TESTIMONY

OF

THE PENNSYLVANIA ALF-CIO

ON

HOUSE BILL 1754, Printers Number 2248

BEFORE

THE SENATE AND HOUSE
LABOR & INDUSTRY COMMITTEES

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Good afternoon, my name is Frank Snyder, Secretary-Treasurer of the Pennsylvania AFL-CIO, a federation of labor organizations in the Commonwealth whose affiliates represent approximately 900,000 working people and their families in virtually every community of Pennsylvania and in virtually every vocation and profession in which our citizens are engaged. On behalf of our President, Rick Bloomingdale, our Executive Council, and our 900,000 members who we are so blessed to represent, I want to thank you, Senate Labor Committee Chairs Gordner and Tartaglione, and House Labor Committee Chairs Miller and Keller, and the members of the House and Senate Labor Committees for giving us the opportunity to share some of our views on unemployment insurance in general and House Bill 1754 in particular.

Before delving into the particulars of the legislation before us, I think it important to provide the Committees with some more broadly based observations regarding Pennsylvania's unemployment insurance law. At the time of its adoption in the 1930s, our statute was and has remained to this day part of a coordinated federal/state relationship encouraged by the fed-

eral Social Security Act. It was adopted during the depths of the Depression, not only or even primarily for the purpose of providing subsistence to the victims of the ravages of unemployment, but also to assure the flow of basic consumer dollars in a very sick economy. It was recognized then, as it must be now, that unemployment insurance benefits paid to eligible claimants provide very little, and at best mere subsistence, utilized by its recipients for the purpose of putting a few groceries on the table, making payments on gas, electric, water and telephone bills, maybe buying a new pair of sneakers for a child returning to school, making a mortgage or rent payment, paying for medicine, etc. It is not the source of funding for trips to the beach, vacations on a Caribbean island, or the purchase of big screen TVs.

Additionally, it must be recognized that our unemployment insurance system does not, in any fashion, create or eliminate any rights on the part of any employer to hire, discipline, discharge, replace or terminate any worker. Pennsylvania is an “employment at will” state where, unless there is a collective bargaining agreement, individual employment contract, or a very well-defined public policy, employers retain the right, unilaterally, to determine the nature, composition and members of its workforce.

Unemployment insurance in this state is simply a state program that addresses one aspect of what happens ***after*** a person, temporarily or per-

manently, loses a job with respect to providing short-term subsistence income for those who have become unemployed as a result of the private and unfettered decisions of their employers. I repeat, our unemployment insurance law has nothing whatsoever to do with the right of any employer, public or private, to terminate the employment of any employee. And I bring this to the attention of these Committees in order to avoid any confusion whatsoever with respect to analyzing House Bill 1754.

Our unemployment insurance law, since its inception, has been very clear in its essential public policy purpose. Section 3 of the unemployment compensation law which is the same today as it was when the law was first adopted in the 1930s states, in plain language, the following:

> Economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the Commonwealth . . . [U]nemployment and its resulting burden of indigency falls with crushing force upon the unemployed worker, and ultimately upon the Commonwealth and its political subdivisions . . . Security against unemployment and the spread of indigency can best be provided by the systematic setting aside of financial reserves to be used as compensation for loss of wages by employees during periods when they become unemployed . . . The principle of the accumulation of financial reserves, the sharing of risks, and the payment of compensation with respect to unemployment meets the need of protection against the hazards of unemployment and indigency. The Legislature therefore, declares that in its considered judgment the public good and the general welfare of

> the citizens of this Commonwealth require the exercise of the police powers of the Commonwealth in the enactment of this act for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed . . .

Your predecessors in this State Capitol chose these very poignant and powerful words, and our Supreme Court, in a long line of decisions, teaches us that the section of the unemployment insurance law that I just quoted, "[I]s not merely a perfunctory preface, but is, rather, the keystone upon which the individual sections of the Act must be interpreted and construed . . ." (Penn Hills School District v. Unemployment Compensation Board of Review, 496 Pa. 620 at 621.) To that end, the administrative agencies charged with the application and administration of our unemployment insurance law, the Pennsylvania Department of Labor and Industry and the Unemployment Compensation Board of Review, along with our Courts, have consistently recognized the objective of our unemployment insurance law, as declared in Section 3, is to insure that workers who become unemployed are provided some semblance of limited economic security. Mindful of this remedial, humanitarian objective, our courts have always interpreted the unemployment insurance benefits and eligibility sections broadly to alleviate the distress of the unemployed. Accordingly, a principle of construction of our unemployment insurance law has been de-

veloped over three-quarters of a century . . . an unemployed worker may be denied unemployment insurance benefits ***only*** by explicit language in the law which clearly and plainly excludes that worker from its coverage. In determining whether a disqualification from unemployment insurance eligibility is appropriate, the test is not one of whether the claimant has taken herself or himself out of the scope of the law, but whether the law specifically excludes him or her from its provisions. In other words, our unemployment insurance law, an organic statute that applies its humanitarian principles to current, actual and real present facts, operates with a presumption that an unemployed worker who registers for unemployment insurance is eligible for benefits and unless there exists evidence that demonstrates that the claimant is specifically disqualified by some explicit section of the unemployment insurance law, the unemployed claimant is eligible for unemployment insurance benefits.

It is against this backdrop that we must measure the significance and the impact of the proposals embodied in House Bill 1754.

I must also note the very clear insurance based concepts articulated in Section 3 of our unemployment insurance statute. Its public policy is predicated upon setting aside financial reserves and sharing of the risks to meet the need of protection against the hazards of unemployment and in-

digency. Those again are very significant words. When the General Assembly initially adopted our unemployment insurance law the wage base on which employers paid into the unemployment insurance system was approximately 335% of the statewide average annual wage. By the mid 1980s, the last time the General Assembly set the wage base on which unemployment insurance premiums are paid, it set that base with a cap of $8,000.00 per year. At that time the $8,000.00 number represented approximately 48% of the statewide average annual wage. Today that same $8,000.00 cap remains in place and represents scarcely 19% of the statewide average annual wage. I dare say that had this cap merely kept up with that 48% of the statewide average annual wage number, our state unemployment trust fund at present would likely have no debt to the federal government even in the face of this protracted period of economic downturn and unprecedented unemployment.

And that fact is further exacerbated by the reality that Pennsylvania workers pay directly into our unemployment insurance trust fund as well, based upon statutory trigger mechanisms, and their contributions are paid on every single dollar they earn, not capped at an artificially limited annual wage base. Indeed, every time a worker gets a raise in wages, her contri-

bution to the unemployment insurance trust fund immediately increases while her employer's contribution remains unchanged.

I also wish to point out that, in addition to the direct worker contributions I have just described, it is clear that even the payments made directly by employers to our unemployment insurance system are indirectly financed by workers by way of fewer dollars being available in the pay envelope while employers pay what even they refer to as "employment costs and payroll taxes."

Our Unemployment Insurance statute has, virtually since its inception, been bound up in and interpreted to be a law that is "***REMEDIAL"*** in its nature and in its application recognizing the public policy behind the law as I have mentioned.

It is against this backdrop, this long standing public policy approach articulated by this General Assembly and consistently applied by the appropriate administrative agencies of this Commonwealth charged with the application and enforcement of this law (the Unemployment insurance Board of Review and the Pennsylvania Department of Labor and Industry) that we must today measure the very plain and broad sweeping significance of the two proposed new impositions of ***ineligibility*** for unemploy-

ment insurance benefits proposed in the current iteration of House Bill 1754.

We must also recognize that the unemployment insurance statute is ***organic*** law that must be flexible enough to deal with the ever changing march of progress in the world of work in our Commonwealth. In fact, one of the marks of the true genius of our unemployment insurance statute is the visionary organic articulation of the disqualification sections as presently appearing in the law that House Bill 1754 proposes to radically change.

Our current unemployment insurance law generally provides three broadly articulated statutory disqualifications for unemployment insurance eligibility for those who were employed in covered employment and are otherwise able and available for suitable work. One is participation in a work stoppage or strike in which the claimant is a direct beneficiary. The other two, both of which are proposed to be dramatically modified in House Bill 1754, are leaving work for a reason that is not "necessitous and compelling," and a claimant who is terminated from employment for "willful misconduct."

The first of these two proposed modifications in the nature of an amendment to Section 402(b) of the unemployment insurance law would, if adopted, add a further modifier to the existing "necessitous and compelling"

language that would create a disqualification even where the claimant's leaving work is necessitous and compelling but is somehow not "attributable to his employment . . ." The proposed amendment further eliminates eligibility for unemployment insurance benefits for individuals who become disabled from performing their current jobs and who therefore have a necessitous and compelling reason for leaving work, when that disability is not, as proposed by the amendment, "work-related." In proposing these changes, we are faced with a subtle, but breathtaking, exception to the rule of the remedial purpose of this statute. Fundamentally, the adoption of this change in the leaving of employment section of the law, if adopted, would, in one fell swoop, both take the determination of eligibility in this area out of the objective hands of the Commonwealth of Pennsylvania and place it in the subjective hands of an individual employer and at the same time eliminate the living, organic nature of the unemployment insurance statute in general and Section 402(b) of the law in particular. Please remember my earlier comments, our unemployment insurance law, at present, does not in any way limit, impede or restrict the employer/employee relationship. It speaks only to the relationship between an unemployed individual and the remedial system of the unemployment insurance law after a claimant loses her job.

That reality, however, would be turned on its head if the living nature of this area of the law were modified as proposed in House Bill 1754 to include the modifiers of “work-related” and “attributable to his employment.” That statutory change would place the determination of the Commonwealth’s obligations to those compelled to leave their jobs in the hands of their former employers as opposed to the objective hands of our rational adjudicatory system. Imagine with me if you will a situation in which a worker has a heart attack, contracts Parkinson’s Disease or has permanent secondary effects from a regimen of chemotherapy, who is able and available for suitable work but disabled from performing her past job with her employer. Under this proposal, because that other than total disability is not “work-related” or “attributable to her employment” she would be deemed to be ineligible for unemployment insurance benefits despite the fact that she would have left her work for the statutorily contemplated necessitous and compelling reasons. And we must remember that none of the three alternative disabilities that I have just described could have been contemplated as falling within the necessitous and compelling language of the current statute when it was written because, as recently as 25 or 30 years ago, each of those medical conditions were totally disabling. Today, through the progress of medical science and technology, the victims of

these maladies may have some limitations, but are not totally disabled from active gainful employment. Under the proposed statutory modification of House Bill 1754, such an individual would be disqualified from unemployment insurance eligibility. And that, Senators and Representatives, I can assure you does not serve the "remedial, humanitarian objective" of the public policy of the unemployment insurance law that has existed in this Commonwealth since the adoption of our original statute.

The other section of the law proposed to be changed by House Bill 1754 relates to Section 402(e) which deals with the statutorily created ineligibility for benefits due to a discharge or temporary suspension based upon alleged "misconduct." The current statutory framework, and that which has existed throughout the history of the unemployment insurance statute, has been to permit a deviation from the general presumption of benefit eligibility when a claimant has engaged in what is objectively and organically described in the law as "willful misconduct." Once again this proposed amendment, in very poignant terms, attempts to shift the role of the Commonwealth in the objective administration of its laws and vest that responsibility in the subjective decision making of an employer who already has exercised its right to discharge or suspend a worker. In this instance not only does the proposed amendment eliminate the important modifier, "will-

ful," from the disqualification for unemployment insurance eligibility, it then goes on to place the capacity to define workplace rules exclusively in the hands of employers; that would not only result in the claimant losing his or her job (the employer's sole decision) but also result in the claimant being statutorily deemed to be ineligible for subsistence unemployment insurance benefits, thereby having the state delegate to an employer the determination of benefit eligibility. Indeed, the proposed statutory definition goes so far as to not only eliminate the requirement that the putative disqualifying conduct be "willful," but in fact creates a disqualification from Pennsylvania state unemployment insurance benefit eligibility, after the imposition of a discharge, based on mere "negligence." Even more troublesome is the fact that the proposed language creates ineligibility for Pennsylvania state unemployment insurance for a claimant who threatens, "[T]o harm the interest of the employer . . ." Thus a claimant who protests the unwanted sexual advances of an employer by responding to those advances by advising the employer that if he fails to stop she will report him to the proper authorities would likely be deemed to have "threatened to harm the interest of the employer" and thus be deemed to have engaged in statutory "misconduct" rendering her ineligible for unemployment insurance benefits. The same could equally be said for the employee who refuses an employ-

er's directive to sabotage a competitor or to misuse a competitor's proprietary information who would also then be deemed, because of the refusal, to have threatened to "harm the interest of the employer" and therefore have engaged in disqualifying "misconduct." And, coupled with the other proposed change that I have already discussed with respect to voluntarily leaving employment for a necessitous and compelling reason, even if such unemployment insurance claimants as I have just described quit their jobs for so fundamental a ***necessitous and compelling*** reason, I dare say the other changes in House Bill 1754 would, nonetheless, serve to disqualify these individuals from unemployment insurance benefit eligibility. This cannot be the salutary, remedial purpose envisioned by the framers of our Pennsylvania Unemployment Insurance Law.

The true genius of these particular sections of our unemployment insurance law is their organic, flexible nature. Our present statutory framework flows, and adapts, with the times and the expanse of technology as it develops at the workplace. I can assure you that as recently as the 1980s, no one contemplated the utilization of computer-based social networking websites on employer paid time as even existing, much less being, as it is now generally recognized, disqualifying "willful misconduct" resulting in an ineligibility for unemployment insurance benefits for a claimant that has en-

gaged in such conduct. And I can equally assure you that in a less mobile society of the 1950s, where the typical family had one, not two, wage earners, the notion of one spouse being compelled to follow another to a new community for a new job was not in the cards. But today the two wage earner household is commonplace and our salutary desire to keep families together and intact must not be assaulted, eroded or eliminated by a statutory change to our unemployment insurance law that would destroy benefit eligibility for a spouse who, of necessity, is compelled to follow where the household income leads.

I anticipate that we will hear arguments about the solvency of our unemployment insurance fund and, with that, the need to further kick people when they are down by eliminating benefit eligibility. With all due respect to the purposes of the authors, I humbly suggest that while the proposed changes embodied in HB 1754 are pernicious, they do precious little to establish even a vague path toward solvency. Solvency will be achieved when we attach the stated public policy purpose of the unemployment insurance law, going back to its inception, of "setting aside of financial reserves to be used as compensation for loss of wages by employees . . ." to our legislative actions.

The sad but poignant reality, Senators and Representatives, is that our unemployment insurance system is predicated on a notion of how much we are as a society willing to spend to keep people unemployed. While the underlying concepts are virtuous, I am here today to extend our hand and ask that you join with us in the exploration of new models, alternative models, that restore the dignity of a real and meaningful job to those who are and have been the victims, not only of our current economic downturn, but of the structural changes to our state's economy that have fundamentally changed the character and nature of work and the jobs that people do. I for one would ask that we join together to find methods by which we invest in jobs . . . real, meaningful, family-sustaining jobs, with family-sustaining benefits and the prospect of dignity in our work and security in a future retirement. For far too long I have known the pain, the anguish, the agony of a family whose breadwinners are out of work, whose prospects for meaningful replacement employment have evaporated, where parents send their children off to school in the morning in the hope that there will be at least one decent meal through the day and are home at the afternoon conclusion of the school day to greet their kids not merely because of the joy of welcoming a child to the family home but because there is no job. Ladies and gentlemen, I know of the harsh reality of unem-

ployment, and I know it firsthand. And I know the harsh reality of whole industries disappearing and the devastation certainly in our communities but more significantly on our families. Changing the unemployment insurance law to create yet more devastation, to inflict yet more pain, to destroy even short term subsistence, is not, in our judgment, the appropriate role of this General Assembly.

Thank you for your attention. I will be happy to attempt to respond to your questions to the best of my ability.