

**STATE OF MINNESOTA
IN COURT OF APPEALS
COURT OF APPEALS NO. A06-0660**

MARTIN GARCIA,

Petitioner,

v.

**MINNESOTA DEPARTMENT OF EMPLOYMENT AND
ECONOMIC DEVELOPMENT,**

Respondent.

PETITIONER'S BRIEF AND APPENDIX

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CERTIFICATE OF SERVICE

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in the manner indicated below, on the 5th day of June, 06.

 U.S. Mail Fax Express Mail Messenger

Subscribed and sworn to before me this
5th day of June, 06.

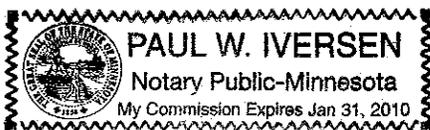
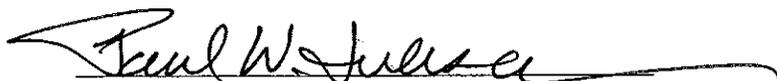
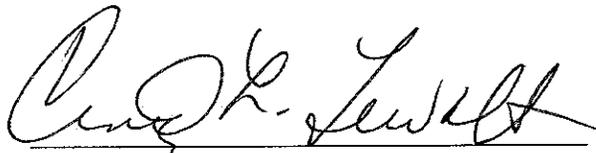


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LEGAL ISSUES

- **Did the Commissioner err as a matter of law by failing to apply the express language of Minn. Stat. §268.085, subd.3(a) and (b)?**

The Unemployment Law Judge answered NO.

Markel v. City of Circle Pines, 479 N.W.2d 382 (Minn.1992)

Brookfield Trade Center, Inc. v. County of Ramsey, 584 N.W.2d 390 (1998)

- **Did the Commissioner err in failing to consider the contractual relationship between petitioner and the employer, which precluded petitioner from receiving severance benefits during the time period petitioner was receiving unemployment benefits?**

The Unemployment Law Judge answered NO.

Ackerson v. Western Union Telegraph, 234 Minn. 271, 48 N.W.2d 338 (1951)

Busch v. Reserve Mining Company, 415 N.W.2d 892 (Minn.App.1987)

Auren v. Belair Builders, Inc., 2006 WL 771394 (Minn.App.2006) APP.at 0074-0077

- **Was the application of Minn. Stat. §268.085, subd.3(a) and (b) by the Commissioner on the facts of this case violative of petitioner's rights of due process, equal protection and freedom from impairment of contract under the United States and Minnesota Constitutions?**

The Unemployment Law Judge answered NO.

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716 (1978)

New London Nursing Home, Inc. v. Lindeman, 382 N.W.2d 868 (Minn.App.1986)

STATEMENT OF CASE

This is an appeal by *certiorari* from two determinations by the Minnesota Department of Employment and Economic Development. Decision 10773-05 declared petitioner ineligible to receive unemployment insurance benefits during a period of time that petitioner was on furlough from his employer. Decision 10774-05 orders repayment of benefits received. Furlough status is the equivalent of layoff in that the employee has continuing expectation of future employment with the employer, assuming that business conditions warrant it. During furlough, the employer also continues to pay the employee premiums for medical and dental benefits. Petitioner was placed on furlough status on May 25, 2005. Approximately five months into the furlough period, the employer determined there would be no future chance of employment for the petitioner. Accordingly, petitioner's employment was terminated on November 8, 2005. At that time, pursuant to the employer's written policy, petitioner became entitled to severance pay. After termination, the employer ceased paying medical and dental benefits on behalf of the petitioner and started making periodic severance payments, which were paid on the same schedule as pay was provided to active employees.

Based upon the receipt of severance payments commencing November 9, 2005, the Unemployment Review Judge held that petitioner was disqualified during the period June 6, 2005, through June 3, 2006, which included May 25 through November 8 when he was on furlough.

Petitioner sought review by *certiorari* based upon misapplication of the statute and denial of equal protection, due process, and impairment of contract rights resulting from the application by the Department of the statutory language on the facts presented in this case.

STATEMENT OF FACTS

1. Petitioner worked for the employer under a Minnesota contract of hire. On May 26, 2005, the employer placed petitioner on furlough status. Furlough is a status applied to salaried employees that allows the employer to temporarily displace uniquely skilled personnel for up to a maximum of six months until such time as any anticipated business rebound occurs. APP at 0024.

2. This defined small furlough population receives no salary, because they are performing no work. The employer, however, during the furlough period pays full medical and dental benefits. This furlough population is, in fact, deemed “active” on the employer’s payroll due to the fact that they have a benefits extension. APP. at 0024.

3. The employer in this case provides customized solutions and products to the rail and mass transit industry. Because its work is customized, it has a broad applications design cycle and has experienced training challenges with respect to having qualified staff available. It is for this reason that the business has adopted the furlough status as a method by which they can retain access to employees who have key skill sets. APP. at 0024.

4. On May 25, 2005, in accordance with the furlough policy, petitioner was placed on furlough status.

5. After about five months, the employer determined that there was not likely to be business available and the furloughed group of employees, including petitioner, was terminated from the employer effective November 9, 2005. Since this termination was permanent, petitioner's rights and the employer's severance policy were triggered. Severance benefits are based upon years of service and base salary at the time of termination. APP at 0014; 0024.

6. An employee does not become qualified for the Separation Plan unless they experience an involuntary separation of employment through no fault of the employee, which separation is intended to be permanent. The policy specifically excludes payment of severance to an employee who is on furlough until such time as the furlough is converted to a permanent termination. At that time the employee becomes eligible for severance benefits. APP at 0023-24.

7. Severance benefits are not payable if an employee resigns or otherwise voluntarily terminates employment. APP at 0015 (Section 4.3 of policy).

8. Severance benefits are not payable to an employee who is on furlough. APP at 0016.

9. Severance benefits may be payable if a furlough becomes permanent. APP at 0016.

10. A furloughed employee remains “active” on the employer’s payroll system as the employer continues to pay full dental and medical benefits during the furlough period. APP at 0023.

11. Furloughed employees do not receive salary because they are not performing work. APP at 0023.

12. If an employee receiving severance benefits is rehired, the benefit ceases immediately upon reemployment. APP at 0017.

13. In the event an employee receiving severance is rehired, if there is a subsequent separation, the employee will not receive service credit for any service prior to the date of reemployment. APP at 0017.

14. Petitioner received no W-2 earnings during the furlough period from May 26, 2005, through November 8, 2005. APP at 0021.

15. Petitioner established his benefit account on June 5, 2005. He collected \$10,353 in benefits at \$493 per week for the weeks ending June 18, 2005, through November 11, 2005.

16. When petitioner became eligible for severance on November 9, 2005, he contacted the Department of Employment and Economic Development advising of that fact. APP at 0059-60; 0053-54.

17. Petitioner did not receive a lump sum severance payment. He is paid two weeks of payments every two weeks in accordance with the severance plan. APP at 0059; 0016 (4-5 of the severance plan); 0054-0055.

18. On December 2, 2005, the Department determined that petitioner was ineligible for benefits during the period June 5, 2005, through June 3, 2006. It also determined that he had been overpaid \$10,353 in benefits for the weeks ending June 5, 2005, to November 11, 2005. Petitioner appealed that determination. APP at 0035; 0038; 0059.

19. The determinations were upheld on appeal by an Unemployment Compensation Judge. APP at 0035-0040.

20. Petitioner timely sought reconsideration of the judge's decisions in appeal Nos. 17703-05 and 17704-05. APP at 009-0033.

21. On March 7, 2006, Orders of Affirmation were issued with respect to both appeals. APP at 004-008.

22. Pursuant to these Orders (APP at 005 and at 008), petitioner timely filed a petition for certiorari. APP at 001.

ARGUMENT

I. APPLICABLE STATUTORY PROVISIONS.

Minnesota Statutes §268.085 Eligibility Requirements.

...

Subd.3. **Payments that delay unemployment benefits.**

(a) An applicant shall not be eligible to receive unemployment benefits for any week with respect to which the applicant is receiving, has received, or has filed for payment, equal to or in excess of the applicant's weekly unemployment benefit amount, in the form of:

...

(2) severance pay, ... and any other money payments ... but only if the money payment is considered wages at the time of payment under section 268.035, subdivision 29, or United States Code, title 26, section 3121, clause (2), of the Federal Insurance Contribution Act;

...

(b) This subdivision shall apply to all the weeks of payment and shall be applied to the period immediately following the last day of employment. The number of weeks of payment shall be determined as follows:

(1) if the payments are made periodically, the total of the payments to be received shall be divided by the applicant's last level of regular weekly pay from the employer; or

(2) if the payment is made in a lump sum, that sum shall be divided by the applicant's last level of regular weekly pay from the employer.

...

II. SCOPE OF REVIEW.

The standard of review in this case is *de novo*. Construction of the application of the language of a statute is a question of law and, as a general

proposition, fully reviewable by an appellate court. *Hibbing Education Association v. Public Employee Relations Board*, 369 N.W.2d 527, 529 (Minn.1985). When an appellate court reviews questions of law, it is not bound by the Administrative Law Judge's conclusions of law. It is free to exercise independent judgment in that regard. *Markel v. City of Circle Pines*, 479 N.W.2d 382, 384 (Minn.1992). In particular, disqualification of an employee from receiving unemployment benefits is a question of law. *Brookfield Trade Center, Inc. v. County of Ramsey*, 584 N.W.2d 390 at 393 (Minn.1998).

Where the statutory language is not technical in nature and where the agency's interpretation is not one of longstanding application, a court is not bound by an agency's conclusions of law as to the fashion in which it has construed a statute. *Lolling v. Midwest Patrol*, 545 N.W.2d 372, 375 (Minn.1996), (citing *Arbig Telephone Company v. Northwestern Bell Telephone Company*, 270 N.W.2d 111, 114 (Minn.1978)). See also in this regard, *Thrall v. Lund Industries, Inc.*, 2002 WL 206408 (Minn.App.2002), APP at 0067-0069; *Auren v. Belair Builders, Inc.*, 2006 WL 771394 (Minn.App.2006), APP at 0074-0077.

III. THE UNEMPLOYMENT REVIEW JUDGE MISAPPLIED THE PLAIN LANGUAGE OF THE STATUTE.

The Unemployment Review Judge relied upon the provisions of Minn. Stat. §268.085, subd.3(a)(2) and (b)(2). The decision of the Unemployment Review Judge is clearly contrary to the plain language of the statute. Section 3(a) defines

those payments that delay the payment of unemployment benefits. It provides that an applicant is not eligible to receive unemployment benefits for any week with respect to which the applicant is: a) receiving; b) has received in the past; or c) has made a filing for payment of such benefits and the benefits are equal to or in excess of the applicant's weekly unemployment benefit amount. These payments include, pursuant to subd.3.(a)(2), "severance pay ... but only if the money payment is considered wages at the time of payment under [Minnesota Statutes] Section 268.035, subd.29, or United States Code, Title 26, Section 3121, Clause 2 of the Federal Insurance Contribution Act."

Minnesota Statutes §268.035 defines severance payment as wages. However, Minn. Stat. §268.085, subd.3(a)(2), limits the application of subd.3(a) to pay that is considered wages at the time of payment.

This language is critical to this case. First of all, it is clear that on the facts presented in this case the petitioner did not receive any severance pay of any kind during the May 25 to November 8 time period. Secondly, it is clear that he did not receive any severance payment for that period. This is shown by the fact that he received no W-2 income by way of severance for that period. The taxable income he received during that time period were the UI benefits. See 1099G, APP.at 0063. Petitioner's severance payments were neither received during the period of furlough nor applied by the employer to the period of furlough. The reason for this

is that there was no right to severance payments during that period. In fact, quite specifically the severance pay policy of the employer excludes payment of severance during any period of furlough. The payment of severance is triggered only upon a permanent termination of employment.

This brings us to the third possibility that would result in a delay of unemployment benefits and that would be that petitioner had filed for severance. Petitioner clearly did not file for severance during the May-November period since there was no right to severance under the employer's policy. In fact, during the time period he was on furlough, he was subject to recall and not covered by the Severance Plan. In fact, during this period the employer retained him as "active" on its payroll system because it continued to pay his medical and dental benefits.

Petitioner's contract right to severance arose on November 8, 2005, when the employer changed petitioner's status from furloughed to terminated. At that time the employer ceased paying medical and dental benefits and petitioner qualified for severance under the employer's severance policy. The severance payments commenced November 9 (the day after he was permanently terminated), and are paid on the same interval as salary for active employees. These payments, although severance, are not a credit against unemployment benefits received between May and November, 2005. The language of the statute makes clear that not all severance pay will delay unemployment benefits – only that severance pay

that meets the conditions set forth in Minn. Stat. §268.085, subd.3(a)(2). The severance pay received by petitioner does not meet those conditions.

IV. MINNESOTA STATUTES §268.085, SUBD.3(b), BY ITS TERMS, DOES NOT APPLY TO THE SEVERANCE PAYMENTS RECEIVED BY PETITIONER.

The severance payments received by petitioner on the facts of this case do not fall within the definitions under §268.085, subd.3(a) of payments that would delay payment under subd.3(a). Thus, subd.(b) on that basis alone has no application to the facts of this case.

The policy under which the severance payments were received was a policy predicated upon a permanent termination of the employee's employment relationship with the employer. That status commenced on November 9, 2005. It was the unilateral decision of the employer to permanently sever the petitioner from employment that triggered petitioner's rights to severance. Pursuant to the severance plan, the contractual right to severance did not arise until petitioner was permanently terminated, no longer active on the employer's payroll records, and no longer receiving benefits. Those conditions occurred on November 8, 2005. Thus, pursuant to the statute, the first "week with respect to which the applicant is receiving [or] has received" [Minn. Stat. §268.085, subd.3(a)] severance was the week commencing November 9, 2005. What the department has done is make a claim for credit for severance payments for which the employee did not qualify,

had no legal or contractual right to receive, and which the employer would not give him based upon his status during the furlough period when he was collecting unemployment insurance. In other words, the employee neither received nor was credited with any severance pay for the period during which he was on furlough. Under these circumstances, since the severance payments do not meet the definition in subd.3(a), they are not subject to the provisions of subd.3(b). Applying severance payments that first contractually came into existence on November 9 to a prior period when such payments and the right to such payments did not exist, is not only contrary to the plain statutory language, it also impairs the contract that petitioner had with his employer and denies petitioner due process and equal protection of the law.

A. The application of the statute is governed by the provisions of the severance contract between the petitioner and the employer.

Minnesota Courts have long recognized that in reviewing *de novo* the application of law to the Minnesota Unemployment Compensation Statute, the contractual terms under which payments are received is a material factor for the Court to consider. This issue was first addressed by the Minnesota Supreme Court in *Ackerson v. Western Union Telegraph*, 234 Minn. 271, 48 N.W.2d 338 (1951). The issue there was whether a separation allowance (severance pay), which was received in a lump sum could be allocated over the number of weeks it was intended to cover for purposes of a credit against UI benefits or, in the alternative,

could only be counted in the week in which the lump sum was received. The Supreme Court in *Ackerson* held the lump sum severance payment was available to set off benefits only for the actual week in which the lump sum payment was received. The statute interpreted by the Supreme Court at that time, unlike the current statute, did not have a provision for allocation. However, the *Ackerson* court made clear, that if the contract between the parties, which in that case provided solely for a single lump sum severance payment, had, in fact, allocated the severance payments to a period of time following the employee's separation, the *Ackerson* court may have upheld the Commissioner's offset of unemployment compensation benefits over such a contractual time period. The *Ackerson* court recognized the relationship between the employment contract and the application of the UI statute.

It is noteworthy that the language the *Ackerson* court was interpreting with respect to the language of §268.08, subd.3, the current statute's predecessor, which insofar as material is identical to the language in the current statute at §268.085, subd.3(a), in defining the payments that would make someone ineligible to receive unemployment benefits based upon severance. The *Ackerson* language provided: "An individual shall not be eligible to receive benefits for any week with respect to which he is receiving, has received, or has filed a claim for remuneration in an

amount equal to or in excess of his weekly benefit amount in the form of [severance]...” *Ackerson*, 234 Minn. at 340.

The Minnesota Court of Appeals reached a similar conclusion in *Busch v. Reserve Mining Co.*, 415 N.W.2d 892 (Minn.App.1987). In *Busch*, the question arose not with respect to severance, as such, but to a special retirement bonus to which the parties were entitled under the terms of a collective bargaining agreement. This contractual provision allocated the payments to the first 13 weeks following the employee’s last date of work. Accordingly, the *Busch* court noted that the allocation by the commissioner of that payment over the weeks immediately following the layoff were consistent with both the contract and the statute.

This principal of maintaining the contractual integrity of the contractual relationship between the applicant and the employer has been recently applied by this Court in *Auren v. Belair Builders, Inc.*, 2006 WL 771394 (Minn.App.2006). See APP. at 0074-0077, wherein the Court of Appeals determined that vacation pay received by the employee would not be a credit against UI benefits. This case again was predicated upon the specific terms and conditions of the contract of employment under which the vacation pay was provided.

It is clear that, to the extent the contract between the parties does not provide for receipt of severance pay or other forms of wages, as defined by state and

federal law, during a period of unemployment compensation and, in particular where the contract specifically provides that there is no right to such payments during that time period, the provisions of §268.085, subd.3(a) and its statutory predecessors, does not apply to such payments.

There have been circumstances where efforts have been made by claimants to avoid setoff when it is clear that payments received were designated for the period during which the claimant received unemployment compensation benefits. *Carlson v. Augsburg College*, 604 N.W.2d 392 (Minn.2000). In *Carlson*, the employee left by mutual agreement of the parties and as part of the separation agreement, he was paid what was designated by the parties as a separation allowance. Since it was being paid as part of a settlement package, Carlson specifically requested that it be designated as settlement pay. This was done on the advice of counsel that by designating it as a settlement allowance, it would not reduce his unemployment insurance benefits. The college clearly viewed it as severance as did the Commissioner. The Court of Appeals likewise concluded that since the pay was clearly received for the period commencing immediately after the employee's termination, merely designating it as something other than severance did not change the fact that it was a severance payment.

A similar result was reached in *Lemmerman v. Eta Systems, Inc.*, 458 N.W.2d 431 (Minn.App.1990). In *Lemmerman*, the employee received a

termination notice on April 17 but continued to receive paychecks every two weeks until approximately June 17 of the same year. At that time Lemmerman received her last regular paycheck and a lump sum severance check in an amount in excess of \$4,000.

The statute at that time provided that severance would be allocated to a maximum 28 day period following termination. Lemmerman took the position that her termination occurred on April 17 and, hence, the 28 days commenced running on April 18, the day after her last day of work. The Department determined that in fact the 28 days was to be applied to the period following June 17 when she received her last paycheck. The Court of Appeals affirmed.

The *Lemmerman* case is noteworthy because it is clear that the severance in that case was not allocated to a time period beginning with the last actual day of work. It was allocated to the day upon which the claimant stopped receiving pay from the employer. These two cases stand for the provision that where one actually receives payments from the employer for the same period unemployment insurance benefits are being received, the claimant may not avoid the impact of the setoff provisions by calling the severance payment something other than severance or, as in the case of *Lemmerman*, attempting to “game” the system to avoid the impact.

It is noteworthy, however, that petitioner in the instant case has been unable to find any situation in which any employee has ever been declared ineligible for

unemployment insurance benefits during a period for which they received no other compensation from the employer. Nor has petitioner been able to find a case in which the Commissioner or the courts have ever applied a statute in such a way that it is contrary to the clear contractual obligations between the employer and the employee.

The application by the Commissioner in the instant case creates a result that is not only inconsistent with the prior application of the law, but so fundamentally unfair as to create constitutional infirmities. As has been pointed out above, petitioner in this case had no legal, contractual, or other right to receive any benefit from the employer during the period of the furlough period during which unemployment benefits were received. The result of the application of §268.085, subds.3(a) and (b), by the Unemployment Compensation Judge has a two-fold result. Both results are untenable under the statute as well as the Minnesota and Federal Constitutions.

The first is to deprive petitioner of unemployment compensation benefits to which the employee was legally entitled at the time they were received. It should be pointed out that in none of the other cases in which the Supreme Court has affirmed the decision of the Commissioner allocating severance pay to a period of time when unemployment insurance benefits were received, were the facts ever presented that clearly indicated that the only source of income to which the

claimant was legally entitled or in fact received were unemployment insurance benefits. In each of the cases where it was determined that the claimant was ineligible, there was actual legal right to and receipt of payments that fell within the definition of Minn. Stat. §268.085, subd.3(a) or its predecessors. Petitioner, in essence, is being denied the right to receive unemployment insurance benefits for a period of time during which he was neither disqualified under the statute from receiving those benefits nor at the time they were actually received was he ineligible to receive the benefits.

Secondly, petitioner is being forced to refund unemployment insurance benefits that, as described above, he was lawfully entitled to receive at the time they were received this refund is based upon constructive receipt that was not only never received but which he had no right to receive. The Unemployment Compensation Judge erroneously found, contrary to the record, that petitioner received a lump sum severance payment. That is not the case. Petitioner has been receiving his severance in the form of periodic payments. Thus, petitioner has never actually received any funds that correspond in any way to the time period in which he was on furlough, having his benefits paid by the employer and considered on active payroll status by the employer.¹

¹ This is also a period during which by virtue of the specific language in the severance policy of the employer, petitioner was not entitled to receive severance payments.

B. The actions of the department are an unconstitutional impairment of contract.

As pointed out above, the application of the Minnesota UI laws with respect to the treatment of payments from an employer post termination has always been dependent upon and consistent with the terms of the employment agreement between the employer and the employee.

The Commissioner in this case applied a statute contrary to its express terms and, in doing so, ignored and/or distorted the existing contractual relationship between the employer and its employees, in this case specifically the petitioner. In doing so, it deprived petitioner not only of his rights under the furlough provisions of the contract, but also deprived him of severance payments that petitioner could receive only upon final termination of his employment.

The petitioner gave significant consideration for this severance contract. It should be kept in mind that during the furlough period petitioner received no pay from the employer, but received only payment of dental and medical benefits. During this time period, petitioner could not quit his job without forfeiting severance payments in the event the employer determined either sometime during or at the end of the furlough period that there was no realistic expectation of active employment and, hence, the claimant would be eligible for severance. The severance, which was based upon number of years of service, was significant in light of petitioner's 34 years of service with the employer. Thus, petitioner

provided significant consideration with respect to the severance policy. Petitioner, in order to receive the severance, could not quit or leave employment. Petitioner had to remain on furlough during which time he was receiving no pay, or the severance payments would have been lost. It could hardly be said that this was a contract that was without consideration, nor can it be said that there was no adverse impact on petitioner with respect to the Commissioner's actions.

This precise issue has been previously addressed with respect to Minnesota law by the United States Supreme Court. In *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S.Ct. 2716 (1998), Allied challenged a Minnesota statute that expanded the duties of employers with respect to pension rights. In addressing the case, the Supreme Court, in an opinion by Justice Stewart, pointed out that the contract clause imposes limits on the power of the State to abridge existing contractual relationships even if it is in the exercise of an otherwise legitimate police power. *Allied*, 438 U.S. at 234, 240, 243-245, 98 S.Ct. at 2722, 2723. The Court also noted that notwithstanding the fact that the Supreme Court customarily deferred to State laws, which are directed to social and economic problems, the regulation must be of a type and character that is appropriate to the public purpose justifying its adoption.

An examination of Minnesota law makes clear the public purpose behind making a person ineligible for UI benefits during any period of time in which that

person is entitled to, actually receives, or applies for other payment for the same period during which the person would otherwise be eligible for UI benefits is double recovery. The reasons for this are set forth in statute. One obvious reason is to prevent double recovery of benefits. Also, it addresses those situations where someone applies for other benefits, i.e., social security disability which would provide benefits for that time period and which claim is inconsistent with being qualified for UI benefits (in order to collect UI benefits, one has to be able to work, disability is an assertion of inability to perform gainful employment). It also avoids double payments which would be difficult, if not impossible, to recover. *See, Rutledge v. Commissioner of Jobs and Training, 1989 WL 23525* (Minn.App.1989). APP at 0065-0066. In other words, the statute is designed to prevent someone from collecting monies twice during a period of unemployment. Once from the state and once from some other source who has paid or has an obligation to make payments during that same period of unemployment.

In cases where that objective is met, there is no constitutional problem. However, in *Allied*, the Supreme Court pointed out in support of its holding that the Minnesota legislature had entered a field never before sought to be regulated and, in doing so, “grossly distorted the company’s existing contractual relationships with its employees by imposing retroactive obligations upon the company substantially beyond the terms of its employment contract. *See, 438 U.S.*

249, 250, 98 S.Ct. 2725. That is precisely what happened here. Never before had the Commissioner ever sought, nor had the Courts of the State of Minnesota ever supported, applying severance benefits to a period for which they: a) were not allocated; b) a period for which the employee had no right to such benefits; and c) contrary to the express language of the statute, §268.085, subd.(3)(a).

The State may argue that subd.3(a) is at odds with the requirements under subd.3(b) to allocate both periodic and lump sum payments to the period following the last date of employment. This argument is misplaced. Firstly, under the express terms of the statute, subd.3(b) applies only to those payments that, pursuant to subd.3(a), require a delay in receiving UI benefits. As pointed out earlier, the payments received by petitioner in this case do not fall within that class of payments to which subd.3(a) by its terms applies.

Secondly, the application of subd.3(b) to payments that are actually received by an individual, which payments are allocated to the period of unemployment, do not create a constitutional infirmity when the provisions of subd.3(b) are applied to those payments. In fact, such payments actually made or contractually required are duplicate payments covering the same period for which the person has sought and received UI benefits. In the instant case, that is clearly not true.

Perhaps the most compelling example of the unconstitutionality of the statute is that under the interpretation applied to petitioner, all the employer would

have had to do in this case is return the petitioner to work for one day, then terminate him and provide him with severance benefits. Those circumstances would create a situation, which from the view of the contractual entitlement of petitioner to severance benefits, would be no different than the present one. It would not change petitioner's consideration. In order to be returned to work, petitioner could not have quit and would have to remain in furlough status without pay. During that furlough period, petitioner would not have been entitled to receive any severance benefits.

After termination, just as in the instant case, the right to severance payments would be triggered and the severance payments would be allocated just as they are now on the equivalent of a pay period basis until such time as exhausted. The only difference is that by returning the employee to work for one day, there could be no possible interpretation of §268.085, subd.3, which would result in a delay of benefits. The very fact that the simple act of returning an employee to work for one day would defeat this application of the statute shows that it does not serve any legitimate purpose. In fact, it shows that this application does not in any way, shape or form, address the legitimate interests of the State described above. It also results in disparate treatment of similarly situated individuals.

What is most striking about the Commissioner's position in this case is that the only way in which the Commissioner can avoid the legal impact of the

hypothetical above is to “grossly distort [the company’s] existing contractual relationship with its employees by superimposing retroactive applications upon the company substantially beyond the terms of its employment contracts.” *See, Allied, supra.* at 438 U.S. 249-50, 98 S.Ct. at 2725. In order to achieve the result in this, the Commissioner had to either rewrite the parties’ contract or totally ignore the contract language. Neither can be done constitutionally.

The *Allied* case is also noteworthy with respect to the dissent filed by Justices Brennan, White and Marshall. Although they disagreed with the majority’s interpretation of the contract clause, they acknowledge the actions of the State in rewriting a contract would violate the due process clause of the United States Constitution. The dissenters specifically noted that the constitutionality of the type of legislation struck down by the majority under the contract clause had in the past been analyzed by reference to the provisions of the due process clause insofar as legislation had an impact on existing economic values. So, the rights of contract between petitioner and his employer are protected not only by the contract clause of the United States Constitution, but also by the due process clause.² 438 U.S. at 251, 98 S.Ct. at 2726.

The denial of equal protection becomes apparent by reference to the hypothetical above. There is no legitimate State purpose that can be served by not

setting off severance benefits against UI benefits received during the furlough period for the individual who has returned to work for one day and then been terminated and doing so with respect to the person who has not returned to work when the contractual basis for severance is identical for each employee. The very fact that the purported application of the statute creates such a result is the best evidence that there is no “rational” State interest being protected by the Commissioner’s application of the language in Minn. Stat. §268.085, subd.3(a) and (b). See, in this regard, *New London Nursing Home, Inc. v Lindeman*, 382 N.W.2d 868 (Minn.App.1986).

CONCLUSION

Minnesota Statutes §268.085, subd.3(a) provides that a UI applicant will not be eligible for benefits for any week with respect to which the applicant is receiving, has received, or for which the applicant has filed for payment, provided that such payments are equal to or in excess of the applicant’s weekly UI benefit amount. In this case, the severance benefits, which the Commissioner used to deny applicant’s eligibility, were payments the employee did not receive and to which he was not legally entitled during the period that he received UI benefits. This was pursuant to express provisions of his employment contract governing severance

² The dissents’ analysis of the equal protection clause indicates it likely would have found a violation on the facts of this case

payments. The petitioner provided consideration for the severance benefit. The application of the Commissioner's interpretation of the statute on the facts of this case are not only contrary to the express language of the statute, but as applied, violate the equal protection and due process clauses of the United States and Minnesota Constitutions and impair the contractual rights of petitioner.

CERTIFICATE OF BRIEF LENGTH

The undersigned certifies that the foregoing brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3 for a brief produced with a proportional font. The length of this brief is 5813 words. This brief was prepared using Microsoft Word 2000 (9.0.2720).

Respectfully submitted,
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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).