STATE OF NEW YORK
**UNEMPLOYMENT INSURANCE APPEAL BOARD**
PO Box 15126
Albany NY 12212-5126

**DECISION OF THE BOARD**

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Mailed and Filed: OCTOBER 04, 2022

IN THE MATTER OF:
Appeal Board No. 623938

PRESENT: RANDALL T. DOUGLAS, MEMBER

In Appeal Board Nos. 623937, 623938, 623939, the employer appeals from the decisions of the Administrative Law Judge filed May 25, 2022, insofar as the decisions overruled the initial determinations, disqualifying the claimant from receiving benefits, effective December 2, 2020, on the basis that the claimant voluntarily separated from employment without good cause; charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of $10,800.00 recoverable pursuant to § 2104 (f)(2) of the Coronavirus Aid,

Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of $7,098.00 in Pandemic Unemployment Assistance (PUA) recoverable pursuant to § 2102 (h) of the Coronavirus Aid, Relief and Economic

Security (CARES) Act of 2020 and 20 CFR § 625.14 (a); and charging a civil

penalty of $2,684.70 on the basis that the claimant made a willful misrepresentation to obtain benefits.

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances on behalf of the claimant and the employer.

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

FINDINGS OF FACT: The claimant had applied for unemployment insurance benefits on April 2, 2020, with a claim made effective as of March 16, 2020. She was granted unemployment insurance benefits.

The claimant then worked as a police communications' tech for a municipal police department as of May 29, 2020. She ceased claiming unemployment insurance benefits at that time. The position included an 18-month probationary period and radio dispatch training which required either four hours or seven hours of mandatory overtime. The radio dispatch training was normally offered eight months to a year after hire and the employer had no control over its timing because another unit provided the training.

The claimant resided in a homeless shelter with her two-year-old child. She had daycare for her child provided by her cousin. The claimant requested and was granted an exemption from overtime as of September 2020. When the claimant worked normal hours and was exempt from overtime, she had no issues with childcare. The claimant understood that the exemption was temporary and would end once radio training started.

In October 2020, when her cousin returned to work, the claimant lost her childcare. The claimant qualified for a daycare voucher through welfare but was unable to obtain it through no fault of her own. She emailed and called welfare to obtain the written voucher but received no response.

In November 2020, the claimant became aware that radio training would commence and that her overtime exemption was due to end. Although other family members could watch her child, their hours were limited to a normal workday. In response, the claimant secured a 29-day paid leave from her employment from November 12, 2020, through December 10, 2020, to find childcare at a facility that could accommodate her mandatory overtime schedule. Without a written daycare voucher from welfare, the claimant could not enroll with a new daycare provider. The exemption from overtime would end when the claimant resumed work on December 11, 2020.

On or about December 2, 2020, the claimant came into the office to talk to the employer to discuss how she could retain her employment. During that conversation, the employer reiterated that overtime was mandatory. The claimant understood that she would have to find a daycare provider that allowed for overtime and knew she would not find one before the end of her leave on December 11. As a result, the claimant offered her resignation that same day, December 2, and indicated, in her exit interview, that she was resigning because her childcare needs conflicted with the mandatory overtime.

The claimant then reopened her claim for unemployment insurance benefits. When certifying for unemployment insurance benefits, the Department of Labor asked the claimant whether her "break in claim" was due to employment. She responded "Yes." She then indicated that the "reason for the separation from her most recent employment" was due to "lack of work." The claimant had no memory of the questions or answers. Continuing work had been available to her had she not resigned. The claimant certified for unemployment insurance benefits thereafter and received the unemployment insurance benefits at issue.

OPINION: Pursuant to Labor Law § 597 (3), any determination regarding a

benefit claim may, in the absence of fraud or willful misrepresentation, be reviewed within one year from the date it is issued because of new or corrected information. As the Department of Labor issued the initial determinations herein on January 28, 2022, an initial determination of willful misrepresentation is required to provide the authority for the Department of Labor to review the claim at issue herein prior to January 28, 2021. Hence, we must assess whether the claimant's selection of "lack of work" constitutes a wilful misrepresentation to obtain benefits.

In so determining, we note that on December 3, 2020, when the claimant reopened her claim for unemployment insurance benefits, she selected "lack of work" as the reason for the separation. Although the prior hearing Judge determined that the claimant's confusion prompted an incorrect response, we must disagree. "Willful" does not imply a criminal intent to defraud but means "knowingly", "intentionally", "deliberately" to make a false statement. (See Matter of Vick, 12 AD2D 120 [3D Dept 1960])

We find it significant that the claimant could not recall being asked the reason for her separation, nor does she recall her response. We note too, that the claimant never denies being asked the reason for her separation, nor does she deny offering such a response. We find it significant that the claimant was reopening her claim, in order to seek additional benefits, after the loss of her most recent employment. Hence, we reject her contention of confusion regarding which response to select, as she does not deny being aware that the questions all related to her recent employment. The claimant knew or should have known that her certification was inaccurate, as she had initiated the separation. Her failure to recall the questions does not allow her to evade responsibility. As a result, we find that the claimant, in certifying to lack of work, when she knew that she had resigned from the municipal employer due

to childcare issues, made a wilful misrepresentation to obtain benefits. Accordingly, we find that the Commissioner of Labor possesses the jurisdiction to redetermine the claimant's right to unemployment insurance benefits prior to January 28, 2020.

The credible evidence further establishes that the claimant resigned from her employment due to lack of childcare. Although the employer contends that it suspended the requirement of overtime for the claimant, thereby rendering her childcare concerns moot, we find the contentions unpersuasive. In so determining, we find the claimant credible and consistent in her first-hand testimony that the suspension of overtime was merely temporary. Significantly, the employer's two witnesses confirmed the fact that the claimant would have to work overtime within her probationary period as related to radio training. Also, although the claimant secured other family members who could only provide care within a normal workday, she requested leave from work to find a daycare facility that could accommodate the mandatory overtime schedule. We also note that the claimant had approached her employer, prior to the expiration of her leave, for further suggestions as to how to retain her employment, all to no avail. Moreover, during the claimant's exit interview, she reiterated that her departure was due to the mandatory overtime and her lack of childcare. Hence, we conclude that the claimant took reasonable steps to preserve her employment. As overtime remained mandatory, we find that the claimant had no choice but to resign. Accordingly, we conclude that the claimant separated from her employment with good cause, under non-disqualifying circumstances.

We further find that, as a result, the claimant remained entitled to the unemployment insurance benefits which she received and cannot be said to have been overpaid unemployment insurance benefits. We further note that in the absence of a recoverable overpayment, no civil penalty may be imposed.

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

In Appeal Board Nos. 623937, 623938, 623939, the initial determinations, disqualifying the claimant from receiving benefits, effective December 2, 2020, on the basis that the claimant voluntarily separated from employment without good cause; charging the claimant with an overpayment of Federal Pandemic Unemployment Compensation of $10,800.00 recoverable PURSUANT to §

2104 (f)(2) of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020; charging the claimant with an overpayment of $7,098.00 in Pandemic Unemployment Assistance (PUA) recoverable pursuant to § 2102 (h) of the

Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 and 20 CFR §

625.14 (a); and charging a civil penalty of $2,684.70 on the basis that the claimant made a willful misrepresentation to obtain benefits, are overruled.

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

RANDALL T. DOUGLAS, MEMBER