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

DECISION OF THE BOARD

Mailed and Filed: NOVEMBER 29, 2022

IN THE MATTER OF:
Appeal Board No. 624638

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board Nos. 624636, 624637, 624638, the claimant appeals from the decisions of the Administrative Law Judge filed June 21, 2022, which sustained the initial determinations, holding the claimant ineligible to receive benefits, effective March 7, 2022, through March 13, 2022, on the basis that the claimant did not comply with work search requirements; charging the claimant with an overpayment of $504.00 in benefits recoverable pursuant to Labor Law § 597 (4); reducing the claimant's right to receive future benefits

by eight effective days; and charging a civil penalty of $100.00 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 a full opportunity to be heard and testimony was taken. There were appearances by the claimant and 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 foreman for a large asphalt company for over ten

years. The asphalt season ran from May 1 through early November, weather dependent. The claimant last

worked on October 25, 2021.

The claimant filed for unemployment insurance benefits, when his previous claim expired, on January 2, 2022, and his claim was made effective December 27, 2021. His benefit rate was set at $504.00 per week. He received a Claimant Handbook that stated "The Department of Labor will tell you if you are exempt from the work search requirements as you file your claim. A Career Center staff member may also tell you if you are exempt. You may be exempt if you are temporarily laid off or seasonally employed and (the) employer has given you a definite return to work date of up to eight consecutive weeks..."

The claimant had collected unemployment insurance benefits during his seasonal layoff for the past ten years. He had never previously been required to perform a work search. The claimant did not seek temporary employment elsewhere for fear he would lose his permanent employment and jeopardize his health insurance coverage for the full year.

The employer held meetings during the winter months for the employer's supervisors/foremen. The employer had always asked employees to resume work on May 1, or if May 1 fell on a Saturday or Sunday, the Monday thereafter.

The Department of Labor directed the claimant to attend a work search meeting on January 20, 2022. In response, the claimant sent a secure message, on January 20, 2022, to the Department of Labor asking whether he needed to attend because he had seasonal employment with a definitive return date in May. The Department of Labor did not respond.

On January 20, 2022, the claimant attended the required telephone meeting with career counseling services. The career counselor filled out a "Work Search Plan for Unemployment Insurance" for the claimant. In completing such a form, the claimant and the career counselor reviewed the document line by line on the telephone, including the need to make three weekly job search activities. During that discussion, the claimant again reiterated that he resumed work as of May. The career counselor, nevertheless, warned him of the need to perform a weekly work search.

During the week ending March 6, 2022, the claimant attended management meetings with his employer to prepare for the start of the season. The employer paid him for his work for the week ending March 6, 2022.

The claimant then certified for unemployment insurance benefits for the following week, ending March 13, 2022, on March 14, 2022. When he certified

for benefits for that week, his certification included language in the attestation wherein he agreed to have complied with work search requirements unless being designated as exempt.

The employer then contacted the claimant on or about April 27, 2022, regarding his return to work. The employer directed that the claimant and his subordinates submit to drug testing in advance of Monday, May 2, 2022, when they would report for safety training. The claimant so notified his crew, via group text, about the drug testing and start dates. The claimant resumed his employment on Monday, May 2.

OPINION: Pursuant to Labor Law § 591 (2), a claimant must be actively seeking

work by engaging in systematic and sustained efforts to find work. Pursuant to 12 NYCRR § 473.4 (b) "[a] claimant's 'systematic and sustained efforts to

find work' must include at least three work search activities per week in an effort to obtain suitable work." Pursuant to 12 NYCRR § 473.4 (k) (2022), "A

claimant is exempted from work search requirements for one of the following reasons (1) A temporary layoff or seasonal loss of employment where the employer has given a written definite return-to-work date of up to eight consecutive weeks. Up to an additional four weeks may be authorized by the Department of Labor upon an employer's written request that provides a new return to work date."

The credible evidence establishes that the claimant, a foreman for an asphalt company, was due to resume his work, after temporary layoff, as of May 1. We are not persuaded by the Commissioner of Labor's contention that the claimant should be ineligible to receive benefits for the week of March 7 through March 13, 2022. The claimant provided credible testimony that he believed he did not have to engage in work search efforts because he had a set return-to-work date. He previously notified the Department of Labor, both through the secure messaging system and a career counselor, that he was a seasonal employee with a return-to-work date of May 1. He was never instructed that to be exempt from work search requirements, he needed to provide written proof of this date. Significantly, the claimant handbook makes no mention of this requirement in its instructions and at no point prior to finding the claimant ineligible did the Department of Labor request the claimant provide written proof of the date he was returning to work. Under these circumstances it cannot be fairly said

that the Department of Labor disclosed the requirements to the claimant in a meaningful and understandable manner. As the record contains no evidence that the claimant was informed of the actions he needed to take to be eligible for unemployment insurance benefits, we conclude that the determination cannot be sustained and the claimant is eligible for unemployment insurance benefits for the period from March 7, 2022 through March 13, 2022.

As the claimant remained eligible for unemployment insurance benefits for the period of March 7, through March 13, 2022, we further conclude that the claimant was entitled to the unemployment insurance benefits which he received and was not overpaid unemployment insurance benefits.

Further, as the claimant reasonably believed that he was exempt from work search requirements for that week, we further conclude that he did not make a willful misrepresentation to obtain unemployment insurance benefits when certifying for unemployment insurance benefits for the week ending March 13, 2022. Accordingly, the claimant is not subject to a forfeit penalty and no civil monetary penalty can be imposed.

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

In Appeal Board Nos. 624636, 624637, 624638, the initial determinations, holding the claimant ineligible to receive benefits, effective March 7, 2022, through March 13, 2022, on the basis that the claimant did not comply with work search requirements; charging the claimant with an overpayment of $504.00 in benefits recoverable pursuant to Labor Law § 597 (4); reducing the

claimant's right to receive future benefits by eight effective days; and charging a civil penalty of $100.00 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.

JUNE F. O'NEILL, MEMBER