

New York State Department of Labor  
Unemployment Insurance Division  
Adjudication Services Office

October, 2015

Interpretation Services - Benefit claims  
Total or Partial Unemployment  
Separation Payments

**Last Day of Work vs. Last Day of Employment**

If a claimant's employment is terminated by the employer, but pays the claimant until the effective date of the termination which is set at a future date, the employer-employee relationship continues in effect to the effective date of the termination, which is considered to be the last day of employment.

A.B. 581,056

The Department of Labor issued the initial determination holding the claimant ineligible to receive benefits, effective January 20, 2014, due to receipt of dismissal pay. The claimant requested a hearing.

Pursuant to the decision of the Appeal Board filed June 2, 2014 (Appeal Board No. 579086), remanding the case for further evidence regarding the claimant's last day of employment, the Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the Commissioner of Labor. By decision filed July 2, 2014 (A.L.J. Case No. 014-17383), the Administrative Law Judge overruled the initial determination.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statements submitted by the claimant and on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following:

**Findings of fact:** The claimant was employed by a company for twenty-eight years in its tech support division; in or about 2013, the company was bought out by another company and the tech support division was outsourced to India. On December 27, 2013, the claimant was told by the new employer to hand in his employee identification and disable his e-mail. He was told that he should not return to work, but would be

receiving his salary through January 15, 2014. He was also informed that he would be receiving over \$109,000.00 in severance pay.

The claimant received his regular pay, at least, through January 15, 2014. On February 7, 2014, the employer issued a check to the claimant in the gross amount of \$109,927.45, which represented \$109,239.01 in severance pay and \$688.44 in vacation pay. The net amount was directly deposited into the claimant's savings account on that day.

When the claimant filed his claim for benefits on January 20, 2014, he indicated that his last day of work was January 15, 2014.

**Opinion:** The credible evidence establishes that the claimant received a lump sum payment of dismissal pay on February 7, 2014. There is no dispute that the payment made to the claimant represented dismissal pay. The only question is whether the payment was made to the claimant within thirty days of his last day of employment, as required by Labor Law § 591 (6) (d).

Although the claimant was last physically at work on December 27, 2013, we do not agree that the employment relationship was severed as of that date. The claimant continued receiving his regular pay through January 15, 2014, and therefore must be considered to have continued to be employed through that date. Whether the claimant accrued vacation and sick pay between December 27, 2013, and January 15, 2014, is not dispositive of the issue of whether the employment relationship continued in existence. In any event, we are not convinced that the claimant was not continuing to accrue vacation pay, given that the lump sum payment included nearly \$700.00 in vacation pay. As the claimant's last day of employment was January 15, 2014, and he received his dismissal pay on February 7, 2014, he is subject to the provisions of the statute. Accordingly, we conclude that the claimant is ineligible to receive benefits effective January 20, 2014.

**Decision:** The decision of the Administrative Law Judge is reversed.

The initial determination, holding the claimant ineligible to receive benefits, effective January 20, 2014, due to receipt of dismissal pay, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

### Comments

1. Although the claimant was last physically at work on December 27, 2013, the employment relationship was *not* severed as of that date as the claimant continued receiving his regular pay through January 15, 2014. Therefore, the claimant *must* be considered to have continued to be employed through that date.

2. However, staff must determine that any money the claimant has received is not lag pay. If a claimant is on the payroll and receiving lag pay after his last day of work then we would use the last day of work and not the last day of employment.
3. This Appeal Board decision is in accord with earlier Appeal Board and Court decisions holding that New York City, State and federal employees are considered not totally unemployed while remaining on payroll to liquidate leave credits. In those cases the employer-employee relationship was deemed not to have been severed until the claimant was off the employer's payroll. (For a fuller discussion of these cases see Interpretation Index entries 1460.C 3, 4 and 5.)