STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD
PO Box 15126
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DECISION OF THE BOARD

Mailed and Filed: JUNE 06, 2022

IN THE MATTER OF:
Appeal Board No. 621073

PRESENT: GERALDINE A. REILLY, MEMBER

In Appeal Board Nos. 621072, 621073, and 621074, the claimant appeals from the decisions of the Administrative Law Judge filed January 21, 2022, which sustained the initial determinations holding the claimant ineligible to receive benefits, effective March 29, 2021 through March 27, 2022, due to receipt of dismissal pay; charging the claimant with an overpayment of $13,104 in regular benefits recoverable pursuant to Labor Law § 597 (4); an

overpayment of Federal Pandemic Unemployment Compensation of $6,600 recoverable pursuant to Section 2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; and reducing the claimant's right to receive future benefits by eight effective days and charging a civil penalty of $2,955.60 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference hearing before the Administrative Law Judge, all parties were accorded an opportunity to be heard and testimony was taken. There was an appearance by the claimant.

Based on the record and testimony in Appeal Board No. 621072 only, the Board makes the following

FINDINGS OF FACT: The claimant was employed as associate director in the employer's business development group for about fourteen months, until March 31, 2021. The claimant was paid an annual salary of approximately $125,000, and had gross weekly earnings in excess of $2,400. On or before March 16, 2021, the claimant was informed that March 16 would be her last day of work,

but that she would remain on the payroll until March 31, 2021. The claimant was also informed that upon her separation and her signing of a Separation Agreement with the employer, and contingent upon that signing, she would receive a one-time lump sum severance payment in a maximum amount equal to 12 months of her salary, less accrued vacation time, resulting in a lump sum payment of $122,596. A summary of the terms of the separation and severance pay was made available to the claimant on March 31, 2021, her last day of employment. This summary stated that it provided some guidance with respect to the payments and benefits the claimant could expect, but that the actual terms and conditions of the payment were fully outlined in the settlement agreement to be signed by the claimant.

The claimant had some questions about the terms of the separation and agreement, and emailed the employer for clarification on April 3, 2021; receiving no response, she followed up on April 5, and again on April 9, with no response from the employer. On April 10, 2021, the claimant applied for unemployment benefits online. The claimant received a lump sum payment from her former employer in the gross amount of $125,000 by direct deposit on April 30, 2021. The claimant would not have been paid this amount of severance pay if she had not been separated from her employment, and had not signed a Separation Agreement.

OPINION: The eligibility for unemployment benefits for a claimant who has received dismissal pay is governed by Labor Law § 591(6), which provides, in

part: "(a) No benefits shall be payable to a claimant for any week during a dismissal period for which a claimant receives dismissal pay, nor shall any day within such week be considered a day of total unemployment under section five hundred twenty-two of this article, if such weekly dismissal pay exceeds the maximum weekly benefit rate."

Although the claimant never provided a copy of the signed separation agreement to the Department of Labor, and did not produce it at the hearing, the "Wage Continuation Questionnaire" she completed (in evidence as Hearing Exhibit 3), and the claimant's hearing testimony, provide the relevant information needed to decide the issue of the claimant's eligibility. That evidence establishes that the claimant received a lump sum payment of $125,000 in connection with her separation from employment, that the amount was based upon her yearly salary, that her gross weekly earnings were in excess of $2,400 (125,000 divided by 52 = 2,403.84), and she received the lump sum amount by direct

deposit on April 30, 2021, within 30 days of March 31, 2021, her last day of employment. The claimant's dismissal payment, divided by the period covered by the payment, results in a weekly payment of more than $2400 per week, well in excess of the maximum weekly unemployment compensation rate of $504. Accordingly, the lump sum payment was properly held to constitute dismissal pay under the terms of the Labor Law.

Further, according to the pertinent section of Labor Law §591 (6)(c), "If the

dismissal payment is in a lump sum amount or for an indefinite period, dismissal payments shall be allocated on a weekly basis from the day after the claimant's last day of employment and the claimant shall not be eligible for benefits for any week for which it is determined that the claimant receives dismissal pay. The amount of dismissal pay shall be allocated based on the claimant's actual weekly remuneration paid by the employer during his or her employment." The lump sum payment received by the claimant divided by her gross weekly salary (125,000 divided by 2,403) results in a 52-week period of ineligibility. Accordingly, we conclude that the $125,000 paid to the claimant constitutes dismissal pay under Labor Law § 591(6), that the amount of

dismissal pay allocated weekly exceeds the maximum unemployment insurance weekly benefit rate, and that the claimant is ineligible to receive unemployment benefits for the period set forth in the initial determination at issue.

Our review of the record, however, reveals that Appeal Board Nos. 621073 and 621074 should be remanded to hold a further hearing on the issues of recoverable overpayment and wilful misrepresentation. Further testimony and other evidence are needed to decide these issues, and the Commissioner of Labor shall be given the opportunity to address the claimant's contention that she advised the Department of Labor that she received a lump sum severance payment shortly after she filed her claim for benefits.

Specifically, at the further hearing, the claimant shall provide testimony and other evidence to establish the date on which the Separation Agreement providing for a lump sum severance payment was signed by her and her former employer. This evidence shall include a copy of the fully executed Separation Agreement. The signed agreement shall be received into evidence after the appropriate confrontation and opportunity for objection.

In addition, the claimant shall be questioned further regarding her response of "No" to the unemployment insurance claim application question regarding the receipt of severance pay, and why she responded the way she did. Towards this end, the claimant shall be confronted with and questioned about the screen shot of "Eligibility Information, Part 2" (page 49 of the hearing packet), which shall be received into evidence after the appropriate confrontation and opportunity for objection.

The claimant shall also be questioned further regarding what information she provided to the Department of Labor on May 11, 2021, and whether and when she informed the Telephone Claims Center by telephone on or before that date that she had received a lump sum severance payment.

Since the claimant testified that she faxed information regarding her receipt of severance pay to the Department of Labor on May 11, 2021, and her November 8, 2021 hearing request attaches a fax transaction log, these pages (Pages 9-11 of the hearing packet) shall be received into evidence after the appropriate confrontation and opportunity for objection. The claimant shall be asked to specify the document faxed to the Department on that date. If not already in the record, the document identified by the claimant shall be received into evidence after the appropriate confrontation and opportunity for objection.

As noted above, and in light of the claimant's testimony that she notified the Department of Labor on May 11, 2021 that she had in fact received severance pay, the Commissioner of Labor shall be represented at the remand hearing, and shall be prepared to address the claimant's contention. Specifically, the Commissioner of Labor representative shall be prepared to provide testimony and other evidence regarding whether such information was received by the Department of Labor on or about May 11, 2021, and what, if any action the Department took after receiving that information. In connection with this inquiry, the Commissioner's representative shall also be prepared to provide testimony and other evidence regarding the "Separation information via SIDES" provided by the employer on or about April 12, 2021 (in the hearing packet at pages 38 and 39), which indicates that the claimant was receiving a lump sum severance payment. This document shall be received into evidence after the appropriate confrontation and opportunity for objection.

The parties are placed on notice that failure to produce the documentation directed herein may result in the hearing Judge or the Board making an

inference that the information not produced would not have supported that party's position.

The hearing Judge shall receive any additional evidence needed to decide the remanded issues.

DECISION: With respect to Appeal Board No. 621072, only, the decisions of the Administrative Law Judge, insofar as they sustained the initial determination holding the claimant ineligible to receive benefits, effective March 29, 2021 through March 27, 2022, due to receipt of dismissal pay, are affirmed.

In Appeal Board No. 621072, the initial determination holding the claimant ineligible to receive benefits, effective March 29, 2021 through March 27, 2022, due to receipt of dismissal pay, is sustained.

The claimant is denied benefits with respect to the issue decided in Appeal Board No. 621072.

With respect to Appeal Board Nos. 621073 and 621074, the decisions of the Administrative Law Judge are rescinded.

Now, based on all of the foregoing, it is

ORDERED, that the case shall be, and the same hereby is, remanded to the Hearing Section to hold a hearing on the issues of recoverable overpayment of regular and FPUC benefits, and wilful misrepresentation, including monetary penalty, only, upon due notice to all parties and their representatives; and it is further

ORDERED, that the Notice of Hearing shall identify as the Purpose of Hearing the remanded issues of recoverable overpayment of regular and FPUC benefits, and wilful misrepresentation, including monetary penalty, only; and it is further

ORDERED, that the hearing shall be conducted so that there has been an opportunity for the above action to be taken, and so that at the end of the hearing all parties will have had a full and fair opportunity to be heard; and it is further

ORDERED, that an Administrative Law Judge shall render a new decision, on the remanded issues of the recoverable overpayment of regular and FPUC benefits, wilful misrepresentation, and the imposition of a forfeit penalty and monetary penalty only, which shall be based on the entire record in this case, including the testimony and other evidence from the original and the remand hearings, and which shall contain appropriate findings of fact and conclusions of law.

GERALDINE A. REILLY, MEMBER