge was not certain to result from his act. In the instant case it was completely within the power of the claimant that he should or should not pay his dues, and his voluntary choice of the latter necessarily meant that discharge would follow.

Sovereign Immunity

In *Glassman v. Glassman,*[20] plaintiff brought an action to set aside a conveyance made by a judgment-debtor to the New York State Employees Retirement System,[21] such conveyance rendering the judgment-debtor insolvent. The Court held that even though the doctrine of sovereign immunity bars suits against the state and its agencies, the doctrine will not be applied where, as here, the state or governmental unit, although named as a defendant, is not an actual or interested adverse party, and the suit is, therefore, not a suit against the state.

The doctrine of sovereign immunity in modern times serves to protect the state against interference with the performance of its governmental functions and preserve its control over state funds, property and instrumentalities.[22] In New York, the remedy whereby individuals with claims against the state may seek redress has taken the form of a legislative waiver of the state's "immunity from liability."[23] Such suits must, however, be brought in the Court of Claims.[24]

The New York State Employees Retirement System is "a state instrumentality clothed with sovereign immunity."[25] The immunity of a state agency is in no way affected by the lack of any other remedy[26] or by the fact that the agency is endowed with the powers and privileges of a corporation.[27]

The nature of the creditor's recovery in the instant case brought under Section 273 of the New York Debtor and Creditor Law is to levy upon such property "which he is entitled to treat as belonging to the debtor, albeit the title is ostensibly lodged elsewhere."[28] The Retirement System is a party in the instant

20. 309 N.Y. 436, 131 N.E. 2d 721 (1955).
21. N. Y. CIVIL SERVICE LAW §50 et seq.
22. *U. S. v. Lee,* 106 U.S. 196 (1882).
23. N. Y. COURT OF CLAIMS ACT §8.
24. id.
25. *Glassman v. Glassman,* 309 N.Y. 436,438 131 N.E. 2d 721,724 (1955).
26. *Psaty v. Duryea,* 306 N.Y. 413,419,420, 118 N.E. 2d 584,587,588 (1954); *Buckles v. State of New York,* 221 N.Y. 418, 423,424, 117 N.E. 811, 812,813 (1917).
27. *Breen v. Mortgage Commission of State of New York,* 285 N.Y. 425,430, 35 N.E. 2d 25,27 (1941).
28. *Hearn 45 St. Corp. v. Jano,* 283 N.Y. 139,142, 27 N.E. 2d 814,816 (1940).