

A.D. No. UCFE 77-10907-56170

S.S. No. [REDACTED]

B.O. No. 23

Di Pg 3.04

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF MACOMB

JOHN ZAJAC,

CLAIMANT-APPELLANT,

-v-

FILE No. 80-2340 AE

U.S. POST OFFICE AND MICHIGAN
EMPLOYMENT SECURITY COMMISSION,

APPELLEES.

DAVID A. MCKINNON (P27299)
ATTORNEY FOR APPELLANT

FRANK J. KELLEY, ATTORNEY GENERAL
OF THE STATE OF MICHIGAN
BY: SHIRLEY L. PALARDY (P23221)
ASSISTANT ATTORNEY GENERAL
ATTORNEYS FOR
MICHIGAN EMPLOYMENT SECURITY COMMISSION

OPINION

THE CLAIMANT-APPELLANT BRINGS THIS APPEAL FROM A DECISION OF THE EMPLOYMENT SECURITY BOARD OF REVIEW DATED MARCH 5, 1980 AT WHICH TIME THE BOARD DENIED A RE-HEARING ON ITS EARLIER DECISION OF DECEMBER 7, 1979.

THIS COURT HAS CAREFULLY REVIEWED THE RECORD OF THE PROCEEDINGS BELOW AS WELL AS THE BRIEFS BY COUNSEL. IT IS THIS COURT'S OPINION THAT THE DECEMBER 7, 1979 OPINION OF THE BOARD SETS FORTH CLEAR, LEGAL AND FACTUAL BASIS FOR ITS HOLDING. THIS COURT HAS FOUND NO EVIDENCE OF ERROR OR ABUSE OF DISCRETION. THE DECISION OF THE BOARD OF DECEMBER 7, 1979 IS HEREBY ADOPTED AND INCORPORATED AS A PART OF THIS OPINION AND IT IS AFFIRMED.

AN ORDER CONSISTENT WITH THIS OPINION MAY ENTER.

/s/ GEORGE R. DENEWETH
GEORGE R. DENEWETH
CIRCUIT JUDGE

DATED: FEBRUARY 9, 1981

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

JOHN ZAJAC,

Claimant

U. S. POST OFFICE,

Employer

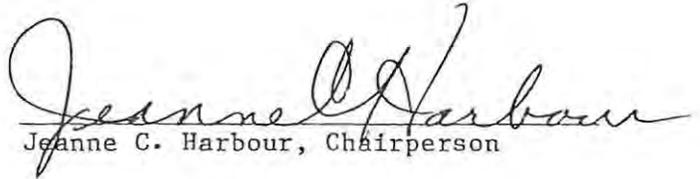
Appeal Docket No. UCFE77-10907-56170

Social Security No. 376-03-4540

ORDER DENYING APPLICATION FOR REHEARING

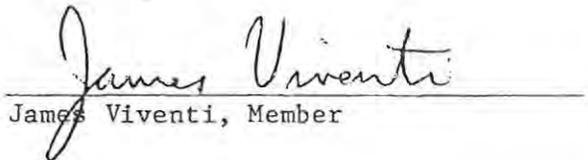
This case is before the Board of Review upon application of the claimant for a rehearing by the Board in respect to its decision dated December 7, 1979. Having read and considered said application, and having reviewed the record in the matter, it is the opinion of the majority of the Board of Review that said application should be denied.

IT IS THEREFORE ORDERED that said application shall be and the same is hereby denied.


Jeanne C. Harbour, Chairperson

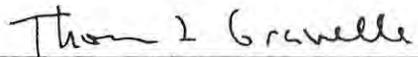

Frank Salomone, Member


Morris W. B. Cohl, Member


James Viventi, Member

THOMAS L. GRAVELLE (MEMBER) DISSENTING:

I disagree with the majority and would grant a rehearing in this matter for the reasons set forth in my dissent to the Board decision of December 7, 1979.



Thomas L. Gravelle, Member

MAILED AT DETROIT, MICHIGAN March 5, 1980

This order will become final unless a written appeal to the appropriate circuit court is RECEIVED on or before

March 25, 1980

TO PROTECT YOUR RIGHTS YOU MUST BE ON TIME.

STATE OF MICHIGAN
EMPLOYMENT SECURITY BOARD OF REVIEW

In the Matter of the Claim of

JOHN ZAJAC,

Appeal Docket No. UCFE77-10907-56170

Claimant

Social Security No. 376-03-4540

U. S. POST OFFICE,

Employer

DECISION OF BOARD OF REVIEW ON REHEARING

This matter is before the full Board of Review pursuant to an Order Allowing Oral Hearing issued by the Board on September 7, 1979. The rehearing was requested by the Commission. A prior decision of a panel of the Board of Review issued on March 7, 1979 was set aside by such Order. Oral argument was presented before the entire Board on September 24, 1979.

The Referee Decision affirmed a redetermination which held that the claimant's weekly benefit rate was subject to reduction in accordance with Section 27(f) of the Michigan Employment Security Act because the claimant was receiving a retirement benefit to which he contributed less than one-half the cost.

After a review of the entire record, it is the opinion of the majority of the Board that the Referee Decision is in conformity with the law and facts and should be affirmed for the following reasons.

The Board adopts the findings of facts as set forth in the referee's decision; and, in particular, notes the following. The claimant worked for the United States Postal Service from 1942 until 1976. While the claimant was employed, matching contributions were made by the claimant and the employer to the Federal Retirement Program. Claimant's total contributions to this fund amounted to \$15,939.00 (T/S at 4, page 1 of Ex. 3). The claimant receives a gross monthly annuity of \$913.00 (T/S at 4, p. 1 of Ex. 3). As of the date of the claimant's separation, the total present value of his annuity or retirement benefit was \$93,452.33 (page 2 of Ex. 3).

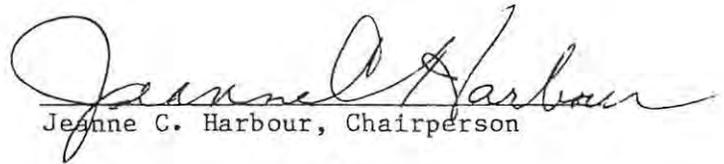
The Michigan Employment Security Act provides that a claimant's weekly benefit rate shall be adjusted because of the receipt of a retirement benefit only if the claimant contributed less than one-half of the cost of the retirement benefit. Section 27(f)(1), 27(f)(1)(b), 27(f)(4)(a) and (b).

Further, Section 27(f)(4)(c) provides that the burden of establishing an individual's contribution to the cost of his retirement benefit shall be upon the employer.

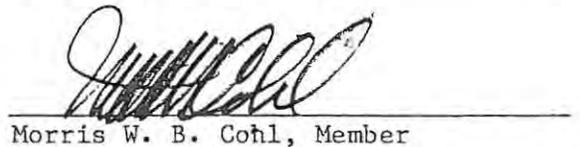
The central inquiry is whether the claimant's contribution of \$15,939.00 was less than one-half the cost of his retirement benefit. This Board adopts the

definition of "cost of the benefit" enunciated in James L. Taylor v M.E.S.C. and U.S. Postal Service, (Kent Co Cir Ct No. 74-16180-AE, 1975). The "cost of the benefit" is the present actuarial value of the retirement benefit. Applying that definition to the facts at hand, it is immediately evident that the claimant's contribution of \$15,939.00 is less than half of the cost of the benefit of \$93,542.33. Also, see In re Z. Arthur Korreck, UCFE73-7960-44568. Thus, the claimant's weekly benefit rate is properly subject to adjustment under Section 27(f) despite the matching contributions that were made by the claimant and employer during the claimant's employment.

For the above reasons, the decision of the referee is hereby affirmed.


Jeanne C. Harbour, Chairperson


Frank Salomone, Member

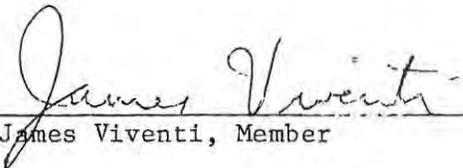

Morris W. B. Cohl, Member

JAMES VIVENTI (MEMBER), CONCURRING:

I agree with the result reached by the majority but for a different reason.

After studying the "Fiftieth Annual Report of the Board of Actuaries of the Civil Service Retirement System" (93rd Congress, 1st Session, House Document Number 93-37, June 30, 1970) it is apparent that the Michigan Employment Security Board of Review may take judicial notice that no federal employee currently retiring has paid half of the cost of his retirement benefit. Granted, page 11 of the Report reads: "Each employee contributes 7 percent and each employing agency matches the contributions of its employees," the Federal Government further contributes substantial additional money to keep the fund solvent given the cost of living and other liberalizations of the benefit levels which have been granted by Congress over the years. On page 13 of the Report, the Chairman of the U.S. Civil Service Commission recommends that based on the inflation protection in the federal pension the annual contribution would need to be substantially in excess of 20%. He concludes, "Thus, the 14 percent combined contribution falls far short of the normal cost measured by realistic assumptions." (p. 13 of the Report). Given the inflation rate since 1970, it is apparent that the 14 percent contributed one-half by the employee and one-half by the agency is not funding the pension received.

On this basis, I would find that the contributions made by the claimant were less than one-half of the cost of the benefit.


James Viventi, Member

THOMAS L. GRAVELLE (MEMBER), DISSENTING:

I still think the referee's decision should be reversed for the reasons set forth in the Board's Decision dated March 7, 1979, together with the following reasoning.

Section 27(f)(4)(b) of the Michigan Employment Security Act provides in material part:

"If a [retirement] benefit...is payable or paid to the individual under a plan to which the individual has contributed:

* * * * *

(ii) Half or more of the cost of the benefit, then none of the benefit shall be treated as a retirement benefit." [Emphasis added.]

A basic issue is what is the meaning of the phrase "cost of the benefit." This phrase "is not defined in the Michigan Employment Security Act. In the absence of a statutory definition of a term,

'it is an accepted rule of construction, that words of a statute are to be given their plain and ordinary meaning, for it is to be presumed that the legislature, not having indicated otherwise, so intended.' 22 Callaghan's Michigan Civil Jurisprudence, 3121, p. 479." Bingham v MESC, 398 Mich 546, 563 (1976).

I think that the plain and ordinary meaning of "cost of the benefit" is the normal cost of the benefit. The normal cost is what is anticipated when a plan providing for future payments becomes effective. To be excluded, then, from the definition of "cost of the benefit" would be contingent or extraordinary liabilities in the event the normal cost proved inadequate.

At the hearing before the Board of Review, the Commission submitted the "Fiftieth Annual Report of the Board of Actuaries of the Civil Service Retirement System." It is under this system that the claimant is receiving

retirement benefits. On page 11, the Annual Report provides in material part:

"Each employee contributes 7 percent of his compensation and each employing agency matches the contributions of its employees....

* * * * *

The normal cost was calculated as the average percentage of the salaries of new employees that is required to be paid into the fund from the time they enter service until they leave service in order to accumulate sufficient funds to pay their benefits. This normal cost has historically been compared with the combined employee-agency contribution rate (currently 14 percent) as a measure of adequacy, although there is no statutory basis for doing so." [Emphasis added].

It may be seen, then, that the claimant has contributed half of the normal cost of his retirement benefit. Therefore, there should be no reduction in weekly benefit rate under Section 27(f)(4)(b) of the Michigan Employment Security Act.

In my judgment, payments into the fund by the Federal Government to liquidate unfunded liability or as interest on unfunded liability are not a normal cost of the claimant's retirement benefit and should be excluded from consideration in applying Section 27(f)(4)(b) of the Act.

Thomas L. Gravelle
Thomas L. Gravelle, Member

Dated and mailed at
Detroit, Michigan on
December 7, 1979