



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: JULY 23, 2021

IN THE MATTER OF:

Appeal Board No. 614806

PRESENT: MARILYN P. O'MARA, MEMBER

The Department of Labor issued the initial determinations reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$196.50 on the basis that the claimant made willful misrepresentations to obtain benefits. The claimant requested a hearing.

The Administrative Law Judge held a telephone conference 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 employer and the Commissioner of Labor.

By combined decision filed March 17, 2021 (), the Administrative Law Judge sustained the initial determinations, holding, effective July 6, 2020, through September 6, 2020, that the wages paid to the claimant, a non-professional employee of an educational institution, cannot be used to establish a valid original claim during the period between two successive academic terms, on the basis that the claimant had reasonable assurance of performing services at the educational institution in the next academic term pursuant to Labor Law § 590 (11); charging the claimant with an overpayment of \$1310.00 in benefits recoverable pursuant to Labor Law § 597

(4); charging the claimant with an overpayment of Lost Wages Assistance benefits of \$1800.00 recoverable pursuant to 44 CFR § 206.120 (f)(5); and overruled the initial determinations reducing the claimant's right to receive

future benefits by eight effective days and charging a civil penalty of \$196.50 on the basis that the claimant made a willful misrepresentation to obtain benefits.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board, insofar as it overruled the initial determinations reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$196.50 on the basis that the claimant made a willful misrepresentation to obtain benefits. The Board considered the arguments contained in the written statement submitted 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 as a ten-month unionized bus driver for the employer, working 25-30 hours per week and earning \$16.92 per hour. The employer guaranteed the claimant 187 days of work pursuant to the collective bargaining agreement. The employer did not guarantee summer employment to the claimant; summer employment was based upon seniority and obtained by bidding on routes.

The claimant last worked for the employer as of March 16, 2020. In May of 2020, the employer notified the claimant, through a letter of reasonable assurance, that he would be resuming his employment in the fall. The employer continued to pay the claimant from March 2020, through June 30, 2020. After June 30, 2020, during the summer break, the claimant made food deliveries on behalf of the employer and worked until approximately July 26, 2020.

The claimant then applied for unemployment insurance benefits online on or about July 27, 2020 and his claim was made effective as of July 6, 2020. During the certification process, the claimant was asked "In the past 18 months, were you an employee of an educational institution." The claimant responded "Yes." The next question then continued, "Are you filing this claim between academic terms or years, or during a customary vacation or holiday recess?" The claimant answered "No." The claimant knew that he was on summer break and that his response "was not right" but he wanted to receive federal unemployment insurance benefits like his coworkers. The claimant received the unemployment insurance benefits in question thereafter. He resumed his employment as a bus driver for the school district in September 2020.

OPINION: There having been no appeal therefrom, it remains the law of the case that the claimant, a permanent unionized bus driver for the employer, had reasonable assurance of continued employment in the 2020-2021 school year, and was overpaid both federal and state unemployment insurance benefits which are recoverable.

The credible evidence establishes that the claimant, when filing his claim for benefits, responded "No" when asked whether he was filing a claim for benefits between academic years or on a customary vacation or holiday recess, but knew that he was on summer break. We find it significant that at the hearing, the claimant knew that he was filing during a summer break and that his response "was not right" but elected to answer to the contrary because he wanted benefits. As a result, we conclude that the claimant's incorrect response, which was factually false, was known to be false, and constitutes a willful misrepresentation to obtain benefits. Hence, we find that the forfeit penalty was properly imposed. We further find that because the claimant was overpaid regular unemployment insurance benefits which are recoverable and the claimant is also subject to a forfeit penalty, the civil penalty was also properly imposed against the claimant.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is reversed.

The initial determinations, reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of \$196.50 on the basis that the claimant made willful misrepresentations to obtain benefits, are sustained.

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

MARILYN P. O'MARA, MEMBER