

In reply refer
to ULRS

U. S. DEPARTMENT OF LABOR
Bureau of Employment Security
Washington, D. C. 20210

Unemployment Insurance
Program Letter No. 787
October 2, 1964

TO: ALL STATE EMPLOYMENT SECURITY AGENCIES

SUBJECT: The Secretary's Decision in the South Dakota Conformity Hearing
Held July 7, 1964. Disqualification for Base-Period Wages of
&6,000 or Over

We are attaching a copy of the Secretary of Labor's decision of September 25,
1964 In the Matter of the Hearing to the South Dakota Department of Employ-
ment Security Pursuant to Section 3304(c) of the Internal Revenue Code of
1954 (29 F.R. 7621). The Secretary adopted as his decision the Recommended
Decision of the Hearing Examiner, dated August 21, 1964.

Sincerely yours,



Robert C. Goodwin
Administrator

Attachment
Secretary's decision

UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

WASHINGTON, D. C.

DECISION OF THE SECRETARY OF LABOR

Upon consideration of the entire record, including the transcript of the hearing, the exhibits received in evidence, the briefs filed by the parties of record and interested parties, the recommended decision of the Hearing Examiner, and the exceptions and objections thereto filed on behalf of the State of South Dakota, I concur in and hereby adopt the findings and conclusions contained in the recommended decision of the Hearing Examiner as my decision in this matter.

Dated at Washington, D. C. this 25th day of September 1964.

/s/ W. Willard Wirtz

SECRETARY OF LABOR

UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

WASHINGTON, D. C.

IN THE MATTER OF THE HEARING TO THE : RECOMMENDED DECISION
SOUTH DAKOTA DEPARTMENT OF EMPLOYMENT : OF THE
SECURITY PURSUANT TO SECTION 3304(c) : HEARING EXAMINER
OF THE INTERNAL REVENUE CODE OF 1954 :

Pursuant to the Notice of Opportunity for Hearing issued by the Secretary of Labor on June 9, 1964 and published in the Federal Register on June 13, 1964, hearing was held in Washington, D. C. on July 7, 1964 before the undersigned Hearing Examiner on the question of whether the State of South Dakota has amended its Employment Security Law so that it no longer contains the provisions specified in section 3304(a)(4) of the Internal Revenue Code of 1954, also known as the Federal Unemployment Tax Act, and the further question whether the South Dakota Employment Security Law continues to include the provisions required by section 303(a)(5) of the Social Security Act, to permit the Secretary of Labor to determine whether or not the State of South Dakota may be certified to the Secretary of the Treasury as provided in section 3304(c) of the Internal Revenue Code of 1954 and section 302(a) of the Social Security Act. By the terms of the Notice of Opportunity for Hearing, the determination of the Secretary, preceded by this recommended decision, is to be made on the basis of the record adduced at the hearing, and with consideration being given to briefs filed after the hearing, provision for which is also contained in the Notice.

Appearing at the hearing for the State of South Dakota were Attorney General Frank L. Farrar, P. J. Maloney, Commissioner and Counsel, Employment Security Department, State of South Dakota, and J. V. Yaukey, Executive Assistant, Employment Security Department. The United States Department of Labor was represented by Louise F. Freeman, Chief Counsel for Unemployment Compensation, and H. A. Kelley, Attorney, Office of the Solicitor. Others appearing as interested parties and presenting argument were Harold V. Kelly, Assistant Attorney General Commonwealth of Virginia, Jeremiah Murphy, Sioux Falls, South Dakota, as counsel for The Greater South Dakota Association, an association of employers in the State, and Raymond Munts, Assistant Director, Department of Social Security, AFL-CIO, who also filed a written statement.

Initial and reply briefs, together with proposed findings of fact and conclusions of law, have been filed since the hearing on behalf of the State of South Dakota and the Department of Labor. Posthearing briefs have also been received for the record from the Employment Commission of the State of Texas, from the Employment Security Agency, Department of Labor, State of Georgia, and from the Greater South Dakota Association.

Section 3304 of the Internal Revenue Code of 1954 reads in pertinent part as follows:

"(a) REQUIREMENTS. - The Secretary of Labor shall approve any State law submitted to him, within 30 days of such submission, which he finds provides that--

* * *

"(4) all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation * * * "

Section 3304(c), pursuant to which the Notice of Opportunity for Hearing was issued, provides:

"CERTIFICATION. - On December 31 of each taxable year the Secretary of Labor shall certify to the Secretary [of the Treasury] each State whose law he has previously approved, except that he shall not certify any State which, after reasonable notice and opportunity for hearing to the State agency, the Secretary of Labor finds has amended its law so that it no longer contains the provisions specified in subsection (a) * * * and such finding has become effective. Such finding shall become effective on the 90th day after the governor of the State has been notified thereof, unless the State has before such 90th day so amended its law that it will comply substantially with the Secretary of Labor's interpretation of the provisions of subsection (a), in which event such finding shall not become effective. * * * "

Section 302(a) of the Social Security Act provides:

"The Secretary of Labor shall from time to time certify to the Secretary of the Treasury for payment to each State which has an unemployment compensation law approved by the Secretary of Labor under the Federal Unemployment Tax Act such amounts as the Secretary of Labor determines to be necessary for the proper and efficient administration of such law * * *"

Section 303(a) of the Social Security Act provides:

"The Secretary of Labor shall make no certification for payment to any State unless he finds that the law of such State, approved by him under the Federal Unemployment Tax Act, includes provision for--

* * *

(5) Expenditure of all money withdrawn from an unemployment fund of such State, in the payment of unemployment compensation * * *"

Section 3306(h) of the Internal Revenue Code of 1954 provides:

"COMPENSATION. - For purposes of this chapter, the term 'compensation' means cash benefits payable to individuals with respect to their unemployment."

Section 3306(f) of the Internal Revenue Code of 1954 provides:

"UNEMPLOYMENT FUND. - For purposes of this chapter, the term 'unemployment fund' means a special fund, established under a State law and administered by a State agency, for the payment of compensation. * * * An unemployment fund shall be deemed to be maintained during a taxable year only if throughout such year * * * no part of the moneys of such fund was expended for any purpose other than the payment of compensation * * *"

There are no disputed issues of fact in this proceeding. The basic issue, whether the South Dakota Employment Security Law meets the requirements of statutory provisions of Federal law set forth above, arises out of the amendment of the State Employment Security Law made by and contained in Chapter 125 of the South Dakota Session Laws of 1963, approved March 13, 1963, which became effective from and after July 1, 1964 under the terms of Senate Bill 179 passed by the State legislature and approved February 13, 1964 (Department of Labor Exhibits 1 and 2). Chapter 125 amended section 17.0830 of the State Employment Security Law by adding a new subsection numbered (9) which reads as follows:

"(9) An individual whose base period earnings are from \$6,000.00 to \$6,999.99 shall not be eligible for benefits under this chapter for a period of seven weeks following the separation from employment predating the filing of a valid new claim. An individual whose base period earnings are from \$7,000.00 to \$7,999.99 shall not be eligible for benefits under this chapter for a period of nine weeks following the separation from employment predating the filing of a valid new claim. An individual whose base period earnings are from \$8,000.00 to \$8,999.99 shall not be eligible for benefits under this chapter for a period of eleven weeks following the separation from employment predating the filing of a valid new claim. An individual whose base period earnings are in excess of \$9,000.00 shall not be eligible for benefits under this chapter for a period of thirteen weeks following the separation from employment predating the filing of a valid new claim.

Nothing in this section shall prevent the individual from filing a new claim at any time prior to the end of the prescribed ineligibility period for the purpose of establishing a benefit year; nor shall it prevent the imposition of any other disqualifications provided in this chapter to follow the end of the prescribed ineligibility period."

In more concise and graphic form section 17.0830(9) of the South Dakota Law provides that a claimant for unemployment compensation "shall not be eligible for benefits" for the number of weeks shown opposite the base-period earnings ^{1/} in the following table:

<u>Base Period Earnings</u>	<u>Number of Weeks Ineligible</u>
\$6,000 to \$6,999.99	7
\$7,000 to \$7,999.99	9
\$8,000 to \$8,999.99	11
\$9,000 and over	13

Coming now to the question of whether the South Dakota Employment Security Law, as so amended, conforms to the cited provisions of Federal law, I am of the conviction that it does not. The fundamental character of these provisions and the need for compliance with them by the States were recognized by the United States Supreme Court in the case of Steward Machine Company v. Davis, 301 U. S. 548, decided May 24, 1937, which came before the court on the constitutionality of the Federal law. In delivering the opinion of the court, Mr. Justice Cardozo said, at pages 593-595:

^{1/} The term "base period" is defined in section 17.0802(18) of the South Dakota Law as the first four out of the last five completed calendar quarters immediately preceding a claimant's benefits year.

Base-period earnings thus constitute the earnings of a claimant over a period of a year. The term "benefit year" is defined in section 17.0802(17) as the 1-year period beginning with the day on which a claimant files a valid new claimant for unemployment benefits. The periods of ineligibility prescribed by section 17.0830(9) must be served following separation from employment and are in addition to the 1-week waiting period prescribed in section 17.0829(4).

A credit to taxpayers for payments made to a state under a state unemployment law will be manifestly futile in the absence of some assurance that the law leading to the credit is in truth what it professes to be. An unemployment law framed in such a way that the unemployed who look to it will be deprived of reasonable protection is one in name and nothing more. What is basic and essential may be assured by suitable conditions. The terms embodied in these sections are directed to that end. A wide range of judgment is given to the several states as to the particular type of statute to be spread upon their books.....

What they may not do, if they would earn the credit, is to depart from those standards which in the judgment of Congress are to be ranked as fundamental.

The only consequence of the repeal or excessive amendment of the statute, or the expenditure of the money, when requisitioned, for other than compensation uses or administrative expenses, is that approval of the law will end, and with it the allowance of a credit, upon notice to the State Agency and an opportunity for hearing.

A state looking for a credit must give assurance that her system has been organized upon a base of rationality.
(Underscoring supplied.) 2/

In substantially the same terms contained in section 303(a)(5) of the Social Security Act, section 3304(a)(4) of the Federal Unemployment Tax Act requires an approvable State law to provide that "all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation * * *", and the term "compensation" is defined in section 3306(h) as "cash benefits payable to individuals with

2/ Other statements contained in the opinion of Mr. Justice Cardozo, quoted by the Employment Security Agency of the State of Georgia on page 13 of its brief, do not alter or detract from the stated and paramount statutory obligation of a State to conform its unemployment compensation system to the "minimum criteria" or "basic standards" of the Federal law if its system is to be accepted as a basis for tax credit and administrative expense assistance.

respect to their unemployment." ^{3/} Read together, these provisions of the Federal law expressly require that all money withdrawn from the unemployment fund of a State be used solely in the payment of benefits to individuals with respect to their unemployment. The legislative history is abundantly clear that Congress, through these provisions, intended to insure and make certain that State unemployment compensation laws would be genuine unemployment compensation laws, genuinely protective of the unemployed, under which the expenditure of funds would be devoted exclusively to the payment of unemployment insurance benefits. ^{4/} More precisely, it was the intent of Congress to create a social insurance system under which entitlement to benefits was a matter of right on the part of those who became involuntarily unemployed because of lack of work, e.g., laid off from work or otherwise unemployed through no fault of their own, and who are able to work and available for work, but who are unable to find suitable work. In short, what Congress was prescribing was wage insurance for the relief of the unemployed, to compensate for wage loss resulting from unemployment due to lack of work, without regard to any means or needs test or criteria of entitlement having no reasonable relationship to "unemployment."

^{3/} See also section 3306(f) which defines the term "unemployment fund" and stipulates that: "An unemployment fund shall be deemed to be maintained during a taxable year only if throughout such year * * * no part of the moneys of such fund was expended for any purpose other than the payment of compensation * * *."

^{4/} Senate Report 628, May 13, 1935, 74th Congress, 1st Session; pages 10-15; House Report 615, April 5, 1935, 74th Congress, 1st Session; pages 7-9

Under the South Dakota Employment Security Law as amended by Chapter 125, individuals who are unemployed and otherwise entitled as a matter of right to the payment of unemployment compensation are denied compensation over specified periods of time solely for the reason that their base-period earnings exceed the specified amount of \$6,000. In consequence, the payment of unemployment compensation to individuals under the State law is not solely with respect to their unemployment due to lack of work. A worker laid off by his employer, whose base-period earnings exceed \$6,000, is no less unemployed than the laid-off worker whose base-period earnings are less than \$6,000. The eligibility for payment of compensation in the one case and the ineligibility for payment in the other are premised upon the amount of income from earnings, a condition of entitlement unrelated to the fact or cause of unemployment and therefore inconsistent with the stated requirements of the Federal law.

The arguments advanced at the hearing and in briefs by the State of South Dakota and others in support of the State's position that the South Dakota Law as amended meets the requirements of Federal law do not, in my opinion, warrant a conclusion different from that reached here. Much emphasis has been placed upon the wide latitude which Congress intentionally left to the States to develop their own unemployment compensation laws as encompassing the right of the States to prescribe "waiting periods" or "periods of delay." This, in effect, restates and brings us back to the basic question of whether the State, in so doing, has contravened the Federal law. There is little of substance to add to the reasons already given for the conclusion that the South Dakota Law is in contravention of the Federal law. Merely by way of elaboration at the risk of being repetitious, the unemployment compensation insurance system Congress had in mind was a social

insurance system clearly distinguishable from a relief or other public assistance program, under which benefits would be paid to the involuntarily unemployed as a matter of right, one of the most important aspects, if not the very crux, of the intended system. Whatever terminology may be used in referring to the provisions of the South Dakota Law, whether they be characterized as "disqualification" provisions or as provisions merely "delaying" or "postponing" the payment of benefits, ^{5/} they have the effect of denying benefits to those entitled thereto by virtue of their unemployment. Those with durations of unemployment less than the ineligible periods of from 7 to 13 weeks receive nothing to compensate them for their wage loss resulting from their involuntary unemployment, and even as to those with longer spells of unemployment, the denial is complete and total for the prescribed weeks of ineligibility.^{6/} It is difficult to understand, by any stretch of the imagination, how this contributes to the goals of economic stability and the relief of the unemployed. Rather, it runs counter to these purposes for which the Federal law was enacted. We have seen that the wide latitude and

^{5/} The suggestion that the prescribed periods of ineligibility are nothing more than variable and permissive waiting periods distorts the true nature and meaning of a waiting period applicable to all claimants. The South Dakota legislature saw fit to add the disputed amendment to the section of the State law which is captioned "Disqualification for Benefits," justifying the reference to it as graduated disqualification. Be that as it may, the State of South Dakota itself has acknowledged that the ineligibility periods are something else than the standard 1-week period appearing elsewhere in the State law and left unaffected by the amendment, and prefers to look upon them as a "delay period" (Tr.p. 41). The amended State law must be appraised on its merits, however, and not on what it may be called.

^{6/} At this point, the statistics set forth in the concluding paragraphs of this recommended decision, relative to the potential impact of the South Dakota Law, assume significance.

discretion conferred upon the States does not extend to unbridled authority, but on the contrary, the States must adhere to those fundamental standards which Congress deemed necessary in the preservation of the national interests. The very wages and salaries which Congress intended to be insured have been made the basis for the denial of insurance benefits.

An argument advanced in support of the South Dakota law is that all moneys from the State unemployment fund, when withdrawn and expended, are used solely to compensate individuals for their unemployment and that such expended moneys therefore retain their character as unemployment compensation as required by section 3304(a)(4) of the Federal Unemployment Tax Act and section 303(a)(5) of the Social Security Act. The limitation in these sections of the Federal law on the use of moneys in the State fund for "unemployment compensation" has more substance than the argument implies. As previously indicated, the statutory language of the Federal law is plain in requiring that all money withdrawn from the unemployment fund of a State be used solely in the payment of benefits to individuals with respect to their unemployment. Under the amended State Law, the payment of benefits to the unemployed worker with base-period earnings of less than \$6,000 is not solely with respect to his unemployment due to lack of work, nor is the denial of benefits to the employed worker with base-period earnings in excess of that figure based on anything other than the amount of such earnings. If the language of the Federal law is not in itself sufficiently plain to preclude the application of the income-from-earnings test as a condition of entitlement unrelated to the fact or cause of unemployment, one need look only to the intent of Congress and its mandate for "genuine unemployment compensation laws" for the principle that unemployment compensation

is to be paid as a matter of right without any test of means or other condition of entitlement not reasonably related to the insurance program or to the insured risk, involuntary unemployment. If payments for the relief of the unemployed are not predicated upon the fact or cause of unemployment, the deduction can fairly be made that such payments are not "unemployment compensation" within the meaning of the Federal law, but have more of the color of "assistance" payments foreign to the purposes of Congress.

A main contention of counsel for the Department of Labor, which has provoked much argument, is that the South Dakota Law injects a needs or means test contrary to the requirements of Federal law. That I am of the opinion that the Federal law precludes the imposition of a needs or means test or any other condition of entitlement unrelated to the fact or cause of the worker's unemployment has by now become apparent. Nor do I entertain any doubt that the South Dakota statute, which conditions entitlement to compensation on the basis of income, introduces or imposes a needs or means test determinative of entitlement. But whether the State Law establishes a needs or means test in clearly understood terminology is irrelevant. The Federal law requires entitlement to unemployment compensation to be determined and based on unemployment, and the amount of income from earnings constitutes a condition of entitlement not reasonably related to the fact or cause of unemployment.

Certain statistical evidence and testimony, to which objections were interposed on behalf of the State of South Dakota (Tr. 15, 17-18, 21), was offered at the hearing by counsel for the Department of Labor to show the potential impact of the South Dakota Law as amended. The brief period of its effective existence precludes any real or actual experience with the law.

Although the number of workers who may be affected by the law is not necessarily essential to a determination of the legal issue involved, the issue becomes less abstract in the light of the statistical evidence. On the basis of data derived from reports filed by the State with the Secretary of Labor, the average number of weeks of unemployment compensation actually paid to claimants under the South Dakota Law for the first spell of unemployment in a benefit year, as well as the average total weeks of compensated unemployment per claimant for the entire benefit year, in each of the last four years, are as follows:

	<u>For First Spell</u>	<u>For Entire Benefit Year</u>
1960	6.4 weeks	10.9 weeks
1961	6.6 weeks	11.8 weeks
1962	5.8 weeks	10.6 weeks
1963	6.4 weeks	11.6 weeks

Using calendar year 1963 as an illustrative base period, 21% of all workers who earned enough wages during such period to qualify for any unemployment compensation under the South Dakota Law would have been potentially ineligible under section 17.0830(9) based on such earnings, had the amendment made by Chapter 125 been in effect. The percentage was greater than 21% in several industries which employ about one-third of the workers covered by the South Dakota Law.

For me to pass upon all of the arguments advanced in support of the State Law would only require further repetition of the principles on which I have reached the conclusion that the South Dakota Employment Security Law, as amended by Chapter 125, no longer contains the provisions specified in section 303(a)(5) of the Social Security Act and section 3304(a)(4) of the Federal Unemployment Tax Act.

Respectfully submitted,

Dated at Washington, D. C.
This 21st day of August 1964.

/s/ Clifford P. Grant
CLIFFORD P. GRANT
Hearing Examiner