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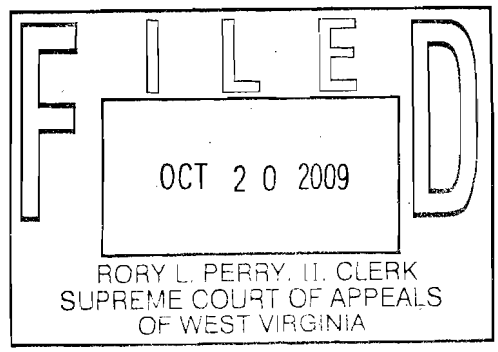

In the
Supreme Court of Appeals
of West Virginia

STATE OF WEST VIRGINIA BY
RONALD E. RADCLIFF, COMMISSIONER,
WORKFORCE WEST VIRGINIA
UNEMPLOYMENT COMPENSATION DIVISION,

Appellants/Respondents Below,

v.

PERRY D. DAVIDSON,

Appellee/ Petitioner Below

REPLY BRIEF OF APPELLANTS

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Counsel for Appellant received the brief of the Appellee/Petitioner on October 7, 2009. Now comes the Appellant, the Commissioner of WorkForce West Virginia (hereinafter Appellant) by counsel and submits the following reply brief requesting that this Honorable Court reverse the Circuit Court of Cabell County's decision of setting aside the Magistrate Court's judgment granted to WorkForce West Virginia and uphold the finality of the Deputy's decision as well as the Magistrate Court's decision creating an overpayment and judgment for the Appellant in the amount of $1,962.00 against the Appellee/Petitioner. (Reply Brief Exhibits A, C)

I.

KIND OF PROCEEDING AND NATURE OF THE RULING OF THE LOWER TRIBUNAL

The Circuit Court of Cabell County's order never found that the Magistrate Court's order was to be set aside due to the Appellee/Petitioner inability to appear due to illness as alleged by the Appellee/Petitioner. However, the Circuit Court of Cabell County did find in its order that the Appellee/Petitioner had a final judgment against him due to the fact that he did not appeal WorkForce West Virginia's local office Deputy's decision. (Reply Brief Exhibit A)

II.

STATEMENT OF FACT

The Appellee/Petitioner committed fraud by reason of nondisclosure of his working at ClientLogic on a continued claim form. (Tr. Exhibit D) This fact was discovered upon the Appellant's investigation of the continued claim. (Tr. Exhibit B) The Appellee/Petitoner was paid and received unemployment benefits for that period of time which he cashed. (Tr. at 33-34) This fraud was also affirmed by the unappealed judgments as well as the fact that the Appellee/Petitioner never provided Appellant with any timely proof that his separation from ClientLogic was due to the fault of ClientLogic, his employer. (Tr. Exhibits A, B)

At the first level hearing on the continued claim, a predetermination hearing, the employer ClientLogic, which was the only party present, (Tr. Exhibit A) testified that when the Appellee/Petitioner was hired he was advised that all the employees that ClientLogic hired were hired as associates at $8.50 an hour, and that as internal positions come open associates were eligible to be hired for higher paying jobs. The

Appellee/Petitioner was never hired for a different position and was well aware of the pay rate when hired. The employer ClientLogic further stated that the Appellee/Petitioner was quitting, because he could make more money on unemployment. (See Tr. Exhibit A)

Also at this hearing a determination was made that the continued claim was fraudulent in that the Appellee/Petitioner by means of nondisclosure incorrectly filled out a continued claim form that said he was unemployed when he was really working for ClientLogic. (Tr. at Exhibit B and D) The Appellant/Petitioner received unemployment compensation benefits for the time he was at ClientLogic based on his incorrectly filled out continued claim form. This created a fraudulent overpayment of $1,962.00. (Tr. Exhibit A)

These determinations were mailed to the Appellee/Petitioner at the same address as all his benefits checks were mailed to as well as notice of hearings in both magistrate court and the Circuit Court of Cabell County. The Appellee/Petitioner did not appeal these determinations of Appellant. (Tr. at 33-34 Tr. Exhibits A, B, C, E, Reply Brief Exhibits C, D)

Seven years later, the Appellant filed a complaint in magistrate court to obtain a judgment so that collections could begin against the Appellee/Petitioner before the statute of limitations ran out. (Reply Brief Exhibit B) Again, the Appellee/Petitioner did not show up for the hearing, and judgment for $1,984.00 was obtained. (Reply Brief Exhibit C) The magistrate court determination was mailed out to the same address as the Appellants 's notices; (Reply Brief Exhibit C); however this time the Appellee/Petitioner responded and did a Motion to Set Aside the Magistrate's judgment. (No written motion was received by Appellant's Counsel.) The Magistrate Court held a hearing on the

Appellee/Petitioner Motion to Set Aside and denied the motion. (Reply Brief Exhibit D) The Appellee/Petitioner then appealed the decision of the Magistrate Court to the Circuit Court of Cabell County which without request for de novo hearing or any record below held a hearing de novo, and reversed the magistrate court judgment as well as Appellant's final unappealed agency decisions. (Reply Brief Exhibit A)

III.

REPLY ARGUMENTS

A. THE CIRCUIT COURT WAS NOT IN ITS RIGHT IN ITS DECISION UNDER DUE PROCESS, SINCE IT SHOULD HAVE RULED ON WHETHEROR NOT THE MAGISTRATE COURT SHOULD HAVE GRANTED APPELLANT'S JUDGMENT BASED ON UNAPPEALED FINAL AGENCY DECISIONS INSTEAD OF PREJUDICING THE CASE BY RETRYING THE FINAL AGENCY DECISIONS.

All state laws have provisions identifying, establishing and collecting unemployment insurance benefit overpayments. West Virginia's law on benefit overpayment is §§21A-10-7, 21A-10-8 and 21A-10-21 of the West Virginia Code.

In addition, all states in conformity with §503(a)(3) of the Social Security Act provide for a fair hearing before an impartial tribunal to all individuals whose benefit claims are denied. Finally, in all but a few states the first stage appeals body is final in the absence of a further appeal.

Moreover, §21A-7-19 of the West Virginia Code states that a person seeking judicial review in a Circuit Court must exhaust his remedies before the Board of Review. This the Appellee/Petitioner did not do, since he did not appeal any of the determinations against him before the statute of limitations ended.

When the Appellee/Petitioner did decide to appeal the judgment of the Magistrate Court based on Appellant agency's final decisions, he sent no record to the Court or request for a de novo hearing. Unlike the Kanawha County Circuit Court where all Circuit Court appellate review is done on unemployment appeals from the Board of Review's decisions based on the record below (See § 21A-7-17 of the West Virginia Code), the Circuit Court of Cabell County had no record or transcript below. Due process of law or law through the regular course of administration through courts of justice (Blacks Law Dictionary 500 (6th ed. 1990) was violated when the case was relitigated seven years later. The statutory mandate of Circuit Court unemployment compensation administrative hearing reviews is a review of the record not a de novo hearing. Thus the Cabell County Circuit Court Judge violated the Appellant's due process rights by overturning the facts of the unappealed decisions instead of reviewing the magistrate court decision to see what basis there was to not set aside the judgment.

B. THE AGENCY (APPELLANT) MUST BE IN COMPLIANCE WITH THE SECRETARY OF LABOR IN ORDER TO OBTAIN THE MONEY TO ADMINISTER UNEMPLOYMENT COMPENSATION AND THIS INCLUDES STATE LAWS APPROVED BY THE BOARD SECRETARY OF LABOR UNDER THE FEDERAL UNEMPLOYMENT TAX ACT THAT PROVIDE OPPORTUNITY FOR A FAIR HEARING (APPEALS HEARINGS) BEFORE AN IMPARTIAL TRIBUNAL TO ALL INDIVIDUALS WHO'S CLAIMS FOR UNEMPLOYMENT COMPENSATION ARE DENIED. [42 USCS §503(3)]

When a state is not allowed to recoup moneys which were expended in overpayments, then the Secretary of Labor is required to stop paying federal unemployment grants to states under 42 USCS §503(a)(9). Brewer v. Cantrell 622 F. Supp. 1320 (WD Va. 1985); 796 F. 2d 472 (4th Cir. 1976).

Appeals hearings are structured and have to be in compliance with the

Secretary of Labor's requirements for appeals hearings or a fair hearing. (See §§21A-7-4, 21A-7-7, 21A-7-8; 21A-7-9; 21A-7-10; 21A-7-17; 21A-7-19 and 21A-7-27 of the West Virginia Code.)

In conclusion of this argument, no where does the Appellee/Petitioner discuss his failures to appeal the agency decisions. He never even made a late appeal to the agency's decisions; instead he waited seven years or until the agency wanted to collect its money and then protested the magistrate court's judgment on said final decisions.

"Employment" according to the Unemployment Compensation Act of West Virginia is service performed for wages or under any contract of hire written or oral, express or implied. The Appellee/Petitioner did receive unemployment benefits at the time he worked for ClientLogic which he cashed (Tr. 33-34). This became an overpayment which federal law as well as state law mandates to be collected.

C. THE AGENCY COMPLIES WITH FEDERAL LAW TO RECOUP OVERPAYMENT OF BENEFITS THROUGH THE APPEALS HEARING PROCESS.

The appeals hearing process at the higher levels is a review of the record below to see if a proper decision has been made. The appeal must be made timely or the party to whom the determination has gone against will lose his right to appeal. In the instant case, the party's complaints are moot for he never tried to appeal his case within the time limits of appeal.

The Appellee/Petitioner was notified concerning all agency decisions at the same address every other forum used. The Respondent never appealed any of these decisions until seven years later.

Thus, the Appellee/Petitioner is chargeable with knowledge he could have acquired by proper inquiry which inquiry it was his duty to make. Wells v. Tennant, 180 W.Va. 166, 375

S.E.2d 798 (1988); Holleran v. Cole, 200 W.Va. 49, 488 S.E.2d 49 (1997). Thus in arguendo, when the Appellee/Petitioner benefits stopped, he should have asked the local office why, instead of making no inquiry and then protested to the Appellant these lower level determinations.

The Appellee/Petitioner never mentions why he appeals out of time nor never shows up for hearings. In other words, what good cause does he have for not showing up at his hearings. Notice was sent to the Appellee/Petitioner of the date time and place of all hearings at the same address all other forums used for notice of hearings. No other address was given to Appellants.

In summation, it is the Appellee/Petitioner's responsibility to take the opportunity to appeal timely so that he can have due process through appeal hearings.

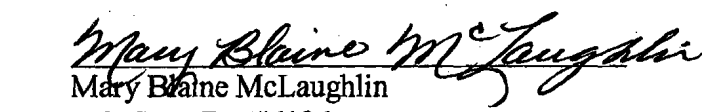
CONCLUSION

Based on the above, the Appellant respectfully requests this Honorable Court to reverse the order of the Circuit Court of Cabell County and grant the Appellant judgment on the overpayment of benefits in the amount of $1,962.00, plus interest and court costs.

Respectfully submitted,

WORKFORCE WEST VIRGINIA
UNEMPLOYMENT COMPENSATION DIVISION
Appellant

By Senior Counsel



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West Virginia Code § 21A-7-9 (1931).....6

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EXHIBITS

ON

FILE IN THE

CLERK'S OFFICE