IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

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Case No. 24-ICA-39

(Appeal from WorkForce Board of Review
Case No. R-2023-1780 (R-2-J))

DEBORAH BEHELER BALDWIN,

Claimant Below, Petitioner,

vs.

SCOTT A. ADKINS, in his official capacity as Acting Commissioner of WORKFORCE WEST VIRGINIA, and WORKFORCE WEST VIRGINIA BOARD OF REVIEW

Respondents.

PETITIONER'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Administrative Law

I. ASSIGNMENTS OF ERROR

1. The Board of Review of WorkForce West Virginia erred as a matter of law in invoking West Virginia's fraud, misrepresentation, and non-disclosure statute in its administrative decision against Petitioner and concluding that her alleged overpayment fell under *W. Va. Code* § 21A-10-8, because actions under such statute are permitted only in West Virginia trial courts and the Board of Review had no jurisdiction.

2. The Board of Review erred in making finding that Petitioner had failed to disclose that she had worked and earned wages pursuant to *W. Va. Cod*e § 21A-10-8, which was plainly wrong, and this collection action against Petitioner by WorkForce exceeds the two-year statutory time bar set forth in *W. Va.* Code § 21A-10-21.

3. The Board of Review erred as a matter of law by basing its decision on a new legal theory raised for the first time on appeal (*W. Va. Code* § 21A-10-8), as well as by considering such matters before proper notice and opportunity to be heard could be provided to Petitioner, denying her due process.

4. The Board of Review erred in failing to provide proper notice of its decision to Petitioner in accordance with W. Va. C.S.R. § 84-1-6.14 and *W. Va. Code* § 21A-7-17 by failing to mail it to the correct address, delaying service.

II. STATEMENT OF THE CASE

This is an appeal of an administrative decision by the Board of Review of WorkForce West Virginia ("Board of Review" or "Board") alleging overpayments of unemployment benefits to Petitioner which occurred four (4) years ago. (D.R. p. 56-59). Petitioner, like many during the early months of the pandemic, was instructed to file a low-earnings claim utilizing the WorkForce online portal, without her employer having submitted low-earnings reports due to the

shutdown. (D.R. p. 4-5). Where possible, Petitioner disclosed that she was still working at fewer hours and added income amounts when the system permitted. (*Id*). Thereafter, Petitioner began receiving unemployment benefits.

More than three years later in August of 2023, Petitioner received for the first time a notice from a WorkForce deputy that she had been overpaid (D.R. p. 3). On appeal, an administrative law judge heard evidence and ruled that the two-year time bar for payments made in error under *W. Va. Code* § 21A-10-21 precluded WorkForce from collections against Petitioner. (D.R. p. 33-35). WorkForce appealed the decision to the Board of Review. Then, two (2) days before the appeal hearing, WorkForce changed the statute under which it sought collection against Petitioner from *W. Va. Code* § 21A-10-21 to *W. Va. Code* § 21A-10-8, for collections due to fraud, misrepresentation and non-disclosure by claimants. (D.R. p. 72-77). Petitioner did not receive WorkForce's submission until after the Board's December 7, 2023 Appeal Review, and the Board issued its decision days later concluding that Petitioner was overpaid due to acts of non-disclosure by Petitioner under *W. Va. Code* § 21A-10-8, with a five-year time bar. (D.R. p. 56-59). Nineteen (19) days after the Appeal Review the Board mailed its final decision, but mailed it to the claimant instead of her attorney (D.R. p. 56-59). Petitioner here appeals the final order of the Board of Review mailed December 26, 2023.

This case raises questions of fact but primarily raises questions of law.

III. SUMMARY OF ARGUMENT

The Board of Review erred in concluding that Petitioner had engaged in non-disclosure in relation to her unemployment benefits claim pursuant to *W. Va. Code* § 21A-10-8 because the Board has no jurisdiction or authority to undertake collections against claimants under that statute. While it has a longer time bar of five or more years, it is strictly limited to use by West

Virginia trial courts to deal with these more serious violations, by virtue of mandatory reference to the forum and procedures in *W. Va. Code* § 21A-5-16. Since § 21A-10-8 actions are not authorized in WorkForce's administrative adjudication process, the Board of Review has no jurisdiction to hear such cases, adjudicate them, or make findings of fact or conclusions based in *W. Va. Code* § 21A-10-8.

The Board further erred in its finding of fact that Petitioner had engaged in 'nondisclosure' regarding her work activity during the course of filing her claim and submitting periodic reports. The findings are plainly wrong, as the Board ignored evidence of record that Petitioner had disclosed her work activities and income where WorkForce's online portal would permit, which is corroborated by evidence submitted by WorkForce. The Board failed to liberally apply unemployment statutes in tune with public policy. Such findings were clearly wrong, and WorkForce's collections against Petitioner are time-barred by *W. Va. Code* § 21A-10-21.

Further, the Board denied Petitioner due process by considering new legal claims presented only days before the Board of Review proceeding and without giving her an opportunity to challenge. Although WorkForce had initially sought collections at the ALJ stage under *W. Va. Code* § 21A-10-21, it altered its claim to assert only *W. Va. Code* § 21A-10-8 allegations. These more serious allegations were mailed only two (2) days prior to the Board's Appeal Review for Board's final decision, and Petitioner had no opportunity to review them before the proceeding. Beyond denying Petitioner due process of law, WorkForce was clearly raising new legal grounds for the first time on appeal. *See, Noble v. W. Virginia Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009).

The Board of Review further erred by mailing its December 26, 2023 decision improperly, sending it to the wrong address and causing delay. Despite this, WorkForce relies on the December 26, 2023 date of mailing in an argument that the thirty-day deadline in *W. Va. Code* § 21A-7-17 is a jurisdictional bar to Petitioner's appeal.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Petitioner believes oral argument is necessary in this appeal and should be set for a Rule 20 argument. Petitioner believes no West Virginia appeals court has visited the primary issues in this appeal surrounding the statutory prohibition against *W. Va. Code* § 21A-10-8 proceedings in an administrative hearing forum, and believes these issues to be of fundamental public importance.

V. ARGUMENT

Standard of Review

"The findings of fact of the Board of Review of [Workforce West Virginia] are entitled to substantial deference unless a reviewing court believes the findings are clearly wrong. If the question on review is one purely of law, no deference is given and the standard of judicial review by the court is de novo." Syl. Pt. 3, *Adkins v. Gatson*, 192 W. Va. 561, 453 S.E.2d 395 (1994).

1. **The Board of Review erred as a matter of law in concluding Petitioner's alleged overpayment fell under *W. Va. Code* § 21A-10-8 because actions under such statute are permitted only in West Virginia trial courts and Board of Review had no jurisdiction.**

The Board of Review erred in concluding that Petitioner had committed a "non-disclosure" under *W. Va. Code* § 21A-10-8, which cannot be decided by the Board of Review. The Board of Review simply has no jurisdiction or authority to make determinations regarding *W. Va. Code* § 21A-10-8, whether by findings of fact or conclusions of law, with regard to a claimant's liability or the statute's five-year time bar.

The Board of Review's decision was based directly on *W. Va. Code* § 21A-10-8:

> It is the decision of the Board of Review that the Administrative Law Judge failed to apply the appropriate statute for benefits paid to the claimant for weeks ending April 11, 2020, and April 18, 2020. In that the claimant did not disclose on her weekly certification that she worked and earned wages for the two weeks in question, the Board concludes that the payment of benefits to the claimant was not the result of an error; rather, it was made because of the claimant's nondisclosure that she did work and had earnings for the weeks in question. As such, the Board finds that the applicable code for this nondisclosure is West Virginia Code §21A-10-8. The statute of limitations set forth therein is five-years when a person who, by reason of nondisclosure or misrepresentation, has received a sum as a benefit that the claimant was not entitled to receive.

(D.R. p. 57) (emphasis added).

Generally, the unemployment statute permits overpayments to be pursued either in civil actions or in any manner provided in the unemployment statute for employer collections. *See*, *W. Va. Code* § 21A-7-11(c)(1) and § 21A-7-11(f). But more specifically, the choice of forum, time limits, other guidelines by which WorkForce is able to collect on overpayments are matters which are well-controlled by statute, depending on the type of violation. These applicable sections -- *W. Va. Code* § 21A-10-21 and *W. Va. Code* § 21A-10-8 -- refer to employer collections to articulate their respective procedural requirements. For payments WorkForce believes were made in error, WorkForce is permitted to pursue them for up to two (2) years and may do so either in virtually any manner:

> A person who, by reason of error, irrespective of the nature of said error, has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him and shall repay to the commissioner the amount which he has received. Collection shall be made in the same manner as collection of past due payment**:** Provided, That such collection or deduction of benefits shall be barred after the expiration of **two years**.

West Virginia Code § 21A-10-21 (emphasis added). Under this rubric WorkForce is free to proceed against claimants for such payments in virtually any way permitted against employers, including through its administrative hearing process, as long as a deputy determination is made within two years of the payment. *See*, *W. Va. Code* § 21A-10-21; *Myers v. Outdoor Express, Inc.*, 235 W. Va. 457, 465, 774 S.E.2d 538, 546 (2015).

In stark contrast, the administrative hearing process is not an option for WorkForce to pursue claimants for up to five (5) years[1] regarding overpayments it believes were the result of

[1] 10 years for Fraud.

dishonesty, such as fraud, misrepresentation, or nondisclosure. WorkForce is prohibited from invoking the administrative hearing process in § 21A-10-8 cases, due to the asbsolute requirement that any such matter be pursued in trial courts:

> A person who, by reason of nondisclosure or misrepresentation, either by himself or another (irrespective of whether such nondisclosure or misrepresentation was known or fraudulent), has received a sum as a benefit under this chapter, shall either have such sum deducted from a future benefit payable to him or shall repay to the commissioner the amount which he has received. **Collection shall be made in the same manner as collection of past-due payments against employers as set forth in section sixteen [§ 21A-5-16] of article five of this chapter, which specifically includes the institution of civil action and collection procedures thereon enumerated in said section**: Provided, That such collection or deduction of benefits shall be barred after the expiration of five years, except for known or fraudulent nondisclosure or misrepresentation which shall be barred after the expiration of ten years, from the date of the filing of the claim in connection with which such nondisclosure or misrepresentation occurred.

W. Va. Code § 21A-10-8 (emphasis added). Instead of referring generally to the unemployment statute for options, § 21A-10-8 specifically mandates that the forum and manner in a precise statute be used.

That statute – *W. Va. Code* § 21A-5-16 – provides various procedural guidelines and requirements when WorkForce pursues employers in trial courts, and trial courts alone. Reviewing § 21A-5-16 in its entirety, the only forum in these procedures is a West Virginia trial court. It does not provide for action in Respondents' administrative adjudication process and there is no room to argue that it does. Instead, all of its subsections -- (a) through (g) -- refer only to civil actions, summarized as follows:

(a) Providing for civil actions by WorkForce after due notice of nonpayment, with required docket preferences "on the calendar of the court over all other civil actions";

(b) Establishing the results as enforceable debts and judgment liens by the circuit court except certain purchasers for value;

(c) Authorizing WorkForce to distrain on property "in addition to all other civil remedies prescribed herein" including intangibles and seizure, and collect attorney fees and costs;

(d) Requiring "any state court in this state" with a receivership or insolvency proceedings to provide for regular debtor payments to WorkForce;

(e) Requiring the Secretary of State to withhold certificates from debtors until notified of payment to WorkForce;

(f) Authorizing injunctions in Kanawha County Circuit Court to prevent debtors from doing business until debts are paid, or to set up bonds to ensure full payment; and

(g) Requiring all payments collected under the civil actions authorized by the statute be deposited to particular accounts.

See, id. (emphasis added.) Importantly, administrative proceedings are not contemplated or discussed whatsoever in § *W. Va. Code* § 21A-5-16.[2]

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[2]Due to the importance of this statute, and what it does not say, Petitioner [apologetically] provides the entire text of the *W. Va. Code* § 21A-5-16 here:

W. Va. Code § 21A-5-16 Collection of payments.

(a) The commissioner in the name of the State may commence a civil action against an employer who, after due notice, defaults in any payment, interest or penalty thereon required by this chapter. Civil actions under this section shall be given preference on the calendar of the court over all other civil actions except petitions for judicial review under article seven [§§ 21A-7-1 et seq.] of this chapter and cases arising under the workers' compensation law. Upon prevailing in any such civil action, the commissioner is entitled to recover attorneys' fees and costs of action from the employer.

(b) Any payment, interest and penalty thereon due and unpaid under this chapter is a debt due the state in favor of the commissioner. It is a personal obligation of the employer immediately due and owing and is, in

To be clear, Petitioner does not argue that § 21A-5-16 requires all collections against employers to be in trial courts.[3] Instead, Petitioner states that *W. Va. Code* § 21A-10-8 is

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addition thereto, a lien that may be enforced as other judgment liens are enforced through the provisions of chapter thirty-eight [§§ 38-1-1 et seq.] of this code and the same shall be deemed by the circuit court to be a judgment lien for this purpose against all the property of the employer: Provided, That no such lien is enforceable as against a purchaser (including lien creditor) of real estate or personal property for a valuable consideration, without notice, unless docketed as provided in article ten-c [§§ 38-10C-1 et seq.], chapter thirty-eight of this code.

(c) In addition to all other civil remedies prescribed herein the commissioner may in the name of the State, after giving appropriate notice as required by due process, distrain upon any personal property, including intangibles, of any employer delinquent for any payment, interest and penalty thereon. If the commissioner has good reason to believe that such property or a substantial portion thereof is about to be removed from the county in which it is situated, upon giving appropriate notice, either before or after the seizure, as is proper in the circumstances, he or she may likewise distrain in the name of the State before such delinquency occurs. For purposes of effecting a distraint under this subsection, the commissioner may require the services of a sheriff of any county in the state in levying distress in the county in which the sheriff is an officer and in which the employer's personal property is situated. A sheriff so collecting any payments, interest and penalties thereon is entitled to compensation as provided by law for his or her services in the levy and enforcement of executions. Upon prevailing in any distraint action, the commissioner is entitled to recover his or her attorney fees and costs of action from the employer.

(d) In case a business subject to the payments, interest and penalties thereon imposed under this chapter is operated in connection with a receivership or insolvency proceeding in any state court in this state, the court under whose direction such business is operated shall, by the entry of a proper order or decree in the cause, make provision, so far as the assets in administration will permit, for the regular payment of such payments as the same become due.

(e) The Secretary of State of this State shall withhold the issuance of any certificate of dissolution or withdrawal in the case of any corporation organized under the laws of this State, or organized under the laws of another state and admitted to do business in this State, until notified by the commissioner that all payments, interest and penalties thereon against any such corporation which is an employer under this chapter have been paid or that provision satisfactory to the commissioner has been made for payment.

(f) In any case where an employer defaults in payments, interest or penalties thereon, for as many as two calendar quarters, which quarters need not be consecutive, and remains delinquent after due notice, the commissioner may bring action in the Circuit Court of Kanawha County to enjoin that employer from commissioner may bring action in the Circuit Court of Kanawha County to enjoin that employer from continuing to carry on the business in which such liability was incurred: Provided, That the commissioner may as an alternative to this action require such delinquent employer to file a bond in the form prescribed by the commissioner with satisfactory surety in an amount not less than fifty percent more than the payments, interest and penalties due.

(g) Amounts of payments and penalties collected under this section shall be deposited to the credit of the Unemployment Compensation Trust Fund. Amounts of interest, attorneys' fees and costs collected under this section shall be paid into the Employment Security Special Administration Fund. Any such amounts are not to be treated by the Auditor or Treasurer as part of the general revenue of the State.

[3] Indeed, there are various situations where WorkForce may pursue employers using its administrative hearing process. *W. Va.* § 21A-5-16 establishes certain procedures and requirements for trial court proceedings if civil actions are filed.

WorkForce's sole legal authority to pursue claimants for overpayments based in fraud, misrepresentation, or non-disclosure. *W. Va. Code* § 21A-10-8 provides that trial court actions under *W. Va. Code* § 21A-5-16 are its sole legal platform for doing so. WorkForce simply has no other authority under the law to pursue claimants for these more serious allegations. Since these actions are not authorized in WorkForce's administrative adjudication process, the Board of Review similarly has absolutely no jurisdiction to hear such cases, adjudicate them, or make findings of fact or conclusions based in *W. Va. Code* § 21A-10-8. For these reasons, under *de novo* review, the Board of Review has erred at law in basing its decision against Petitioner on *W.Va. Code* § 21A-10-8.

As the West Virginia Supreme Court held in *State v. Blevins*,

> Due process of law requires that a court assuming to determine the rights of parties shall have jurisdiction; that such parties shall have notice; and that they be given a reasonable opportunity to be heard before any adjudication is made.

State v. Blevins, 131 W. Va. 350, 361, 48 S.E.2d 174, 182 (1948). By committing this error of law, the Board further denies Petitioner due process.

2. **The Board of Review erred in making finding that Petitioner had failed to disclose that she had worked and earned wages pursuant to *W. Va. Code* § 21A-10-8, which was plainly wrong, and this WorkForce claim against Petitioner exceeds the proper time bar.**

Even if the Board of Review had not exceeded its authority in ruling on a matter reserved only for trial courts, the Board's finding that Petitioner had engaged in 'nondisclosure' was plainly wrong and therefore erroneous. The Board of Review found:

The Board of Review's finding was that payment of benefits resulted from Petitioner's "nondisclosure that she did not work":

> It is the decision of the Board of Review that the Administrative Law Judge failed to apply the appropriate statute for benefits paid to the claimant for weeks ending April 11, 2020, and April 18, 2020. In that the claimant did not disclose on her weekly certification that she worked and earned wages for the two weeks in question, the Board concludes that the payment of benefits to the claimant was not the result of an error; rather, it was made because of the claimant's nondisclosure that she did work and had earnings for the weeks in question. As such, the Board finds that the applicable code for this nondisclosure is West Virginia Code §21A-10-8. The statute of limitations set forth therein is five-years when a person who, by reason of nondisclosure or misrepresentation, has received a sum as a benefit that the claimant was not entitled to receive.

(D.R. p. 57) (emphasis added).

However, this is against direct evidence to the contrary, which WorkForce never contested. Petitioner had laid out in detail the circumstances of her COVID-era claim and the occurrences which clearly led to WorkForce's misunderstanding of the facts. (D.R. p. 4-5). It was all explained in her initial appeal letter to WorkForce, back in August of 2023: (*Id*.)

Petitioner's letter went on to explain her repeated attempts to contact WorkForce during the period she filed her claim, during the period she began receiving benefits, and during periods she submitted her weekly reports, but WorkForce refused and failed to respond to her:

> My claim for unemployment was filed in April of 2020 and was made pursuant to a reduced earning capacity during the COVID-19 outbreak. I was reduced from full-time to part-time by my employer and attempted to file this low earnings claim through the online portal provided by WorkForce. My employer failed to provide a low earnings report, so I used the portal as instructed and filed the necessary information. As shown in my filings, I consistently maintained my employment on a part-time basis for the periods filed. I attempted to contact WorkForce multiple times when filing this claim and subsequent to filing. I even attempted to contact

> WorkForce after receiving my unemployment pay card and noticing the amounts allotted, however, a11 of my attempts were to no avail and no one from WorkForce returned my calls. My application clearly indicates the desire to file a low earnings claim. Now, after three years have passed, WorkForce is attempting to collect thousands of dollars from me.
>
> . . .
>
> When filing my claim online, I did everything I could to establish a low earnings claim and have consistently represented that I was employed, reduced to a part-time basis, and reported wages for the periods required. WorkForce never responded to my requested communications to properly assist me or to confirm that I was filing the correct claim application.

(*Id*).

Petitioner made sure to refer to this evidence in her argument to the Board of Review. The Board had instructed her to submit her arguments only in writing, since it was not according her an in-person or telephonic hearing. (D.R. 55). In compliance with that instruction Petitioner submitted her arguments by letter on December 5, 2023. (D.R. p. 78-80.)

After setting forth her position regarding the two-year prohibition in *W. Va. Code* § 21A-10-21 being dispositive of all other matters, she made sure to refer to all evidence in the record, including that in her original appeal letter:

> The determination by WFWV was issued more than two years following the payments at issue in this claim. Therefore, collection by WFWV in this matter is prohibited and barred. by West Virginia Code § 21A-10-21. See also, Myers v. Outdoor Express, Inc., 235 W. Va. 457,465, 774-S.E.2d 538, 546 (2015). This is dispositive of all other issues in. this claim, but **to the extent any other matter is considered by the BOR, claimant refers to her appeal letter in the WFWV record dated August 16, 2023**; her testimony dated September 26, 2023; and any portion of the record to which they refer.

(D.R. p. 79) (emphasis added.) Again, that original August 16, 2023 appeal letter had gone into significant detail regarding the circumstances of her filing the claim. (D.R. 4-5). She explained the WorkForce portal's inability to function processing the claim as a low earnings claim in the absence of her employer submitting a low earnings report, while proceeding with the claim as instructed, and trying to explain her work hours during the claims process in other ways. (*Id*.) WorkForce's exhibits clearly reflect the same, reflecting the 'no' selections she was instructed to click for two early periods (when her employer had not submitted low earnings reports), and eventually a "yes" selection once her employer had obviously begun submitting low earnings reports. (D.R. p. 11, 17, 19, 21). She further explained several times how she had in fact used other parts of the portal to disclose that she had been working. (D.R. 4-5). That fact also bears out in the WorkForce exhibits:

Q: What was the last date that you worked for this employer?

04/10/2020

Q: What Is the reason you are not working there now?

Still Employed

Q: Select the reason you are filing.

Reduction In full-time hours available

Q: Additional Information

Please explain.

WANTING TO FILE FOR LOW EARNINGS BUT THE EMPLOYER HAS NOT PROVIDED ANY FORMS OR REPORTS.

(D.R. p. 28). This exhibit shows clearly that Petitioner disclosed as much information as she could -- wherever the portal would permit her – about the fact that she was currently working. (See, *id*.) This page even reflects the portal allowed her to answer "**04/10/2020**" as the 'last date that you worked for this employer'. (*Id*) (emphasis added). Nonetheless, WorkForce continued pursuing her and eventually claimed at the Board of Review that she "did not disclose" working during these weeks, including "**the week ending April 11 , 2020**". (D.R. 57) (emphasis added). Obviously however, she had disclosed her work that week by answering where she could ("**04/10/2020**"). (D.R. 28). The records provided by WorkForce do not reflect similar information for other weeks, but these obvious attempts by Petitioner – reflected in WorkForce's own evidence exhibits – clearly confirm all of Petitioner's evidence that she disclosed her work information anywhere the portal would permit, followed instructions, could not get through to WorkForce for questions and assistance, and did what she could at every turn, despite an awkwardly-functioning portal. (*See*, D.R. 4-5).[4]

Importantly, WorkForce did not contest Petitioner's evidence that she had disclosed her work information anywhere the portal would permit, contrary to Respondents' claims. The Board's findings that she had not disclosed her work information are clearly wrong, and must be reversed.

This is especially true in light of the public policy mandate of the unemployment statute:

[4] Sadly, upon information and belief WorkForce is keenly aware of identical and similar defects in the overpayment claims it is pursuing against thousands of claimants, but the agency is wrecklessly pursuing thousands of similar claimants the same way regardless.

Years of West Virginia have made this clear. "Unemployment compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof." *Butler v. Rutledge*, 174 W. Va. 752, 756, 329 S.E.2d 118, 123 (1985); *Belt v. Cole*, 172 W. Va. 383, 305 S.E.2d 340 (W. Va. 1983); *Gibson v. Rutledge*, 171 W. Va. 164, 298 S.E.2d 137 (W. Va. 1982); *London v. Board of Review*, 161 W. Va. 575, 244 S.E.2d 331 (W. Va. 1978); *Davis v. Hix*, 140 W. Va. 398, 84 S.E.2d 404 (W. Va. 1954).

"The Unemployment Compensation Act, being remedial in nature, its beneficent provisions should be liberally applied". *Bennett v. Hix*, 139 W. Va. 75, 79 S.E.2d 114 (W. Va. 1953); *London v. Board of Review*, 161 W. Va. 575, 244 S.E.2d 331 (W. Va. 1978).

> [T]he West Virginia Unemployment Compensation Act is designed to compensate individuals who are involuntarily unemployed. *Lee-Norse Company v. Rutledge*, 170 W. Va. 162, 291 S.E.2d 477, 482 (1982). Furthermore, as this Court held in syllabus point 6 of *Davis v. Hix*, 140 W. Va. 398, 84 S.E.2d 404 (1954): "Unemployment Compensation statutes, being remedial in nature, should be liberally construed to achieve the benign purposes intended to the full extent thereof."

Butler v. Rutledge, 174 W. Va. 752, 756, 329 S.E.2d 118, 123 (1985) (citing also to *Lough v. Cole*, 172 W. Va. 730, 310 S.E.2d 491, n. 5 (1983).

Similarly, the Board's decision was directly against the public policy of the rules from which its authority lies:

> *W. Va. C.S.R.* § 84-1-2.2. Purpose. -- The purpose of the hearing process shall be to receive and consider, as expeditiously and as fairly as possible, evidence and information relevant to the determination of the rights of the parties and to provide a review of the Deputy's decisions and determinations with regard to the granting or denial of any award, or the entry of any Order, or the granting or denial of any modification or change with respect to former findings.

W. Va. C.S.R. § 84-1-2.2. (emphasis added).

Under these circumstances, the most Respondents could possibly posit on the evidence of this claim is that it may have been an overpayment in "error" pursuant to *W. Va. Code* § 21A-10-21. However, as discussed above, such claims would be prohibited by law since more than two years have passed between the last payments at issue (2020) and the deputy's overpayment decision of August 9, 2023. (D.R. p. 3). See, *W. Va. Code* § 21A-10-21; *Myers v. Outdoor Express, Inc.*, 235 W. Va. 457, 465, 774 S.E.2d 538, 546 (2015).

Ultimately, under the public policy of West Virginia's unemployment statute, the intent of *W.Va. Code* § 21A-10-8 is to require enforcement only in West Virginia trial courts. It is reserved for more severe violations of the unemployment claims process involving some level of dishonesty, with significantly longer time-bars than claims with simple errors.

Findings of fact by the Board of Review may be set aside if they are plainly wrong. *Copen v. Hix*, 130 W. Va. 343, 43 S.E.2d 382 (W. Va. 1947); *Kisamore v. Rutledge*, 166 W. Va. 675, 276 S.E.2d 821 (W. Va. 1981); *Oyler v. Cole*, 171 W. Va. 402, 299 S.E.2d 13 (W. Va. 1982); *Belt v. Rutledge*, 175 W. Va. 28, 330 S.E.2d 837 (W. Va. 1985). Because the findings of the Board of Review were plainly wrong, its decision must be reversed.

3. **The Board's reliance on W. Va. Code § 21A-10-8 in this decision was also erroneous because it was never raised in proceedings below. It was raised for the first time on appeal, and it was raised without notice**.

The Board of Review further erred as a matter of law in deciding this claim based on *W. Va. Code* § 21A-10-8 because it was raised for the first time only at appeal stage. Neither the statute nor legal issues suggesting it were voiced during the hearing before the administrative law

judge (D.R. p. 38-42) or in any filings by WorkForce prior to the Board's appeal review (D.R. p. 2-3, 10-32, 37). Instead, WorkForce had brought the matter as an overpayment claim made in error, pursuant to W. Va. Code § 21A-10-21, providing a block quote in their submission to the ALJ (D.R. p. 12). This is an impermissible use of the appeal process. *See*, *Noble v. W. Virginia Dep't of Motor Vehicles*, 223 W. Va. 818, 821, 679 S.E.2d 650, 653 (2009).

In addition to this late-hour change in legal theory and trying to convert a § 21A-10-21 proceeding into a § 21A-10-8 proceeding two days prior to an appeal review, WorkForce simply did not provide notice to Petitioner. The only method of service used prior to the December 7, 2023 appeal review was by mail, and Petitioner did not receive the mailing until after December 7, 2023. Therefore, she had absolutely no way appear or be heard, and the conduct of both WorkForce and the Board at this stage were flagrant violations of Petitioner's due process rights. As discussed by the West Virginia Supreme Court, "The due process of law guaranteed by the state and federal constitutions, when applied to procedure in the courts of the land, requires both notice and the right to be heard". S*tate ex rel. Chris Richard S. v. McCarty*, 200 W. Va. 346, 349, 489 S.E.2d 503 (W. Va. 1997). "Due process of law requires that a court assuming to determine the rights of parties shall have jurisdiction; that such parties shall have notice; and that they be given a reasonable opportunity to be heard before any adjudication is made." *State v. Blevins*, 131 W. Va. 350, 361, 48 S.E.2d 174, 182 (W. Va. 1948). Based on these errors as a matter of law alone, the Board's decision must be reversed.

4. The Board of Review's Decision to Remand did not Render the Appeal Interlocutory.

By its February 16, 2024 Scheduling Order in this appeal, the Intermediate Court of Appeals order asked the parties whether the Board of Review's decision to remand to determine

a repayment amount has rendered this appeal interlocutory pursuant to *Paxton v. Crabtree*, 184 W. Va. 237, 239, 400 S.E.2d 245, 247 (1990).

Petitioner does not assert that this appeal is interlocutory. As the Supreme Court held,

> Ordinarily, a judgment of reversal rendered by an intermediate appellate court which remands a cause for further proceedings in conformity with the opinion of the court is not final and, therefore, not appealable to a higher appellate court, so long as judicial action in the lower court is required.

Id at Syl. pt. 2.

> This rule, however, is limited to those situations where the intermediate appellate court finds that there are disputed issues of fact or law that have not been resolved by the trial court. As a result, remand is proper in order to have all issues fully resolved, rather than to have an appeal on a piecemeal basis. This general rule does not apply to situations where the trial court has reversed or affirmed the agency decision on the merits.

Id at 242, 250 (emphasis added).

In this case, the Board of Review had reversed the Administrative Law Judge's decision on the merits. Therefore, the Board of Review's decision to remand did not render this appeal interlocutory pursuant to *Paxton v. Crabtree*, 184 W. Va. 237, 239, 400 S.E.2d 245, 247 (1990).

VI. CONCLUSION

Based upon the foregoing, the Petitioner requests that this Court grant the following relief:

1. That this Court reverse the Board of Review's order; and.
2. That this Court grant any other relief the Court deems just and proper.

Respectfully submitted,

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IN THE INTERMEDIATE COURT OF APPEALS OF WEST VIRGINIA

DEBORAH BEHELER BALDWIN,

Claimant Below, Petitioner,

v.

Appeal No. 24-ICA-39
(Workforce Case No. R-2023-1780 (R-2-J))

SCOTT A. ADKINS, in his official capacity as Acting Commissioner of WORKFORCE WEST VIRGINIA, and WORKFORCE WEST VIRGINIA BOARD OF REVIEW,

Respondents.

CERTIFICATE OF SERVICE

I, Chris Hedges, attorney for Deborah Beheler Baldwin, hereby certify that a true and correct copy of the foregoing *Petitioner's Brief* was on the 26th day of April, 2024, served upon the parties hereto via efile as available via the through the West Virginia Judiciary Intermediate Court of Appeals, as follows:

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