

- DECISION -

Claimant:	Decision No.:	1277-BR-13
CHRISTOPHER C CUCCOLO	Date:	March 27, 2013
	Appeal No.:	1226037
	S.S. No.:	
Employer:	L.O. No.:	01
	Appellant:	Claimant

Issue: Whether the claimant was appropriately denied a waiver of overpayment pursuant to Title 09.32, Chapter 07 of COMAR

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the Maryland Rules of Procedure, Title 7, Chapter 200.

The period for filing an appeal expires: April 26, 2013

REVIEW OF THE RECORD

After a review of the record, the Board adopts the following findings of facts and conclusions of law.

FINDINGS OF FACTS

The claimant filed a timely appeal of the Agency's initial determination to the Lower Appeals Division. The Benefit Determination stated as follows:

According to local office records, you failed to report your wages earned Center for Children, Inc. while filing for and receiving unemployment

insurance benefits. This was determined to be fraud. In addition, your age and demonstrated *[sic]* earning ability proves you are employable and therefore capable of repaying this debt in the foreseeable future. Finally, you currently reside in a household where income exists and exceeds the federal minimum poverty level for your family.

On August 2, 2012, notices were sent to the claimant and the Agency for a telephone hearing to be held on August 16, 2012 at 9:45 a.m. No notices were returned for a failure to deliver or for an improper address. The parties received proper notice. The parties were to appear telephonically by dialing the noticed telephone number and "participant pass code". None of the parties were required to appear in person before the hearing examiner.

The parties were appellant Christopher C. Cuccolo (the "claimant"), and appellee the DLLR Secretary / Office of Unemployment Insurance (the "Agency")

On August 16, 2012 at 9:45 a.m., Hearing Examiner Moreland dialed into the conference call. The claimant was present. The Agency failed to appear by the end of the ten-minute grace period at 9:55 a.m. The claimant asked the hearing examiner what would happen if the Agency failed to appear. Hearing Examiner correctly responded, "I will take your testimony and then make a decision based upon your testimony."

As the hearing progressed, it was established that the Benefit Determination was incorrect. The Benefit Determination stated that the claimant had committed fraud. There was no actual fraud determination against the claimant. The claimant's overpayment was due to the fact that the Lower Appeals Division found that the claimant had voluntarily quit his employment without good cause or valid circumstances (*See Agency Exhibit 4*). The claimant timely appealed the decision to the Board of Appeals; the Board affirmed the Lower Appeals Division decision. (*See Agency Exhibit 8*).

Hearing Examiner Moreland noted that the Benefit Determination was improper and advised the claimant that she could not proceed with a hearing based upon the incorrect benefit determination. Because the Agency failed to appear, the matter would need to be continued. The claimant agreed to the continuance.

A new hearing was set for September 11, 2012. All parties were present at that hearing.

The issue noticed for the September hearing was as follows:

Whether the claimant was appropriately denied a waiver of overpayment pursuant to Title 09.32, Chapter 07 of COMAR. Whether the appeal was filed timely within the meaning of Section 806 of the Labor and Employment Article.¹

¹ The Hearing Examiner found that the claimant's appeal was timely. The Board shall not address or disturb that part of the decision.

The claimant filed for benefits when he became separated from employment. The claimant received benefits. The employer appealed that decision. By decision dated March 24, 2011, the Lower Appeals found that the claimant voluntarily quit his employment without good cause or valid circumstances and benefits were denied (*See Agency Exhibit 4*). The claimant timely filed an appeal to the Board of Appeals. The Board affirmed the Lower Appeals Decision by decision dated December 6, 2011 (*See Agency Exhibit 8*).

Because of these adverse decisions, it was found that the claimant had received an overpayment of benefits of which needed to be repaid. The claimant requested a waiver of overpayment, which the Agency denied. This appeal followed.

The claimant is thirty-one years old. He resides in a household of one and earned \$34,243.00 for the second quarter of 2011 to the first quarter of 2012. The claimant has a Master's degree.

I

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., §8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training, 309 Md. 28 (1987)*.

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner, or evidence that the Board may direct to be taken, or may remand any case to a hearing examiner for purposes it may direct. *Md. Code Ann., Lab. & Empl. Art., §8-510(d)*; *COMAR 09.32.06.04*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

II

Agency Failure to Appear at initial August 16, 2012 Lower Appeals Division Hearing

The claimant argues in his correspondence to the Board:

DLLR failed to show for the phone hearings with my case. If I fail to show, my case is sunk. However, DLLR is allowed to play by a different set of rules and fail to show up for hearings. You guys get a "do over" yet this "do over" courtesy is never granted to citizens...only DLLR and employers get this special and unequal treatment.

The Board has recently ruled on a similar case where the Agency failed to appear in *McKeown v. DLLR, 5279-BH-12* and the matter was postponed solely to have the Agency appear and present a case. The Board held that the Agency could not be given special deference in contravention of its standard

procedures where the hearing examiner unilaterally contacted an Agency representative to proceed with the hearing prior to the beginning of testimony as follows:

The Board finds that the weight of the evidence supports a finding that the hearing examiner's actions in this regard demonstrate an improper deference to and prejudicial bias towards the Agency.

The hearing examiner should have proceeded with the hearing at ten minutes past the hour, notwithstanding the Agency's failure to appear. If, and only if, at the end of the claimant's testimony and evidence, there was insufficient evidence upon which to base a decision, the hearing examiner could have continued and re-noticed the hearing in order to subpoena the witnesses she deemed necessary to gather sufficient facts to render a decision. Otherwise, if sufficient evidence was presented upon which to base a decision, the hearing examiner must end the hearing and render a decision based upon the credible evidence in the record, even if the decision is based solely upon the claimant's testimony

In the instant case, the claimant appeared at the scheduled time and place for the telephonic hearing. The Agency failed to appear and the hearing examiner arbitrarily and capriciously postponed the matter at which time another hearing was scheduled. The claimant was the appellant in the matter and the hearing should have moved forward in accordance to the well-established procedures. The hearing examiner should have made her decision with the evidence and testimony submitted at the hearing with the appellant.

The hearing examiner incorrectly explained to the claimant that the hearing could not move forward without the Agency present. If the hearing examiner's statement was intended to assert that the Agency was a necessary party to the case, the hearing examiner was wrong. The claimant, as the appellant, had the burden of production and the burden of going forward. The Agency, the party who rendered the initial adverse determination, had the burden of proof on the noticed issues in this case. If the Agency was "supposed to be [at the hearing] to present" it had a duty to appear and "present" evidence. As the appellee, the Agency had no such duty.

Administrative bodies are not ordinarily bound by the strict rules of evidence of a law court. *Hyson v. Montgomery County Council*, 242 Md. 55, 70, 217 A.2d 578, 587 (1966). In that connection, the Court of Appeals stated in *American Radio-Telephone Service, Inc. v. Public Service Commission*, 33 Md. App. 423, 434-35, 365 A.2d 314, 320 (1976), "although administrative agencies are not bound by the technical common law rules of evidence, they must observe the basic rules of fairness as to the parties appearing before them." See *Dickinson-Tidewater, Inc. v. Supervisor of Assessments*, 273 Md. 245, 253, 329 A.2d 18, 24 (1974); *Montgomery County v. National Capital Realty*, 267 Md. 364, 376, 297 A.2d 675, 681 (1972); *Dal Maso v. Board of County Commissioners*, 238 Md. 333, 337, 209 A.2d 62, 64 (1965).

Procedural due process in administrative law is recognized to be a matter of greater

flexibility than that of strictly judicial proceedings. *NLRB v. Prettyman*, 117 F.2d 786, 790 (6th Cir. 1941); *Lacomastic Corp. v. Parker*, 54 F. Supp. 138, 141 (D. Md., 1944). The concept of due process requires that the adjudicative body examine "the totality of the procedures afforded rather than the absence or presence of particularized factors." *Boulware v. Battaglia*, 344 F. Supp. 889, 904 (1972); *Widomski v. Chief of Police of Baltimore County*, 41 Md. App. 361, 378-79 (1979). The concept that an administrative proceeding must be fundamentally fair to the parties pervades Maryland's administrative law. *Cecil County Dep't of Social Servs. v. Russell*, 159 Md. App. 594, 612 (2004). The tenants of fundamental fairness apply to the hearing in the instant case even though the *Maryland Administrative Procedures Act* does not wholly apply to unemployment insurance cases. See *DLLR v. Woodie*, 128 Md. App. 398, 409-412 (1999).

The hearings conducted by the Lower Appeals Division are *de novo*. A *de novo* proceeding is one that starts fresh, on a clean slate, without regard to prior proceedings and determinations. *Mayer v. Montgomery County, Maryland*, 143 Md. App. 261, 281 (2002).

It is a well-established principle of Maryland law that *pro se* parties must adhere to procedural rules in the same manner as those represented by counsel. *DLLR v. Woodie*, 128 Md. App. 398, 411 (1999). The Court of Appeals has stated that "the principle of applying rules equally to *pro se* litigants is so accepted that it is almost self-evident." *Woodie*, 128 Md. App. at 411, citing *Tretick v. Layman*, 95 Md. App. 62, 68 (1993). The Board finds, therefore, self-evident that the Agency must adhere to procedural rules in the same manner as *pro se* claimants.

The hearing notice provided, "Each party should arrange for all necessary witnesses to attend the hearing, and for all necessary documents to be presented at the hearing." The parties in the instant case "had clear notice of [an] obligation to present [a] case before the DLLR Hearing Examiner." Quoting *Woodie*, 128 Md. App. at 411.

Given the specific facts in *McKeown*, and as discussed above, the Board held that:

...the hearing examiner may only seek to have a non-appearing party or its witness appear for the hearing when (after notice of the continuance of the hearing) after the course of a hearing, the hearing examiner determines there is no evidentiary basis upon which to render a decision within the meaning of *Md. Code Ann., Lab. & Empl. art., Section 8-508(c)(2)* and *(c)(3)*. The Board holds that, under the *COMAR* regulations and the Lower Appeals Division's stated procedural policies, an appearing parties' due process rights are violated, and an appearance of bias by the hearing examiner is evinced, when a hearing examiner unilaterally seeks out an adverse party prior to hearing the testimony and evidence of the appearing party and prior to a determination that there is an insufficient evidentiary basis upon which to render a decision.

In footnote 2 of the *McKeown* decision, the Board noted "that the above-described absent adverse party situation is distinguished from a hearing where a party appears for the hearing, and the hearing examiner finds he or she needs an additional fact witness from the appearing party to

clarify or properly develop the record.”

The instant case is distinguished from *McKeown* because it contains a different set of facts regarding Agency’s non-appearance in the first August 16, 2012 hearing.

First, the hearing examiner did not “seek out” the Agency representative. Second, the hearing examiner properly moved forward with the hearing at the behest of the claimant. Once the claimant proceeded with his testimony that the benefit determination contained incorrect information, the hearing examiner properly indicated that it was incorrect and that the matter needed to be continued to remedy the material defect in the record.

The claimant did not object to and agreed with the continuance. Consequently, another hearing date was noticed. In *McKeown*, the claimant was unduly prejudiced by the Lower Appeals Division unilateral action to call the Agency for a representative to appear. In the instant case, the claimant’s due process rights were not violated, but instead were preserved because of the incorrect issues noted on the benefit determination.

Therefore, the Board finds in the instant case, that the claimant’s case was not prejudiced and his due process rights were not violated. The Board also finds that the hearing examiner acted in accord with the Lower Appeals Division’s procedures and procedural due process standards.

III

Waiver of Overpayment

COMAR 09.32.07.05 states that a waiver of recovery of overpayment will be approved when, in the judgment of the Secretary, the overpaid claimant: (1) is without fault and (2) lacks the ability to pay now and in the foreseeable future or is likely to be below the federal minimum poverty level and is likely to remain there for the foreseeable future.” The section further provides that, “in any proceeding under these regulations, the overpaid claimant shall have the burden of proving entitlement to a waiver.”

Pursuant to *COMAR 09.32.07.06(A)*, the word “fault”, as used in the phrase “without fault” applies only to the fault of the overpaid claimant. Fault on the part of the Department in making the overpayment does not relieve the overpaid claimant of liability for repayment if the claimant’s fault contributed to the overpayment.

COMAR 09.32.07.06(B) provides elements in which a determination is made as to whether an individual is at fault. The Secretary may consider the nature and cause of the overpayment and the capacity of the particular claimant to have recognized the error causing the overpayment. The elements which constitute fault on the part of the overpaid claimant depend upon whether the facts show:

- (1) An incorrect statement made by the statement which the claimant knew or should have known to be incorrect;
- (2) Failure to furnish information which the claimant knew or should have known to be material, including failure to correct a monetary determination; or

(3) Acceptance of a payment which the claimant knew or should have known was incorrect.

COMAR 09.32.07.06 (C) provides that a determination of what an overpayment claimant “should have known” is an issue of fact to be found by the administrative agency.

In the instant case, the Board finds that the claimant was without fault for the overpayment. Although the initial determination permitted unemployment benefits, subsequent appeals found that the claimant voluntarily quit his employment without good cause or valid circumstances. The facts do not indicate a “fault” component to the reason behind the overpayment of benefits. The claimant did not make a “known” incorrect statement. He did not fail to furnish information. And, he did not accept payment which he knew to be incorrect.

Based on the facts surrounding his separation, the claimant’s separation could not fit easily into one of the “boxes” on the DLLR website. Once the claimant was found to be ineligible because of the various appeals, he had an overpayment of benefits.

Once it is determined that the claimant was without fault, the Board then reviews the *COMAR 09.32.07.05*. whether, in the judgment of the Secretary, the overpaid claimant: (1) is without fault and (2) lacks the ability to pay now and in the foreseeable future or is likely to be below the federal minimum poverty level and is likely to remain there for the foreseeable future.” The section further provides that, “in any proceeding under these regulations, the overpaid claimant shall have the burden of proving entitlement to a waiver.”

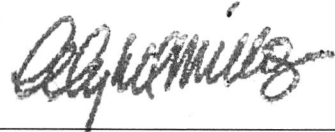
In the instant case, the claimant’s income is not below the federal minimum poverty level. It is clear that the claimant’s income is in excess of that amount. The claimant is 31 years old, he is currently employed. There is insufficient evidence that the claimant is so financially indigent that he cannot pay the overpayment now or in the foreseeable future. The claimant is not a candidate for a waiver of overpayment.

The Board finds based on a preponderance of the credible evidence that the claimant has not met his burden of demonstrating that he qualifies for a waiver of his overpayment pursuant to *COMAR 09.32.07.05*. Although the claimant was without fault, he does not lack the ability to pay the overpayment now or in the foreseeable future nor is he below the federal minimum poverty level. The decision shall be affirmed for the reasons stated herein.

DECISION

THE BOARD HOLDS that the claimant is not entitled to a waiver of benefits overpayment pursuant to *COMAR 09.32.07.05*.

The hearing examiner’s decision is affirmed.



Clayton A. Mitchell, Sr., Associate Member



Donna Watts-Lamont, Chairperson

VD

Copies mailed to:

CHRISTOPHER C. CUCCOLO

LINDA CRANDELL

CATHERINE JAPNGIE

Susan Bass, Office of the Assistant Secretary

UNEMPLOYMENT INSURANCE APPEALS DECISION

CHRISTOPHER C CUCCOLO

SSN #

Claimant

vs.

Employer/Agency

Before the:

**Maryland Department of Labor,
Licensing and Regulation**

Division of Appeals

1100 North Eutaw Street

Room 511

Baltimore, MD 21201

(410) 767-2421

Appeal Number: 1226037

Appellant: Claimant

Local Office : 01 / BALTIMORE

September 18, 2012

For the Claimant: PRESENT

For the Employer:

For the Agency: CATHERINE JAPNGIE

ISSUE(S)

Whether the claimant was appropriately denied a waiver of overpayment pursuant to Title 09.32, Chapter 07 of COMAR. Whether this appeal was filed timely within the meaning of Section 806 of the Labor and Employment Article.

FINDINGS OF FACT

A Notice of Benefit Determination was mailed to the parties in this case. The determination had an appeal deadline of July 12, 2012. In this case, the appeal was filed by mail and postmarked on July 12, 2012.

The Claimant, Christopher Cuccolo, filed a claim for unemployment benefits with a benefit year beginning August 9, 2010 and a weekly benefit amount of \$410.00. The Claimant then filed for and received various unemployment insurance benefits. Pursuant to a Determination rendered on June 27, 2012, the Maryland Department of Labor, Licensing and Regulation ("DLLR") subsequently determined that the Claimant was not eligible (or should not have been eligible) to receive those benefits.

The retroactive effect of this Determination resulted in the Claimant having received unemployment benefits for which the Claimant was not eligible, thus requiring the Claimant to repay to DLLR the unemployment monies that were received.

In an attempt to avoid having to repay the funds owed by the Claimant to the Agency, the Claimant applied for an "overpayment waiver," which was denied. This appeal followed.

With respect to the claimant's request to have the requirements for the waiver reviewed, it is found that the Claimant at fault for the overpayment. On his application for benefits the Claimant answered that his separation from his last employment was due to lack of work when it was, in fact, due to a discharge. It is also found that the Claimant does not lack the ability to pay now and in the foreseeable future, or is likely to be below the federal minimum poverty level and is likely to remain there for the foreseeable future. The Claimant is age thirty-one and presently employed. He has a household size of one and earned \$34,243.00 from the second quarter of 2011 to the first quarter of 2012.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-806(e) provides, in essence, that either a claimant or employer has 15 days after the date of the mailing of the benefit determination to file a timely appeal. COMAR 09.32.06.01(B) provides that an appeal is considered filed on the earlier of the following: (a) the date that is delivered in person to any office of the Department of Labor, Licensing and Regulation ("DLLR") that accepts appeals, or (b) the date on which it is postmarked by the U. S. Postal Service. Appeals filed after that date, shall be deemed late and the determination shall be final, unless the appealing party meets the burden of demonstrating good cause for late filing. COMAR 09.32.06.01B(3) provides that "the period for filing an appeal from the Claims Specialist's determination may be extended by the Hearing Examiner for good cause

shown." Good cause means due diligence in filing the appeal. Francois v. Alberti Van & Storage Co., 285 Md. 663 (1979) and Matthew Bender & Co. v. Comptroller of the Treasury, 67 Md. App. 693 509A 2d 702 (1986).

The Code of Maryland Regulations ("COMAR"), Section 09.32.07.02, provides that any person who has been found to have received an overpayment of unemployment insurance benefits may apply for a waiver of that overpayment unless it resulted from fraud on the part of the claimant.

COMAR 09.32.07.05(A) provides that a waiver of recovery of the overpayment will be approved when, in the judgment of the Secretary, the overpaid claimant:

- (1) Is without fault; and
- (2) Lacks the ability to pay now and in the foreseeable future, or is likely to be below the federal minimum poverty level and is likely to remain there for the foreseeable future.

COMAR 09.32.07.05(B) provides that if an overpaid claimant is found to be without fault because the overpayments were caused exclusively by agency error, the waiver request may be recommended.

COMAR 09.32.07.05(C) provides that, in any proceedings under the applicable regulations, the overpaid claimant shall have the burden of proving entitlement to a waiver.

COMAR 09.32.07.05(D) provides that an overpayment found to have been illegally received pursuant to Labor and Employment Article, §8-809, Annotated Code of Maryland, may not be waived.

Pursuant to COMAR 09.32.07.06(A), the word "Fault", as used in the phrase "without fault", applies only to the fault of the overpaid claimant. Fault on the part of the Department in making the overpayment does not relieve the overpaid claimant of liability for repayment if the claimant's fault contributed to the overpayment.

Pursuant to COMAR 09.32.07.06(B), in determining whether an individual is at fault, the Secretary may consider the nature and cause of the overpayment and the capacity of the particular claimant to have recognized the error causing the overpayment. The elements which constitute fault on the part of the overpaid claimant depend upon whether the facts show:

- (1) An incorrect statement made by the claimant which the claimant knew or should have known to be incorrect;
- (2) Failure to furnish information which the claimant knew or should have known to be material, including failure to correct a monetary determination; or
- (3) Acceptance of a payment which the claimant knew or should have known was incorrect.

Finally, pursuant to COMAR 09.32.07.06(C), the determination of what an overpaid claimant "should have known" is an issue of fact to be found by the administrative agency.

EVALUATION OF THE EVIDENCE

The Claimant filed an appeal of the benefit determination by the deadline date. The appeal was, therefore, timely filed.

In the case at bar, the credible evidence establishes that the Claimant failed to prove that the requirements of COMAR Sections 09.32.07, *et seq.* have been met.

Specifically, the Claimant reported that his separation was due to a lack of work when it was actually due to termination, a statement that he knew or should have known to be incorrect. The Claimant has a Masters Degree and should be capable of understanding the plain language in which Agency instructions and questions are written.

It is also found that the Claimant does not lack the ability to pay now and in the foreseeable future, or is likely to be below the federal minimum poverty level and is likely to remain there for the foreseeable future. The Claimant is age thirty-one with a Master's degree, factors that demonstrate his employability. He is also presently working full-time with an income that exceeds the Federal Poverty level for his family size.

Consequently, the Claimant's waiver of overpayment shall be denied pursuant to the above-cited sections of law.

DECISION

IT IS HELD THAT the Claimant filed a timely appeal within the meaning and intent of Md. Code Ann., Labor & Emp. Article, Section 8-806(e).

IT IS HELD THAT the claimant does not qualify for a waiver of overpayment pursuant to COMAR 09.32.07, *et seq.*

The Determination of the Claims Examiner is affirmed.



S. Moreland, Esq.
Hearing Examiner

Notice of Right to Petition for Review

Any party may request a review either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by October 03, 2012. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787
Phone 410-767-2781

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : September 11, 2012

CH/Specialist ID: 9999

Seq No: 005

Copies mailed on September 18, 2012 to:

CHRISTOPHER C. CUCCOLO

LOCAL OFFICE #01

LINDA CRANDELL

CATHERINE JAPNGIE