



STATE OF NEW YORK

**UNEMPLOYMENT INSURANCE APPEAL BOARD**

PO Box 15126

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**DECISION OF THE BOARD**

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Mailed and Filed: DECEMBER 02, 2020

IN THE MATTER OF:

Appeal Board No. 612091

PRESENT: GERALDINE A. REILLY, MEMBER

The Appeal Board, on its motion pursuant to Labor Law §620(3), has reopened

and reconsidered , filed January 10, 2020, which sustained the initial determinations holding the claimant not entitled to receive benefits on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the claimant had

insufficient earnings in his covered base period employment, effective July 1, 2018 and ending June 30, 2019, or in his covered alternate base period employment, effective October 1, 2018 and ending September 30, 2019.

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

**FINDINGS OF FACT:** The claimant worked as a Child Protective Specialist 1 for a state agency from November 17, 2014 until June 18, 2018. The claimant earned a yearly salary of \$56,403. She was paid bi-weekly a sum of \$2,157.47. On June 21, 2018, the claimant was arrested for an incident which occurred outside of his work hours. The claimant returned to work on June 22, 2018, at which time he placed a phone call to the Assistant Director and reported his arrest as required by agency policy. The claimant was placed on Administrative Leave with Pay. The claimant was obligated to contact his employer on each day he was scheduled to work and to keep the employer apprised of any changes in the outcome of the criminal matter. During the period of his leave the claimant received his regular pay together with a raise.

The claimant was suspended without pay effective September 18, 2019. The

claimant opted to take his vacation accruals at that time. The claimant's accruals were exhausted on October 24, 2019. The claimant filed a claim for benefits on November 8, 2019, establishing a basic base period from July 1, 2018 and ending June 30, 2019, and an alternate base period from October 1, 2018 and ending September 30, 2019.

OPINION: This case was reopened on the Board's own motion because there was no explanation as to why the claimant's pay while on leave was not considered to be remuneration or why Board precedent was not followed.

Labor Law §527 (1) and (2) do not include a "work requirement". These sections require only that remuneration was paid by an employer for employment during at least two calendar quarters of the base period involved. Labor Law § 511

defines "employment" as "(a) any service under any contract of employment for hire, express or implied, written, or oral and (b) any service by a person for an employer." We have held that wages paid to a claimant during a period of suspension pending the outcome of a disciplinary matter, were remuneration for purposes of establishing a valid original claim (See Appeal Board Nos. 604349 and 569753). In those cases, we have found that although the performance of a service "typically refers to the employee's performance of some affirmative act," when the employer directs a claimant to perform the "service" of not reporting to work until his status is resolved, such service is included in the broad definition of employment including "any service" under Labor Law §511. Additionally, the Commissioner's regulations provide that "a week of

employment includes any statutory week during any part of which an employee is on paid vacation or other paid leave of absence although no work is actually performed." (See 12 NYCRR §470.2[g]).

In the case at hand, the claimant provided service to the employer after June 22, 2018, as he was required to call into the office on a daily basis and to abide by the employer's policies, including keeping the employer apprised of the pending criminal manner. For this activity, the claimant received his regular pay continued to receive his bi-weekly payments. The claimant has provided payroll checks which establish that his bi-weekly payments were \$2,157.47 and based upon his salary of \$56,403. The claimant's base period and alternate base periods wages exceed one and one-half times his high quarter earnings.

We therefore conclude that the claimant's remuneration for the period from June 22, 2018 through October 24, 2019 can be used towards his claim for benefits. This matter is referred to the Department for recalculation of his benefit rate in accordance with this decision.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determinations, holding the claimant not entitled to receive benefits on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the claimant had insufficient

earnings in his covered base period employment, effective July 1, 2018 and ending June 30, 2019, or in his covered alternate base period employment, effective October 1, 2018 and ending September 30, 2019, are overruled.

The matter is referred to the Department for recalculation of his benefit rate.

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

GERALDINE A. REILLY, MEMBER