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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5019-14T1

MIRON FAYNERMAN,

Appellant,

v.

BOARD OF REVIEW, and
JOULE SCIENTIFIC STAFFING
SOLUTIONS,

Respondents.

Argued on November 30, 2016 – Decided February 21, 2017

Before Judges Fuentes, Simonelli and Gooden
Brown.

On appeal from the Board of Review, Department
of Labor and Workforce Development, Docket No.
006,686.

Sara Z. Cullinane argued the cause for
appellant (Make the Road New Jersey,
attorneys; Miron Faynerman, on the pro se
briefs).

Robert M. Strang, Deputy Attorney General,
argued the cause for respondent Board of
Review (Christopher S. Porrino, Attorney
General, attorney; Melissa H. Raksa, Assistant
Attorney General, of counsel; Mr. Strang, on
the brief).

Respondent Joule Scientific Staffing
Solutions has not filed a brief.

PER CURIAM

Miron Faynerman appeals the June 1, 2015 decision of the Board of Review (Board), affirming the Appeal Tribunal (Tribunal) decision that required him to repay the full amount of benefits he received improperly on an emergency unemployment compensation (EUC) claim paid under the Emergency Unemployment Compensation Act, Pub. L. No. 110-252, 122 Stat. 2353 (the Act).¹ Faynerman was ineligible to receive EUC benefits because he was eligible to receive regular unemployment compensation benefits from the State of New York. Faynerman argues that he should not have to repay the EUC benefits because he did not make any misrepresentations nor withheld any information material to his claim for benefits; and he simply filed a claim for benefits in New York as instructed by an employee of the Division. He also argues that he is entitled to have the overpayments waived. After reviewing the record in light of the contentions advanced on appeal, we affirm but remand for the agency to address Faynerman's request for a waiver of the refund, an issue not decided by the Board.

¹ The Act appears as a note to 26 U.S.C.A. § 3304, which it amends.

I.

Faynerman was employed by Joule Scientific Staffing Solutions (Joule), a New Jersey staffing agency, and was placed at Teva Pharmaceutical (Teva) in Pomona, New York, where he worked from October 2011 until his assignment ended in mid-June of 2012. Thereafter, Faynerman applied for unemployment benefits² in person in the Hackensack unemployment office and began receiving benefits in June 2012 at a weekly rate of \$598. He was later approved for and began receiving EUC benefits on December 9, 2012 through June 8, 2013, totaling \$15,548.

In June 2013, when his EUC benefits were exhausted, Faynerman returned to the Hackensack unemployment office to inquire about an extension. He was told by a Division employee that he should have applied for unemployment benefits in New York since Joule, his New Jersey based staffing agency, placed him at Teva, a New York company. Following these instructions, Faynerman filed a claim for unemployment compensation benefits in New York, was found eligible to receive regular unemployment compensation

² Faynerman initially applied and was approved for unemployment benefits on February 27, 2011, prior to his placement at Teva in October 2011. The record is unclear regarding the circumstances of the initial application. However, the unemployment benefits that are the subject of this appeal encompass the time period after Faynerman's placement at Teva ended.

benefits from New York, and received retroactive benefits from December 2012 to June 2013 at a rate of \$360 per week.

On July 8, 2013, the Director of the New Jersey Division of Unemployment Insurance (Director) notified³ Faynerman that he was required to refund \$15,548 received for the weeks ending December 9, 2012 through June 8, 2013 pursuant to N.J.S.A. 43:21-16(d). The Director's request was based on a determination that Faynerman was not eligible for New Jersey EUC benefits because he received regular unemployment benefits from the State of New York during the same time period. On July 15, 2013, Faynerman filed a timely administrative appeal of the Director's determination with the Tribunal.

The Tribunal conducted a telephonic hearing on September 8, 2014,⁴ during which Faynerman testified. Faynerman testified that when he initially applied for unemployment benefits in June 2012 at the Hackensack unemployment office, he disclosed all the

³ The notice also alerted Faynerman that "[a]ny money due . . . from a NJ Income Tax Refund . . . may be utilized to repay [the] debt." There was also a provision in the notification listing the eligibility criteria for a waiver of the recovery of the debt pursuant to N.J.A.C. 12:17-14.2.

⁴ Initially, the Tribunal scheduled a hearing for March 14, 2014. Faynerman's Legal Services attorney requested that the hearing be rescheduled due to his unavailability until March 24, 2014. On March 21, 2014, the Tribunal dismissed the appeal without prejudice, noting counsel's unavailability. On August 12, 2014, the appeal was reinstated.

information that was pertinent to his claim and made no misrepresentations. According to Faynerman, from June 2012 to June 2013, it "never crossed [his] mind" that he had a potential unemployment claim in New York. It was only when he returned to the Hackensack unemployment office in June 2013 to inquire about an extension that he was told that he should have applied for unemployment benefits in New York. Faynerman added that in August 2014 he was notified that his New Jersey income tax refund of \$2011 would be applied to the amount owed. The application of the refund reduced his outstanding balance from \$15,548 to \$13,537.

On September 11, 2014, the Tribunal affirmed the Director's determination, finding that:

Public Law 110-252, the Supplemental Appropriations Act (2008), Title IV provides that to be eligible for a week of 2008 Extended Unemployment Compensation, an individual, in addition to meeting the applicable state law provisions, must have no rights to regular or extended compensation under such law or any other state or Federal unemployment compensation law.

In this case, Division records show that a valid claim for unemployment benefits was filed in the state of New York, with a retroactive effective date of 12/9/12. As such, the claimant has rights to a valid unemployment compensation claim in another state. Therefore, the claimant is ineligible for 2008 Extended Unemployment Compensation
. . . .

In this case the claimant received an overpayment of benefits for the weeks in question. The claimant is still obligated to refund the amount that was overpaid.

As he received benefits to which he had not been entitled, the claimant is liable for refund in the sum of \$15,548[], received as benefits for the weeks ending 12/9/12 through 6/8/13, in accordance with N.J.S.A. 43:21-16(d) unless the Director directs otherwise in accordance with N.J.A.C. 12:17-14.2.

On September 22, 2014, Faynerman appealed the Tribunal's decision to the Board. On June 1, 2015, the Board affirmed the Tribunal's determination and this appeal followed. Faynerman raises the following issues on appeal:

I. THE AGENCY FAILED TO EVALUATE AND APPLY ITS APPLICABLE REGULATIONS IN THIS MATTER CONCERNING THE AGENCY ERROR RULE.

A. SINCE THE OVERPAYMENT WAS DUE TO AGENCY ERROR, THEN THE OFFSET AMOUNT SHOULD BE LIMITED TO COLLECTION AGAINST FUTURE BENEFITS OF [50%] OF THE CLAIMANT'S WEEKLY BENEFIT RATE.

B. THE AGENCY FAILED TO EVALUATE AND APPLY THE AGENCY ERROR RULE.

C. THE ESTOPPEL DOCTRINE IS APPLICABLE IN THE UNEMPLOYMENT BENEFITS CONTEXT TO INSURE SUBSTANTIAL JUSTICE SINCE CLAIMANT FAYNERMAN HAD A NEW JERSEY JOINT EMPLOYER AND FOLLOWED THE INSTRUCTIONS OF THE AGENCY IN RECEIVING BENEFITS.

II. THE AGENCY FAILED TO EVALUTE AND APPLY NEW JERSEY WAIVER OF REFUND RULES AND WAIVER RULES IMPLEMENTED THROUGH UIPL 23-08, ATTACHMENT A.

A. THE UNEMPLOYMENT REGULATIONS AT N.J.A.C. 12:17-14.2 STATE THAT A REFUND SHOULD NOT BE RECOVERED WHEN IT IS PATENTLY CONTRARY TO THE PRINCIPLES OF EQUITY.

B. UIPL 23-08 SETS OUT PROCEDURES FOR CONSIDERATION OF WAIVER OF REFUNDS WHICH WERE NOT CONSIDERED.

C. FUNDAMENTAL FAIRNESS SHOULD PREVENT REFUND SINCE THE ACTION OF THE AGENCY PREVENTED CLAIMANT FROM GETTING BENEFITS TO WHICH HE WAS OWED DURING THE SAME TIME PERIOD.

III. THE AGENCY FAILED TO EVALUATE AND APPLY MONETARY DETERMINATION STANDARDS ACCORDING TO THE HUMANITARIAN STANDARDS OF THE UNEMPLOYMENT COMPENSATION LAW.

IV. THIS MATTER SHOULD BE REVERSED SINCE DUE PROCESS PROTECTIONS WERE VIOLATED SINCE THE AGENCY COLLECTED PORTIONS OF THE REFUND PRIOR TO A DUE PROCESS HEARING, AND IS SEEKING TO OBTAIN A REFUND FROM A CLAIMANT WHO FOLLOWED THE DIRECTIONS OF THE AGENCY AND HAD A NEW JERSEY JOINT EMPLOYER WHICH GIVES A FAIR FINDING OF ELIGIBILITY IN BOTH LOCATIONS.

V. CLAIMANT FAYNERMAN SHOULD NOT BE REQUIRED TO PAY A REFUND IN THIS MATTER SINCE HE HAD ONGOING TWO DETERMINATIONS OF ENTITLEMENT WHICH EXEMPT HIM FROM PAYMENT OF THE REFUND.

II.

Our capacity to review the Board's decision "is limited."

Brady v. Bd. of Review, 152 N.J. 197, 210 (1997) (citing Pub.

Serv. Elec. v. N.J. Dep't of Env'tl. Prot., 101 N.J. 95, 103 (1985)). "An administrative agency's final quasi-judicial decision will be sustained unless there is a clear showing that it is arbitrary, capricious, or unreasonable, or that it lacks fair support in the record." In re Herrmann, 192 N.J. 19, 27-28 (2007) (citing Campbell v. Dep't of Civil Serv., 39 N.J. 556, 562 (1963)). As the Supreme Court noted in Herrmann, "[t]hree channels of inquiry inform the appellate review function":

(1) whether the agency's action violates express or implied legislative policies, that is, did the agency follow the law; (2) whether the record contains substantial evidence to support the findings on which the agency based its action; and (3) whether in applying the legislative policies to the facts, the agency clearly erred in reaching a conclusion that could not reasonably have been made on a showing of the relevant factors.

[Id. at 28 (quoting Mazza v. Bd. of Trs., 143 N.J. 22, 25 (1995)).]

"When an agency's decision meets [these] criteria, then a court owes substantial deference to the agency's expertise and superior knowledge of a particular field." Ibid.

Here, the Board's decision was not only sound, but was required by applicable New Jersey and federal statutory law. Pursuant to §4003 of the Act, a participating state will receive 100% reimbursement from federal funds of the EUC paid to eligible individuals. Section 4001(b)(2) of the Act provides that EUC will

be paid to individuals who have exhausted all rights to regular unemployment benefits under state law or under federal law in any benefit year that commenced after the week of May 1, 2007, who "have no rights to regular compensation or extended compensation . . . under . . . any other State . . . or Federal law" Because Faynerman was eligible to receive regular unemployment benefits from New York, he was ineligible for EUC benefits.

Section 4005(b) of the Act provides that

[i]n the case of individuals who have received amounts of emergency unemployment compensation . . . to which they were not entitled, the State shall require such individuals to repay the amounts of such emergency unemployment compensation to the State agency, except that the State may waive repayment if it determines that -- (1) the payment of such emergency unemployment compensation was without fault on the part of any such individual; and (2) such repayment would be contrary to equity and good conscience.

The New Jersey Unemployment Compensation Law (UCL) has consistent provisions. See N.J.S.A. 43:21-16(d)(1); N.J.S.A. 43:21-16(d)(2)(B). Because Faynerman was ineligible to receive EUC benefits, he is now required to refund the EUC benefits he received. Faynerman argues that he should not be required to refund the New Jersey benefits since he was "jointly employed by a temporary agency in New Jersey and the placement employer in New York," and "a fair interpretation would hold him eligible in both

locations." However, the plain language of the Act refutes such an argument.

Faynerman also argues that the "two-determination rule" exempts him from repayment of the New Jersey benefits. According to Faynerman, "between the initial granting of the extension benefit by New Jersey, when it had all the information to make the appropriate determination, and the ongoing determination of continuing eligibility through payment of benefits," he is entitled to the benefit of the two-determination rule. Pursuant to N.J.S.A. 43:21-6(b)(1) and N.J.A.C. 12:17-14.4, the two-determination rule requires separate findings of eligibility and non-disqualification. See Bocchino v. Bd. of Review, 202 N.J. Super. 469, 472-73 (App. Div. 1985). Because Faynerman was ruled ineligible for New Jersey EUC benefits while he received regular unemployment benefits from New York for the same time period, his reliance on the "two-determination rule" is entirely misplaced.

Faynerman argues further that he is without fault, having provided accurate information when he initially applied for benefits in the Hackensack unemployment office and having followed the advice of a Division employee to submit a claim for benefits in New York after his second visit to the unemployment office. However, we have consistently held that repayment is required even if the ineligible recipient acted in good faith. Bannan v. Bd.

of Review, 299 N.J. Super. 671, 674 (App. Div. 1997); Fischer v. Bd. of Review, 123 N.J. Super. 263, 266 (App. Div. 1973). "[T]he recovery of improperly paid unemployment compensation benefits furthers the purpose of the unemployment compensation laws," by "preserv[ing] the Unemployment Trust Fund for the payment of benefits to those individuals entitled to receive them." Bannan, supra, 299 N.J. Super. at 674. "The public interest clearly is not served when the Unemployment Trust Fund is depleted by the failure to recoup benefits erroneously paid to an unentitled recipient, however blameless he or she may be." Ibid.

Relying on Hopkins v. Board of Review, 249 N.J. Super. 84 (App. Div. 1991), Faynerman invokes the estoppel doctrine to relieve him of his repayment obligation in the interest of fundamental fairness and justice. However,

In [Hopkins], we acknowledged that "courts are loathe, and appropriately so, to burden government with the consequences of estoppel." Nevertheless, in Hopkins, considerations of fundamental fairness, substantial justice and legitimacy of governmental process required the application of estoppel to prevent the agency from recouping unemployment benefits to which the claimant actually was entitled, although she had failed to file a timely appeal from the agency's erroneous determination that she was ineligible for benefits.

[Bannan, supra, 299 N.J. Super. at 676 (quoting Hopkins, supra, 249 N.J. Super. at 86, 90).]

Unlike the claimant in Hopkins, supra, Faynerman has no bona fide entitlement to the benefits in question. Like Faynerman, in Zimmerman v. Bd. of Review, 132 N.J. Super. 316 (App. Div. 1975), a claimant alleged that he did not have to repay improperly-paid unemployment benefits because he relied on a conversation he had with an employee of the Division. Id. at 319. We held that "our cases are clear that we cannot here apply estoppel against this governmental agency." Id. at 324. "The advice allegedly given the claimant by a Division employee . . . does not require a finding that he complied with the applicable regulations or that the Division is estopped from asserting that he failed to do so." Id. at 323.

Because we agree with the Board's determination that Faynerman was not eligible for EUC benefits and is required to refund those benefits, we will not address his argument that the Board violated his due process rights by applying his tax refund to repay the debt while his appeal was pending. We note only that while N.J.S.A. 54A:9-8.1(a) authorizes such collection procedures, the Board has an obligation to ensure that claimants' property interests in unemployment compensation benefits are "protected by due process." Rivera v. Bd. of Review, 127 N.J. 578, 584 (1992). Accordingly, "the citizen facing a loss at the hands of the State

must be given a real chance to present his or her side of the case before a government decision becomes final." Id. at 583. Procedural due process demands the claimant be given an equal opportunity to present defenses and supporting arguments as to why "a refund should not be ordered" even when "the payments should not have been made in the first place." Howard v. Bd. of Review, 173 N.J. Super. 196, 203 (App. Div. 1980) (citing Malady v. Bd. of Review, 166 N.J. Super. 523, 530 (App. Div. 1979)).

Faynerman argues that equity demands he not be obligated to repay the higher level New Jersey EUC benefits.⁵ His equitable argument is persuasive and on the surface appears to meet the waiver of repayment standard set forth in N.J.A.C. 12:17-14.2(a)(3), which states that "[u]pon request of the claimant or the claimant's representative," the Director may grant "a full waiver of recovery of an overpayment" if "the claimant has not misrepresented or withheld any material fact in obtaining

⁵ Alternatively, he argues that since the overpayment was due to agency error, the recovery should be reduced by 50%. Under N.J.A.C. 12:17-14.3, where the overpayment was due to the Division's error, the recovery "shall be limited to 50[%] of the claimant's weekly benefit rate for each week of benefits subsequently claimed." However, Faynerman is mistaken in his assertion of agency error and in his application of N.J.A.C. 12:17-14.3. The regulation clearly outlines that benefits may be offset for those claimants "who subsequently [become] entitled to benefits" and "whose overpayment [was] determined to be the sole result of the Division's error." Ibid. That is not the case for Faynerman.

benefits" and "recovery of the overpayment . . . would be patently contrary to the principles of equity." Under N.J.A.C. 12:17-14.2(d), in determining whether recovery of the overpayment would be patently contrary to the principles of equity, "the Director . . . shall consider whether the terms of a reasonable repayment schedule would result in economic hardship to the claimant."

Indeed, Faynerman's attorney argued at the hearing that "a waiver of recovery is also appropriate since . . . in . . . all circumstances it would be contrary to principles of equity and under . . . [N.J.A.C. 12:17-14.2(a)(3)] a waiver should be pre-entered against the refund in . . . this matter." The Appeals Examiner did not acknowledge or respond to this argument and only mentioned the possibility of a waiver indirectly by stating in the written decision that Faynerman was liable for the refund "unless the Director directs otherwise in accordance with N.J.A.C. 12:17-14.2."

Likewise, the Board's decision makes no mention whatsoever of counsel's request for a waiver but states that "[s]ince the appellant was given a full and impartial hearing and a complete opportunity to offer any and all evidence, there is no valid ground for a further hearing." Because neither the Tribunal nor the Board addressed whether Faynerman was entitled to a waiver pursuant to N.J.A.C. 12:17-14.2, we remand this matter to the Director for

consideration with an enhanced record, if necessary. See Mullarney v. Bd. of Review, 343 N.J. Super. 401, 410 (2001) (remanding the question of a refund waiver to the Division where the issue had been raised for the first time on appeal).

Affirmed in part, and remanded to the Division for consideration of Faynerman's contention that the claim for reimbursement of benefits should be waived. We do not retain jurisdiction.

I hereby certify that the foregoing is a true copy of the original on file in my office.



CLERK OF THE APPELLATE DIVISION