September 12, 1968

James C. Schoenthaler, Chairman

Frank A. Farrington, Assistant Attorney General

Request for Legal Opinion re Section 1193,3,A of the Maine Employment Security Law

QUESTION:

Employer designation of weeks with respect to which vacation pay is received not necessarily final in determining right to unemployment benefits.

FACTS:

Your memorandum of August 8, 1968, recites that the Commission faces problems, from time to time, in interpreting and applying the language in paragraph A of subsection 3 of Section 1193 of the Maine Employment Security Law (Title 26, Chapter 13, M.R.S.A. 1964, as amended). The problems arise in determining whether, and, if so, for what period of time, an individual is disqualified for unemployment benefits because of money received as vacation pay. A situation specifically mentioned is where employment is terminated and the individual receives with his final check an additional sum consisting of vacation pay, which sum may represent previously earned time not taken, or future vacation time guaranteed in the contract of employment.

QUESTION:

Is an employer's designation of the weeks with respect to which vacation pay is received necessarily final?

ANSWER:

No.

OPINION:

Section 1193, provides that an individual shall be disqualified for benefits under certain circumstances. Subsection 3, A is one of the circumstances and as far as pertinent to this question reads as follows:

> "3. Receiving remuneration. For any week with respect to which he is receiving, is entitled to receive or has received remuneration in the form of
>
> "A. Dismissal wages or wages in lieu of notice or terminal pay or vacation pay; or" (underlining supplied).

Cases which bear on the question, found in other jurisdictions, seem to accept the theory that an employer has the basic right to fix vacation periods. It has been held that this right extends to allocations of vacation pay to weeks following termination of employment. (See Cutler-Hammer, Inc. v. Industrial Commission [1961], 13 Wis. 2d 618; 109 N.W. 2d 465.)

However, the cases consider whether the employer has, by virtue of a union contract or some other method, waived its basic right to so allocate. Careful consideration is given to the terms of such contracts and the manner in which the allocations have been made in the past, in determining how the terms of the contract have been and should be interpreted in this regard, if there is ambiguity in the contract.

Whether the vacation must be taken, or whether the so-called vacation pay may be considered a bonus might also play a part. (See Hibbard v. Michigan Employment Security Commission [1959], 358 Mich. 444; 99 N.W. 2d 6.)

There is a line of thought which could prevent an employer, who has made a vacation allocation, from changing it just for the purpose of preventing receipt of unemployment benefits because of developments after the allocation had been made. (See Campbell Soup Co. v. Board of Review [1952], 20 N.J. Super 81; 89 A. 2d 862.)

In view of these authorities, it behooves the Commission - in cases involving determination of weeks "with respect to which" an employee is entitled to receive or has received vacation pay - to ascertain whether the employer involved has or has not waived his basic right to allocate the weeks with respect to which the vacation money is paid. If he has not, the Commission should allow the employer's designation to stand. If the employer has waived the right to allocate, the Commission should make its own findings of fact as to the proper allocation of the vacation pay.

FAP:s
cc - Mr. Cote
Mr. George