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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2506-20**

ADAM FOX,

Appellant,

v.

BOARD OF REVIEW,
DEPARTMENT OF LABOR,
and U.S. NAVY BUREAU OF
NAVAL PERSONNEL HEAD,
MILITARY CORRESPONDENCE
PERS-312.

Respondents.

Submitted April 4, 2022 – Decided April 27, 2022

Before Judges Firko and Petrillo.

On appeal from the Board of Review, Department of Labor, Docket No. 220250.

Adam Fox, appellant pro se.

Matthew J. Platkin, Acting Attorney General, attorney for respondent (Sookie Bae-Park, Assistant Attorney General, of counsel; Mikhaeil Awad, Deputy Attorney General, on the brief).

PER CURIAM

Adam Fox appeals from the March 26, 2021, New Jersey Department of Labor, Board of Review (Board) decision finding his pension payment should offset his unemployment benefits as set forth in N.J.S.A. 43:21-5(a) and N.J.A.C. 12:17-8.2. For the reasons explained, we affirm the Board's decision.

I.

On May 31, 2020, Fox applied for unemployment benefits. The established weekly benefit rate was \$713. The benefit was calculated based on Fox's earnings with his most recent employer, the United States Bureau of Naval Personnel (employer).¹

On June 1, 2020, Fox began to receive a pension from the employer in the amount of \$3,932 per month. It is undisputed that pension was funded solely by the employer and that Fox made no contributions to his pension during his years of service. On July 20, 2020, the Division of Unemployment Insurance (Division) issued a determination reducing his weekly benefit from \$713 to zero due to a pension offset.

¹ The employer has not participated in this appeal.

On July 31, 2020, Fox appealed the Division's offset determination at a telephonic hearing before a New Jersey Department of Labor Appeals Tribunal (Appeals Tribunal). At that hearing, Fox asserted that a portion of his pension was awarded to his former spouse as part of a marital property distribution scheme contained in a divorce decree from the State of Virginia. Fox argued that the portion of the pension awarded to the former spouse should not be counted as income to him and should be disregarded in determining what benefit he should receive. On November 10, 2020, despite Fox's argument, the Appeals Tribunal upheld the Division's determination.

In reliance on N.J.S.A. 43:21-5a and N.J.A.C. 12:17-8.2, the Appeals Tribunal concluded that the monthly pension benefit was \$3,932 and apparently did not credit Fox's testimony regarding a supposed division of the pension with his ex-spouse. The Appeals Tribunal concluded that New Jersey law and regulation required that the unemployment benefit be reduced by 100% of the pension amount if the pension was funded solely by the pensioner's employer. The Appeals Tribunal calculated the pro-rated weekly pension to be \$908 and, since the weekly pension amount exceeded the weekly unemployment benefit, ruled that the unemployment benefit be reduced to \$0. Fox appealed that decision to the Board.

In a decision dated March 26, 2021, the Board upheld the Appeals Tribunal's decision. In its de novo review, the Board adopted the Appeals Tribunal's findings of fact and specifically noted that even if Fox's testimony regarding the division of the pension was true, the outcome would be the same. The law, according to the Appeals Tribunal, required the gross pension to be considered notwithstanding any purported martial property distribution order that might apply to some portion of it.

This appeal followed. On appeal, Fox argues that the portion of his pension awarded to his former spouse in a divorce should not be considered reasonably attributable to his income for the purpose of reducing his unemployment benefit.

II.

Our scope of review of an agency decision is limited. In re Stallworth, 208 N.J. 182, 194 (2011) (citing Henry v. Rahway State Prison, 81 N.J. 571, 579 (1980)). In challenging an agency conclusion, the claimant carries a substantial burden of persuasion, and the determination of the administrative agency carries a presumption of correctness. Gloucester Cnty. Welfare Bd. v. N.J. Civ. Serv. Comm'n, 93 N.J. 384, 390-91 (1983); McGowan v. N.J. State Parole Bd., 347 N.J. Super. 544, 563 (App. Div. 2002). Specifically with regard to factual

findings made in unemployment compensation proceedings "[t]he test is not whether an appellate court would come to the same conclusion if the original determination was its to make, but rather whether the fact finder could reasonably so conclude upon the proofs." Brady v. Bd. of Rev., 152 N.J. 197, 210 (1997).

Further, "[w]e are obliged to defer to the Board [of Review] when its factual findings are based on sufficient credible evidence in the record." Lourdes Med. Ctr. of Burlington Cnty. v. Bd. of Rev., 197 N.J. 339, 367 (2009) (internal quotation marks omitted) (quoting Brady, 152 N.J. at 210). We overturn an agency determination only if it is arbitrary, capricious, unreasonable, unsupported by substantial credible evidence as a whole, or inconsistent with the enabling statute or legislative policy. Brady, 152 N.J. at 210-11. We accord substantial deference to the agency's interpretation of a statute it is charged with enforcing. Bd. of Educ. of Neptune v. Neptune Twp. Educ. Ass'n, 144 N.J. 16, 31 (1996).

III.

N.J.S.A. 43:21-5a provides that a person's unemployment benefit will be reduced if that person received a pension or retirement based on his previous work.

The amount of benefits payable to an individual for any week which begins in a period with respect to which such individual is receiving a governmental or other pension, retirement or retired pay, annuity, or other similar periodic payment which is based on the previous work of such individual shall be reduced, but not below zero, by an amount equal to the amount of such pension, retirement or retired pay, annuity, or other payment, which is reasonably attributable to such week; provided that such reduced weekly benefit rate shall be computed to the next lower multiple of \$1.00 if not already a multiple thereof and that any such reduction in the weekly benefit rate shall reduce the maximum total benefits of the individual during the benefit year; provided further that, if the provisions of the federal Unemployment Tax Act permit, the Commissioner of Labor and Workforce Development may prescribe in regulations which are consistent with the federal Unemployment Tax Act any of the following:

- (a) The requirements of this section shall only apply in the case of a pension, retirement or retired pay, annuity, or other similar periodic payment under a plan maintained or contributed to by a base period or chargeable employer as determined under the chapter to which this act is a supplement;
- (b) The amount of any such reduction shall be determined taking into account contributions made by the individual for the pension, retirement or retired pay, annuity or other similar periodic payment;
- (c) An individual shall not have his benefits reduced where there has been a transfer of an eligible rollover distribution from a qualified trust to an eligible retirement plan, as defined in section 402(c)(8) of the federal Internal Revenue Code of 1986, 26 U.S.C. §

402(c)(8), provided that, pursuant to that section, the transfer of payments is made within 60 days of receipt. If, however, any distribution from the qualified trust is made which is subject to federal income tax, then unemployment benefits for which the base year earnings include pay from the employer who paid into the qualified trust shall be reduced by the amount of the distribution if otherwise required by section 3304(a)(15) of the Internal Revenue Code of 1986, 26 U.S.C. § 3304(a)(15).

The amount of benefits payable to an individual who is involuntarily and permanently separated from employment prior to the date at which the individual may retire with full pension rights shall not be reduced pursuant to this section because the individual receives a lump sum payment in lieu of periodic pension, retirement or annuity payments, except that the benefits payable to the individual may be reduced during the week in which the individual receives the lump sum payment.

[N.J.S.A. 43:21-5a].

This statute also provides that regulations may be promulgated to limit the amount of any such reduction considering the contribution that person may have made to the pension. N.J.S.A. 43:21-5a(b). "The amount of any such reduction shall be determined taking into account contributions made by the individual for the pension, retirement or retired pay, annuity or other similar periodic payment[.]" Ibid.

The applicable regulation, N.J.A.C. 12:17-8.2(a)(1), provides how a deduction in benefits will be calculated in the situation, such as with Fox, when the recipient of the pension receives the benefit on a periodic basis.

If such payment is made under a plan to which the individual did not contribute, the weekly and maximum amount of benefits payable to the individual shall be reduced by an amount equal to the amount of the pension, retirement or retired pay, annuity or other payment which is reasonably attributable to such week provided that the reduced weekly benefit amount shall be computed to the next lower multiple of one dollar if not already a multiple thereof.

[N.J.A.C. 12:17-8.2(a)(1)].

Of particular relevance for present purposes, the regulation provides that when the pension payment derives from a fund into which only the employer has contributed:

the weekly and maximum benefit amount of benefits payable to the individual shall be reduced by an amount equal to the amount of the pension...or other payment which is reasonably attributable to such provided that the reduced weekly benefit amount shall be computed to the next lower multiple of one dollar if not already a multiple thereof.

[N.J.A.C. 12:17-8.2(a)(1)].

We have said that the purpose of this pension offset is to prevent a retired person receiving both a pension benefit and an unemployment benefit based on

the same work. Giesler v. Bd. Of Rev., 315 N.J. Super. 28, 32 (App. Div. 1998). Central to the limitation imposed by this regulation is the source of the pension funds. The deduction will not apply if the pension benefit is received from an employer other than the one who is chargeable with the unemployment claim. N.J.S.A. 43:21-5a(a).

In this case, Fox's pension was non-contributory; the whole of the pension was funded entirely by his employer; the employer from whose pension fund the pension benefit is being paid is the same employer charged with the unemployment claim; and the gross amount of the weekly pro-rated pension is greater than the weekly unemployment benefit. As such, an offset was legally correct and properly calculated pursuant to both statute, N.J.S.A. 43:21-5a(b), and regulation, N.J.A.C. 12:17-8.2(a)(1). We agree with the Board that these facts can only lead to the outcome which resulted here.

Fox's argument regarding a division of his pension was not supported by anything in the record other than his own testimony. Moreover, the Board concluded that even if it were true, it would not make any difference as to the calculation. We need not, on this record, opine as to whether that observation comports with the actual meaning of N.J.A.C. 12:17-8.2(a)(1) as it was a hypothetical musing by the Board to further support a decision that was

otherwise grounded in the record. There is no support at any level of the proceedings below that Fox's assertion as to the division of his pension is in fact true, nor is there any support for any finding as to the precise amount of any such division. The Division, the Appeals Tribunal, and the Board limited their review to matters of record. There is no evidence, other than Fox's unsupported testimony, of any such division or the amount thereof.


IV.

The Board considered all the available evidence and made its final determination based on that evidence. We discern nothing arbitrary in its decision given the record before it. Neither can we conclude that its interpretation of N.J.S.A. 43:21-5(a) and N.J.A.C. 12:17-8.2, under these facts and on this record, was incorrect.

The Board's findings and conclusions were reasonable based on the proofs. To the extent Fox seeks relief on other grounds not expressly addressed, we consider these issues to lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.


CLERK OF THE APPELLATE DIVISION