



DEPARTMENT OF HUMAN RESOURCES

EMPLOYMENT SECURITY ADMINISTRATION

1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201

383-5032

- DECISION -

BOARD OF APPEALS

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Appeals Counsel

STATE OF MARYLAND

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KALMAN R. HETTLEMAN
Secretary

DECISION NO.: 140-BH-83

DATE: February 2, 1983

APPEAL NO.: 25673

S. S. NO.: [REDACTED]

CLAIMANT: Darlene Leftwich
[REDACTED]

EMPLOYER:

L. O. NO.: 22

APPELLANT: CLAIMANT

ISSUE

Whether or not the original determination, which made the claimant eligible for \$93.00 per week in benefits was final under Section 7(c)(ii), prior to issuance of the "rerun" determination of August 26, 1981; whether or not the agency has the authority, under Section 17(d) of the Law, to issue a "rerun" of a monetary determination and create an overpayment after the period set out in Section 7(c)(ii) has expired; whether the services performed by the Claimant for the Employer were in covered employment within the meaning of Section 20(g)(8)(x) and whether the claimant is eligible for benefits pursuant to Section 3(b) of the Law.

NOTICE OF RIGHT OF APPEAL TO COURT

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT

March 4, 1983

- APPEARANCES -

FOR THE CLAIMANT:

Darlene Leftwich - Claimant

FOR THE EMPLOYER:

EMPLOYMENT SECURITY ADMINISTRATION
Frank Heintz - Executive Director
John Zell - Legal Counsel

EVIDENCE CONSIDERED

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as Employment Security Administration's documents in the appeal file.

The Board also considered the testimony of Frank O. Heintz, Executive Director of the Employment Security Administration including the additional testimony he submitted in writing, correcting his earlier testimony.

FINDINGS OF FACT

The Claimant filed an original claim for unemployment insurance benefits with a benefit year beginning June 14, 1981. At that time she was determined to be eligible for a weekly benefit amount of \$93.00. She received nine weeks of benefits, from the week ending June 20, 1981 through and including the week ending August 15, 1981.

At the time the Claimant filed for benefits, three base period employers reported covered wages paid to her during the base period, the four quarters of 1980. One of these employers, Frostburg State College (hereinafter referred to as "the college") reported as covered wages, earnings that the Claimant had made in the employ of the college while she was an enrolled student, regularly attending classes there.

When the Employment Security Administration (hereinafter referred to as the "Agency") sent the college Form 207 inquiring as to the circumstances as to the Claimant's separation from employment, the college realized its error in reporting the Claimant's wages as covered wages under unemployment insurance law and notified the agency of this error, in a timely manner on the 207 form. However, the 207, after reaching one of the agency's local offices, was lost by the agency. Consequently, the Claimant received \$93.00 a week for nine weeks based, in part, on the wages originally reported by the college.

It wasn't until the college received its quarterly statement from the agency, more than fifteen days after the original determination finding the claimant eligible for \$93.00 per week in benefits had been made, that the college learned that the Claimant was receiving unemployment insurance benefits and that the college was being charged as a base period employer. The college then notified the agency of the error and the agency made a redetermination of the Claimant's monetary eligibility, known as a rerun, deleting the Claimant's 1980 wages from the college. As a result of this rerun, made on August 26, 1981, the Claimant was found to lack sufficient wages under §3(b) of the Law and was therefore ineligible to receive benefits. She was also found to be overpaid the nine weeks of benefits she received, for a total of \$837.00. This decision was issued on December 4, 1981. The Claimant appealed this decision.

CONCLUSIONS OF LAW

This case came before the Board of Appeals on several issues, both procedural and on the merits. The fundamental issue to be decided in this case is whether the Employment Security Administration has the authority, under Section 17(d) of the Law, to issue a redetermination of a claim and create an overpayment after the original determination is final, under Section 7(c)(ii) of the Law. In order to carefully and thoroughly rule on this issue, the Board must first examine the appropriate sections of the law as well as the way those sections have been applied by the Employment Security Administration.

I. The Procedural Issues

- A. Was the original determination which made the Claimant eligible for \$93.00 per week in benefits, final under §7(c)(ii), prior to the issuance of the rerun determination made on August 26, 1981?

Section 7(c) governs the issuance of initial determinations, both monetary and non-monetary. Section 7(c)(ii) clearly and unambiguously states:

A determination shall be deemed final unless a party entitled to notice thereof files an appeal within fifteen days after the notice was mailed to his last known address, or otherwise delivered to him; provided that such period may be extended by the Board of Appeals for good cause. [Emphasis added].

The Board concludes therefore, that Section 7(c)(ii) is conclusive for monetary and non-monetary determinations and provides no exceptions, other than for good cause.

In this case, the undisputed evidence is that one of the parties entitled to notice, namely the employer, Frostburg State College, did file a timely appeal on Form 207 to the initial determination, and it was lost by the agency. Under these circumstances, the Board must conclude that the initial determination finding the claimant eligible for benefits was not final within the meaning of Section 7(c)(ii). Therefore the Board can and will reach the merits.

Although further discussion of the procedural issues originally raised in this case is not necessary to reach a decision here, the importance of the issues raised, as well as the availability of the evidence presented by the Executive Director at the hearing, compels the Board to reach the fundamental issue mentioned above.

Clearly, if the Employer had not filed a timely appeal, the original determination would have been final once the 15 day time period set forth in Section 7(c)(ii) had elapsed. The rerun was issued on August 26, 1981 and the subsequent decision finding the Claimant overpaid was issued on December 4, 1981, both long after the fifteen day time period.

- B. Does the Employment Security Administration have the authority, under §17(d) of the Law, to issue a rerun of a monetary determination and create an overpayment after a decision is final under §7(c)(ii)?

Before answering that question, the Board notes that the issuing of such reruns of monetary determinations, regardless of the status of a determination under §7(c)(ii), for up to three years after the determination was issued, has been the practice of the Employment Security Administration for many years, for the correction of clerical errors and mistakes in the application of the law resulting in overpayments to claimants. The agency's position is that §17(d) of Article 95A gives the Agency the authority to make such redeterminations. However, a careful examination of that section of the law reveals otherwise. (The Executive Director admitted that the agency has no authority to redetermine non-monetary determinations once they are final under §7(c)(ii) of the Law.)

§17. Unlawful Acts

(d) Recoupment of benefits paid - When any person has received any sum for benefits for which he is found by the Executive Director to have been ineligible, the amount thereof may be recovered from benefits payable to him or which may be payable to him in the future, or in the manner provided in §15(f) of this article for the collection of past-due contributions. Such sums may be recouped by either of these methods provided that whenever the Executive Director decides that any sum received by the claimant shall be recouped, either because he has received or has been retroactively awarded wages, was not unemployed as that term is defined in this article, or was disqualified or otherwise ineligible for such benefits, he shall promptly notify the claimant of his decision and the reasons therefor. The decision and the notice shall state the amount to be recovered, the weeks with respect to which such sum was received by or paid to the claimant, and the provision of the law under which it is found that the claimant was ineligible. The Executive Director may reconsider his decision at any time within one year after the date when it was made. Such decision or reconsideration decision may be appealed within the time limits and under the procedure prescribed in §7 of this article for appeal from a determination, but on appeal the issue shall be limited to whether or not the claimant was ineligible during the weeks in question.

[Emphasis added.]

First and foremost, this section of the law deals only with recoupment of benefits paid and not redeterminations of eligibility. All the evidence presented, including the legislative history, discusses giving the Employment Security Administration the power to recover overpayments, through various recoupment procedures. There is nothing in the language of §17(d) that authorizes the agency to redetermine a claim once an original determination of eligibility has become final under §7(c)(ii). In fact, the first sentence of §17(d) presupposes that such a determination of ineligibility has already been made. This section merely gives the agency the right to determine that, as a result of that previously determined ineligibility, the claimant is now overpaid and the agency may recoup those overpayments. See, e.g., Cuervo 1353-BH-82 (9/23/82), for an example of the correct application of §17(d), finding a claimant overpaid.

Likewise, §17(f) sets out a time limitation within which the agency may make a determination to recoup:

(f) Limitation on recoupment of benefits. - A determination under subsections (d) or (e) of this section to recoup benefits may not be made later than 3 years from the date that the benefits were paid to the claimant. Any amount which has not been recouped within 5 years of the date of the determination may be deemed uncollectible at the judgment of the Executive Director.

[Emphasis added.]

The one exception to the finality of the determination of monetary eligibility, which is specifically set out in §17(d) concerns the right to recoup where a Claimant has been retroactively awarded wages. However, the inclusion of this language in the statute evidences a very specific legislative intent to allow recoupment where a recipient has been awarded back pay, a fact that is not in existence at the time an initial determination is made. See, Katsianos v. Employment Security Administration, 42 Md. App. 688, 402 A.2d 144 (1979).

Second, §17(d) allows only for the recoupment of overpayments to claimants. Even under the agency's interpretation of that Section, as a means to correct clerical errors, it is admitted that similar clerical errors resulting in underpayments to claimants cannot be corrected under §17(d). In additional written testimony submitted by the Executive Director, on April 8, 1982, he admitted that if a claimant made a request for a recheck, or rerun more than 15 days after the monetary determination had been issued, the agency would only issue the recheck if the claimant could demonstrate good cause. This is in sharp contrast

to the agency's policy of routinely running reruns at the request of the employer or if the agency itself discovers an error resulting in a possible overpayment, any time up to three years after the original determination and without the necessity of the employer showing good cause for the late request. The inequity of this situation speaks for itself. A claimant has only 15 days to correct an error in a monetary determination; an employer has three years! Absent specific statutory language and legislative intent (and the Board finds neither) such an inequity is not only inherently unfair, but flies in the face of the remedial nature of the statute and the declared intent and policy of §2 of Article 95A. See, Allen v. Core Target City Youth Program, 275 Md. 69, 338 A.2d 237 (1975).

Therefore, the Board concludes that §17(d) does not authorize the agency to issue a rerun of a monetary determination and create an overpayment after a decision is final under §7(c)(ii).

- C. What is the proper procedure for the correction of errors in monetary determinations, once a determination is final under §7(c)(ii)?

The Board of Appeals agrees that fairness to all parties requires some provision for the correction of clerical errors, within a reasonable period of time.

One of the arguments made by the Employment Security Administration in favor of using §17(d), was that there is no independent justification for declaring clerical errors as overpayments in the statute. This is technically correct. However, as discussed earlier in this decision, §7(c)(ii) does provide for a "good cause" exception to late appeals of initial determinations. The Board concludes that as it is for other issues that parties wish to have reconsidered, this is the proper procedure for clerical errors as well. Thus, if an error is discovered after 15 days have elapsed under §7, the party against whom the error was made can file an appeal to the Appeals Referee and a decision (appealable to the Board) will be made regarding whether there is good cause for late appeal. Examples of good cause would include: a clerical error that could not have been discovered by the party within the 15 day time period; failure upon the part of the agency to provide proper notice of a determination to a party. Although these two examples are meant to be illustrative and not exclusive, the Board notes that the misapplication of the law by the agency would not be good cause.

The Board also recognizes that such procedures may necessitate some changes in the current practices of the agency. For example, the Executive Director testified that monetary determinations are not sent to employers, a situation that could give rise, and has in the past to notice problems. However, he also testified that the sending of the non-monetary determinations was feasible.

Finally, the Board cannot stress enough that the opportunity to correct clerical errors must be equally available to claimants as well as employers, for underpayments as well as for overpayments. Although the agency is not a party under Article 95A, except where specifically so designated, the agency may appeal appropriate cases on behalf of the party aggrieved by the error, especially since the agency would be more likely than either party to discover certain kinds of errors.

II. The Merits

After reviewing the merits of this case, the Board concludes that the services performed by the claimant for Frostburg State College do not constitute covered employment, within the meaning of §20(g)(8)(x) of the law. At the time the claimant performed these services she was enrolled in and regularly attending classes at Frostburg State College.

Since these services were not covered employment, the earnings that the claimant received for those services cannot be considered in determining her monetary eligibility for benefits. As a result, the claimant's wages in her base period fall below the \$3,132.00 that she needs to qualify for benefits, within the meaning of §3(b) of the Law. Therefore the decision of the Appeals Referee must be affirmed.

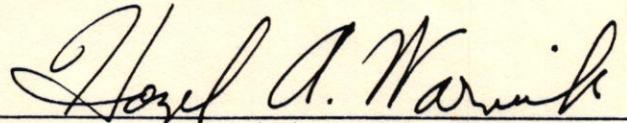
DECISION

The Employer did file a timely appeal within the meaning of §7(c)(ii) of the Maryland Unemployment Insurance Law.

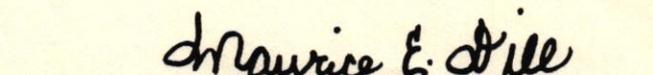
Services performed by the Claimant for the employer were not in covered employment within the meaning of §20(g)(8)(x) of the Maryland Unemployment Insurance Law.

The Claimant is ineligible for benefits within the meaning of Section 3(b) of the Maryland Unemployment Insurance Law. She is disqualified from June 14, 1981 and until monetarily eligible.

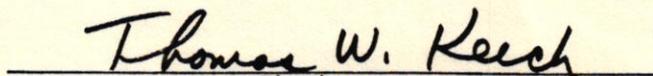
The decision of the Appeals Referee is affirmed.



Associate Member



Associate Member



Chairman

kmb

G.A.

DATE OF HEARING: April 6, 1982

COPIES MAILED TO:

CLAIMANT

John Zell - Legal Counsel

UNEMPLOYMENT INSURANCE - BEL AIR



DEPARTMENT OF HUMAN RESOURCES
 EMPLOYMENT SECURITY ADMINISTRATION
 1100 NORTH EUTAW STREET
 BALTIMORE, MARYLAND 21201
 383 - 5040

STATE OF MARYLAND
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 Secretary

BOARD OF APPEALS

JOHN J. KENT
 Chairman

HENRY G. SPECTOR
 HAZEL A. WARNICK
 Associate Members

SEVERN E. LANIER
 Appeals Counsel

GARY SMITH
 Chief Hearings Officer

- DECISION -

CLAIMANT: Darlene Leftwich

DATE: Feb. 2, 1982

APPEAL NO.: 25673

S. S. NO.:

EMPLOYER:

L. O. NO.: 22

APPELLANT: Claimant

ISSUE:

Whether the claimant is eligible for benefits pursuant to Section 3(b) of the Law.

NOTICE OF RIGHT TO PETITION FOR REVIEW

A. INTERESTED PARTY TO THIS DECISION MAY REQUEST A REVIEW AND SUCH PETITION FOR REVIEW MAY BE FILED IN ANY EMPLOYMENT SECURITY OFFICE, OR WITH THE APPEALS DIVISION, ROOM 515, 1100 NORTH EUTAW STREET, BALTIMORE, MARYLAND 21201, EITHER IN PERSON OR BY MAIL.

THE PERIOD FOR FILING A PETITION FOR REVIEW EXPIRES AT MIDNIGHT ON

February 17, 1982

- APPEARANCES -

FOR THE CLAIMANT:

FOR THE EMPLOYER:

Darlene Leftwich, Present

FINDINGS OF FACT

The claimant filed an original claim for benefits effective June 14, 1981. At first the claimant was found monetarily eligible for \$93 in weekly benefits. Based on a rerun, it was determined that the claimant was monetarily ineligible for benefits. Prior to the rerun, the claimant was paid \$837 in benefits.

The claimant's base period was from January 1, 1980 through

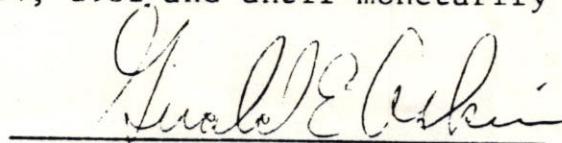
December 31, 1980. The claimant's original monetary determination included earnings of \$575.65 from Frostburg State College where she was attending as a student and participated in a student work program. The rerun of the claimant's monetary eligibility determined that the earnings from Frostburg State College were not certifiable wages. The deletion of these wages resulted in the claimant's base period earnings being less than the \$3132 that she needed to qualify for monetary eligibility.

COMMENTS

Within the meaning of Section 3(b) of the Maryland Unemployment Insurance Law, an individual's weekly benefit amount shall be determined by applying the total wages paid the claimant for insured work in that calendar quarter of his base period in which such term of wages were highest to Column A in the schedule of benefits set forth in Section 3(b) of Article 95A. Because, after the deletion of the claimant's wages from Frostburg State College, the claimant did not earn the minimum qualifying wages, the claimant must be held monetarily ineligible. It is for this reason the determination of the Claims Examiner must be affirmed.

DECISION

The claimant is ineligible for benefits within the meaning of Section 3(b) of the Maryland Unemployment Insurance Law. The claimant is disqualified from June 14, 1981 and until monetarily eligible.



Gerald E. Askin
APPEALS REFEREE

Date of hearing: January 22, 1982

Cassette: 11034

hf (E. McDuffie)

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Claimant
Unemployment Insurance-Bel Air