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[August 25, 2024]
September 22, 2024

Hon. Joseph H. Orlando, Clerk
Appellate Division
P.O. Box 6
Trenton, New Jersey 08625

Re: Yisroel Pick,
Appellant
V.
Board of Review, Department of Labor, and Pandemic
Unemployment Assistance,
Respondent
Docket No. **A-2250-23T2**
On Appeal From: Decision of the Board of Review
Sat Below: Board of Review, Department of Labor

Dear Mr. Orlando:

Kindly accept this letter memorandum in lieu of formal brief, on
behalf of Appellant Yisroel Pick.

TABLE OF CONTENTS

LETTER MEMORANDUM

ORDERS APPEALED FROM	2
STATEMENT OF FACTS	3

PROCEDURAL HISTORY	3
LEGAL ARGUMENT:	
APPELLANT WAS DENIED PROCEDURAL DUE PROCESS (9a).	5
CONCLUSION	11
APPENDIX	
Request for Refund (dated August 29, 2022)	1a
Notice of Appeal to Appeal Tribunal (dated September 6, 2022)	2a
Decision of Appeal Tribunal (dated October 20, 2022)	3a
Notice of Appeal to Board of Review (dated November 3, 2022)	7a
Decision of the Board of Review (dated February 14, 2024)	9a
Amended Notice of Appeal (filed April 3, 2024)	11a
Statement of Items Comprising the Record (filed May 21, 2024)	15a

TRANSCRIPT

Appeal Tribunal Hearing (October 20, 2022)	1T
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ORDERS APPEALED FROM

This appeal is from the Decision of the Board of Review, dated
February 14, 2024 (9a).

STATEMENT OF FACTS

Yisroel Pick received Pandemic Unemployment Assistance (PUA) benefits from September 13, 2020, through September 4, 2021. On August 29, 2022, the Department of Labor and Workforce Development sent him a letter demanding repayment of benefits (1a). It stated:

You were not eligible for the unemployment benefits listed on the back of this form because: YOUR BENEFIT ENTITLEMENT HAS BEEN ADJUSTED

No other explanation was provided.

PROCEDURAL HISTORY

After receiving a notice demanding repayment of PUA benefits (1a), Pick promptly appealed to the Appeal Tribunal (2a). The letter of appeal stated,

Kindly provide a complete copy of the file, including, but not limited to, all applications and benefit calculations, N.J.A.C. 1:12-10.1. Neither my client nor I can ascertain, from the “Request for Refund of Unemployment

Benefits,” what the basis, if any, was for the determination of ineligibility. I reserve the right to supplement this notice of appeal once the appropriate information has been furnished.

To the extent appropriate, I am also requesting a plenary hearing, and transmittal to the Office of Administrative Law as a contested case; N.J.A.C. 1:12-1.1 et seq.

No additional information was forthcoming, and the case was not transmitted to OAL. A telephone hearing was conducted on October 20, 2022 (1T) before an appeals examiner of the Appeal Tribunal; no one testified on behalf of the Department of Labor. Later that same day, the Appeal Tribunal determined that he was “ineligible for PUA benefits from 09/13/20 through 09/04/21” and that he is “liable for refund in the sum of \$11,730” (3a). He filed a further appeal on November 3, 2022 (7a).

The Board of Review affirmed the decision of the Appeal Tribunal, on February 14, 2024 (9a). It found that, “[s]ince the appellant was given a full and impartial hearing, and a complete

opportunity to offer any and all evidence, there is no valid ground for a further hearing.” There were no findings of fact or conclusions of law.

A notice of appeal to the Appellate Division was timely filed on March 28, 2024, and amended on April 3, 2024 (11a).

LEGAL ARGUMENT

APPELLANT WAS DENIED PROCEDURAL DUE PROCESS (9a)

The procedure employed in reviewing Appellant’s claim was fundamentally unfair, and denied him procedural due process. A year after the last payment to him, and without a hearing, he was ordered to return the money, without any factual or legal basis being articulated. This is not an appeal from a denial of benefits, in which the burden would have been on the applicant; instead, this is the State’s claim for the return of monies, in which it has the burden of showing that the applicant was ineligible to receive them.

The temporary Pandemic Unemployment Relief program was created by Section 2102 of the Coronavirus Aid, Relief and Economic Security (CARES) Act of 2020 (P.L. 116-136, 3/27/2020); see Title 20, CFR Part 625, “Disaster Unemployment Assistance.” The program is intended to pay “unemployment assistance to unemployed individuals whose unemployment is caused by a major disaster . . .” and “the implementing regulations . . . shall be construed liberally so as to carry out the purposes of the Act.”

After a demand for repayment was received (1a), Appellant’s attorney promptly wrote to the Appeal Tribunal, as follows (2a):

On behalf of my client, Yisroel Pick, I hereby APPEAL from your determination that he was “not eligible for the unemployment benefits” listed in your letter of August 29, 2022, and that his “benefit entitlement has been adjusted.”

Kindly provide a complete copy of the file, including, but not limited to, all applications and benefit calculations, N.J.A.C. 1:12-10.1. Neither my client nor I can ascertain, from the “Request for Refund of Unemployment

Benefits,” what the basis, if any, was for the determination of ineligibility. I reserve the right to supplement this notice of appeal once the appropriate information has been furnished.

To the extent appropriate, I am also requesting a plenary hearing, and transmittal to the Office of Administrative Law as a contested case; N.J.A.C. 1:12-1.1 et seq.

No records or other information were forthcoming; Appellant should have received all relevant evidence (“evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action,” N.J.R.E. 401) prior to any hearing. The case was not transmitted to OAL. Instead, a telephone “hearing” was conducted, in which only the applicant and his attorney participated. The “hearing” resulting in the issuance of a decision (3a) later that same day, denying the appeal. Rather than requiring the Department of Labor to establish that Appellant was ineligible for benefits, the appeals examiner affirmed determinations – which were not in the record – by the deputy and the director that Appellant should repay monies received.

Appellant then appealed to the Board of Review (7a), again complaining about the failure to provide discovery, as well as the hearing examiner’s refusal to accept Appellant’s undisputed

testimony. The transcript reflects the following:

CLAIMANT’S ATTORNEY: I did request discovery, pursuant to NJAC 1:12-10.1. I requested that several times and have received nothing.

EXAMINER: But there is no discovery in this matter. I looked in the file when I saw your email. *There’s nothing here* except the unemployment determination which the claimant appealed from.

(1T3; emphasis supplied).

The Examiner thus conceded that “[t]here’s nothing here . . .” but affirmed the decision below anyway (9a). Each one of the series of decisions lacked a factual basis.

The appeal procedure for cases before the appeal tribunals (N.J.A.C. 12:20-3.2) and the Board of Review (N.J.S.A. 34:1A-19, N.J.A.C. 12:20-4.2) are found at N.J.A.C. 1:12. N.J.A.C. 1:12-15.1(b) provides:

Hearsay evidence shall be admissible and accorded whatever weight the examiner deems relevant, appropriate, and reasonable under the circumstances. Notwithstanding the admissibility of hearsay evidence, *the decision as rendered must be supported by sufficiently substantial and legally competent evidence* to provide assurance of reliability and to avoid the fact or appearance of arbitrariness.

(Emphasis supplied.) No specific regulation appears to govern the procedure for PUA cases.

Our Supreme Court has recognized that

“[S]tate statutes providing for the payment of unemployment compensation benefits create in the claimants for those benefits property interests protected by due process.” *Wilkinson v. Abrams*, 627 F.2d 650, 664 (3rd Cir., 1980); see also *Ross v. Horn*, 598 F.2d 1312, 1317-18 (3rd Cir., 1979), *cert. denied* 448 U.S. 906, 100 S.Ct. 3048, 65 L.Ed.2d 1136 (1980). . . . Moreover, the Department is not simply seeking to cease future payments but to recoup past payments, which in all likelihood have already been spent by the recipient. The significant property interest in those

benefits is unquestionable and thus protected by the Fifth Amendment. Indeed, federal statutory law recognizes that due-process interest by expressly requiring that unemployment claimants be provided an “opportunity for a fair hearing.” 42 U.S.C. 503(a)(3).

Rivera v. Board of Review, New Jersey Dept. of Labor, 127 N.J. 578, 584 (1992; timeliness of appeal).

The procedure by which a decision was rendered in Appellant’s case was fatally flawed. The Department of Labor simply proclaimed that he was ineligible for monies that he had received a year earlier (“YOUR BENEFIT ENTITLEMENT HAS BEEN ADJUSTED”), without providing any explanation to him, and without offering a hearing at which the State would have had the burden of proof. It continued to conduct “appeals” without allowing Appellant to review any information in the State’s file. Its same-day decisions ignored the only testimony in the record – that of Appellant – in favor of speculation and conjecture.

CONCLUSION

The decisions below were arbitrary, capricious and unreasonable, since they lacked a factual foundation. For the foregoing reasons, the orders allowing the Department of Labor to seek reimbursement from Appellant should be reversed.

Respectfully,

Larry S. Loigman

LARRY S. LOIGMAN

Via eCourts



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January 28, 2025

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Re: Yisroel Pick v. Board of Review, Department of
Labor
Docket No. A-2250-23T2

Civil Action: On Appeal From a Final
Decision of the Board of Review

Letter Brief of Respondent, Board of Review

Dear Mr. Orlando:

Please accept this letter brief pursuant to Rule 2:6-2(b) on behalf of
Respondent Board of Review.



TABLE OF CONTENTS

PAGE

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS . . . 3

ARGUMENT

I.	THE BOARD OF REVIEW CORRECTLY DETERMINED THAT PICK WAS DISQUALIFIED FOR PANDEMIC UNEMPLOYMENT ASSISTANCE BECAUSE HE DID NOT MEET THE CRITERIA IDENTIFIED IN SECTION 2102(a)(3)(A)(ii)(I) OF THE CARES ACT.	5
II.	PICK WAS AFFORDED DUE PROCESS AS PRESCRIBED IN THE UNEMPLOYMENT COMPENSATION LAW	8
III.	PICK IS LIABLE FOR A REFUND OF \$11,730 IN BENEFITS RECEIVED PURSUANT TO N.J.S.A 43:21-16(d).	11
	CONCLUSION	12

APPENDIX

Correspondence from L. Vargas to appellant enclosing copy of the Appeal Tribunal record, dated December 15, 2023.	Ra1
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January 28, 2025

Page 3

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF FACTS¹

Appellant, Yisroel Pick, filed a claim for Pandemic Unemployment Assistance (“PUA”) benefits on September 13, 2020. (Pa3).² On August 29, 2022, the Deputy of the Division of Unemployment Insurance (“Deputy”) determined that Pick was ineligible for PUA benefits from September 13, 2020, on the grounds that Pick “did not have an attachment to the labor market, and did not meet the qualifications under the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act.” (Pa3). On the same date, the Director of the Division of Unemployment Insurance (“Director”) determined that Pick was liable for refund in the sum of \$11,730 received as benefits for the weeks ending September 19, 2020, through September 4, 2021. Ibid.

On September 6, 2022, Pick appealed the determination of the Deputy and Director’s Request for Refund to the Appeal Tribunal. (Pa3). A hearing was conducted on October 20, 2022. (Pa3). Pick testified he did not have a full-time job and was “doing odd jobs here and there” for work. (T9). He would “deliver things to people and . . . driving pay for jobs.” (T9-10). Additionally,

¹ The procedural history and facts of this case are intertwined and have been combined here for the Court’s convenience.

² “Pa” refers to Appellant’s appendix. “Ab” refers to Appellant’s brief “Ra” refers to Respondent’s appendix. “T” refers to the transcript of the October 20, 2022 Appeal Tribunal hearing.

January 28, 2025

Page 4

Pick agreed that he was not considered a W-2 employee in either 2019 or 2020. (T11-12). He could not recall if he even filed taxes relating to these “odd jobs.” (T12). Pick testified that, prior to filing his claim, he could not recall when he last performed any services. (T9; T12).

In a decision issued on October 20, 2022, the Appeal Tribunal (“Tribunal”) found Pick ineligible for Pandemic Unemployment assistance (“PUA”) benefits from September 13, 2020, through September 4, 2021, as Pick had “not met the burden of proof to show that he was genuinely attached to the labor market.” (Pa4). The Tribunal further stated that “[w]ithout specifics regarding his tax documents as a gig worker, or the potential dates of his delivery driving payroll records, it is apparent that [Pick] was not involved in the labor market prior to his claim being filed.” Ibid. Therefore, Pick was found ineligible for PUA benefits under section 2102 of the CARES Act. (Pa4-5). The Tribunal also held Pick liable for a refund in the sum of \$11,730 received as benefits for the weeks ending September 19, 2020, through September 04, 2021. (Pa5).

On November 3, 2022, Pick appealed the Tribunal’s decision to the Board of Review (“Board”) and requested a copy of the complete appeal file. (Pa7). On December 15, 2023, the Board of Review, in accordance with N.J.S.A. 43:21-11(g), forwarded a CD copy of the appeal record to Pick’s counsel. (Ra1).

January 28, 2025

Page 5

The Board issued a decision on February 14, 2024, affirming the Tribunal's decision. (Pa9). The Board found that Pick had not presented evidence of an attachment to the labor market and he therefore did not meet the eligibility requirement for PUA benefits. Ibid. The Board further noted that the CARES Act, the Continued Assistance for Unemployed Workers Act 2020 ("CAA"), and American Rescue Plan Act ("ARPA"), all explain that claimants who had no earnings in either covered or self-employment in 2019 or 2020, prior to the pandemic, or did not have a bona fide offer of work that was disrupted due to the pandemic, were ineligible for PUA benefits. Ibid.

This appeal followed.

ARGUMENT

I. THE BOARD OF REVIEW CORRECTLY DETERMINED THAT PICK WAS DISQUALIFIED FOR PANDEMIC UNEMPLOYMENT ASSISTANCE BECAUSE HE DID NOT MEET THE CRITERIA IDENTIFIED IN SECTION 2102(a)(3)(A)(ii)(I) OF THE CARES ACT

The CARES Act expanded eligibility for and payment of unemployment benefits for certain categories of individuals who may have been adversely affected by COVID-19. Sullivan v. Bd. of Rev., Dep't of Labor, 471 N.J. Super. 147, 153 (App. Div. 2022). Under the CARES Act, an individual is eligible for PUA if they are ineligible for regular unemployment compensation or pandemic

January 28, 2025

Page 6

emergency unemployment. Ibid. If true, an individual then must provide self-certification that they are unavailable or unable to work because of one of the following COVID-19 qualifying reasons identified in Section 2102(a)(3)(A)(ii)(I):

- (aa) the individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- (bb) a member of the individual's household has been diagnosed with COVID-19;
- (cc) the individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;
- (dd) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
- (ee) the individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
- (ff) the individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- (gg) the individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;

January 28, 2025

Page 7

- (hh) the individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
- (ii) the individual has to quit his or her job as a direct result of COVID-19;
- (jj) the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or
- (kk) the individual meets any additional criteria established by the Secretary for unemployment assistance under this section;

The Board here correctly interpreted and applied the above provisions in this case. Pick would only qualify for PUA if he was able to demonstrate that he had earnings (in either covered or self-employment) in 2019 or 2020 or he had a bona fide offer of work that was disrupted prior to the pandemic. (Pa9). Pick admitted that he met neither condition. (T11-12).

Claimants bear the burden of establishing their right to unemployment compensation. Brady v. Bd. of Rev., 152 N.J. 197, 218 (1997). Although Pick testified that he performed “odd jobs here and there” (T9), he did not provide any evidence of specific instances of work, such as tax documents or payroll records. He could not even recall a date as to when he last worked. (T12). In fact, there was no evidence presented that Pick was employed when he filed his

January 28, 2025

Page 8

unemployment claim. He provided no testimony or documentation that he was attached to the labor market prior to the pandemic.

An appellate court's review of an administrative agency's decision is limited. Brady, 152 N.J. at 210. "[I]n reviewing the factual findings made in an unemployment compensation proceeding, the test is not whether an appellate court would come to the same conclusion if the original determination was its to make, but whether the factfinder could reasonably so conclude upon the proofs." Ibid. (quoting Charatan v. Bd. of Rev., 200 N.J. Super 74, 79 (App. Div. 1985) (additional citations omitted)). "If the factual findings of an administrative agency are supported by sufficient credible evidence, courts are obliged to accept them." Self v. Board of Rev., 91 N.J. 453, 459 (1982). Unless the agency's action was arbitrary, capricious or unreasonable, the ruling of the agency should not be disturbed by the court. Brady, 152 N.J. at 210. The Board's findings here are predicated on the evidence in the record that Pick failed to meet his burden to prove his right to unemployment compensation. The decision should be affirmed.

II. PICK WAS AFFORDED DUE PROCESS AS PRESCRIBED IN THE UNEMPLOYMENT COMPENSATION LAW

With this appeal, Pick incorrectly asserts that he was denied due process because his appeal should have been transmitted to the Office of Administrative

January 28, 2025

Page 9

Law (“OAL”). (Ab4; Ab7). Appeals of determinations for unemployment benefits are not heard in the OAL. Rather, N.J.S.A. 43:21-6(d) provides that such appeals are heard before an Appeal Tribunal. The Tribunal affords the parties a reasonable opportunity for a fair hearing and then issues a decision either affirming or modify the findings of fact and the determination. N.J.S.A. 43:21-6(c). The Tribunal decision shall be deemed final unless further appeal to the Board is initiated within twenty days by either party. Ibid.

Once the Tribunal issues its decision, a notice is attached that states if an appeal is filed, the Board exercises its authority pursuant to N.J.S.A. 43:21-6(e) to take jurisdiction over any issues arising from the Tribunal. (Pa6). The Board may affirm, modify, or set aside a Tribunal decision on the basis of the evidence previously submitted. N.J.S.A. 43:21-6(e). Any decision of the Board will be considered final upon mailing and any party may seek judicial review to the Appellate Division. N.J.S.A. 43:21-6(h). Additionally, a Board decision gives notice that any party seeking judicial review of the final decision of the Board should file a notice of appeal directly to the Appellate Division. (Pa10).

Here, Pick appealed the determination of the Director and the Deputy to the Tribunal. (Pa3). He then received a fair hearing with the Tribunal, during which he testified and was represented by counsel. (Pa3). Pick then appealed the Tribunal decision to the Board, which issued its final agency decision on February 14, 2024.

January 28, 2025

Page 10

(Pa9). On this record, it is clear that he received all process to which he was due and his due process rights were not violated at any point of this appeal process.

On appeal, Pick also argues that no discovery was forwarded to him. (Ab6-7). That is not accurate. On December 15, 2023, the Board forwarded a CD copy of the appeal record to Pick's counsel. (Ra1). Any discovery relating to this appeal would have been on that CD. Pick argues that the examiner's statement that there was "nothing here" in response to his request for discovery during the hearing supports his claim that there was insufficient evidence with which to deny benefits here. (Ab8-9). However, Pick admitted no attachment to the labor market (T11), and therefore there was no discovery from any employer to be provided under N.J.S.A. 43:21-6 and no basis for a claim for benefits.

Pick also incorrectly argues that the Department of Labor ("Department") has the burden of establishing ineligibility of benefits. (Ab5). As noted, claimants bear the burden of establishing their right to unemployment compensation. Brady, 152 N.J. at 218. Pick had every opportunity to present evidence of his eligibility for benefits at the Tribunal hearing or before the Board but failed to do so.

On this record, the Board has afforded Pick ample due process throughout his appeal of the denial of benefits. Its decision here was not arbitrary, capricious or unreasonable. It was supported by the evidence in the record and should be affirmed.

**III. PICK IS LIABLE FOR A REFUND OF \$11,730 IN
BENEFITS RECEIVED PURSUANT TO N.J.S.A
43:21-16(d)**

Since Pick received \$11,730 in unemployment benefits for the weeks ending September 19, 2020, through September 4, 2021, to which he was not entitled, the Board concluded that he was liable to refund the entire amount. (Pa9). That decision was in accord with the law and should be affirmed.

The New Jersey Unemployment Compensation Law provides that when an individual who is disqualified from receiving benefits has nonetheless received unemployment benefits, that individual “shall be liable to repay those benefits in full.” N.J.S.A. 43:21-16(d).³ As explained in N.J.S.A. 43:21-16(d)(1), “[w]hen it is determined . . . that any person . . . [for any reason] has received any sum as benefits . . . while otherwise not entitled to receive such sum as benefits, such person . . . shall be liable to repay those benefits in full.” *Ibid.* Full repayment of unemployment benefits received is thus mandated for individuals who, for any reason, regardless of good faith, were not entitled to those benefits. *Sullivan v. Bd. of Rev.*, 471 N.J. Super. 147, 155 (App. Div. 2022) (requiring claimant to refund PUA benefits erroneously received where claimant did not meet the criteria for PUA

³ The relevant provisions of N.J.S.A. 43:21-16(d) were amended in 2022 with an effective date of July 31, 2023. However, as the Director’s Request for Refund in this case occurred prior to July 31, 2023 (Pa3), the pre-amendment version of N.J.S.A. 43:21-16(d) applies here.

January 28, 2025

Page 12

benefits under the CARES Act); Bannan v. Bd. of Rev., 299 N.J. Super. 671, 674 (App. Div. 1997) (requiring claimant to refund benefits paid in error while he was employed full-time); Fisher v. Bd. of Rev., 123 N.J. Super. 263, 266 (App. Div. 1973) (requiring claimant to refund unemployment benefits where his employer had erroneously reported his commissions as wages).

Here, as explained above, Pick was properly disqualified for benefits because he failed to demonstrate he was attached to the labor market. (Pa9). Thus, he is liable under N.J.S.A. 43:21-16(d) to refund the benefits received in the sum of \$11,730. Accordingly, the Board's decision should be affirmed.

CONCLUSION

For these reasons, the Board's decision should be affirmed.

Respectfully submitted,

MATTHEW J. PLATKIN
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