ARIZONA COURT OF APPEALS

DIVISION ONE

RYAN HARDWICK, Appellant, vs. FREEPORT-MCMORAN CORPORATION and ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an agency, Appellees.	Court of Appeals Division One No. 1 CA-UB 21-0271 No. 1 CA-UB 21-0272 (Consolidated) A.D.E.S. Appeals Board No. U-1717149-001-B
RYAN HARDWICK, Appellant, vs. ARIZONA DEPARTMENT OF ECONOMIC SECURITY, an agency, Appellees.	A.D.E.S. Appeals Board No. U-1717149-001-B

APPELLANT RYAN HARDWICK'S OPENING BRIEF

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INTRODUCTION

This is a consolidated appeal from decisions by the Appeals Board of the Arizona Department of Economic Security ("ADES") finding Appellant Ryan Hardwick ("Hardwick") retroactively ineligible for unemployment insurance ("UI") for the period from May 3, 2020, through September 12, 2020 (No. 1 CA-UB 21-0271) and finding Hardwick was overpaid $13,800 (No. 1 CA-UB 21-0272).

Hardwick applied for UI after Freeport McMoran Corporation ("FMC") furloughed him on May 1, 2020, due to the economic effects of COVID-19. ADES investigated the claim, found Hardwick eligible for benefits, and Hardwick received benefits starting from May 3, 2020, including the additional federal funds under the Federal Pandemic Unemployment Compensation available at that time.

FMC ended the furlough and terminated Hardwick's employment effective August 31, 2020. Hardwick received $2,200 in vacation/sick pay on September 3, 2020, and a severance of $25,500 on October 22, 2020, after signing an agreement with FMC.

Later, Hardwick received a December 14, 2020 "Reconsidered Determination of Deputy Notice to Claimant" from ADES informing him

he was not eligible for UI from May 3, 2020, through September 12, 2020, due to payments for unused vacation, sick pay, and severance. This Reconsidered Determination included a statement that "[t]he Department did not address the information provided by the employer in a timely manner that resulted in your disqualification," and that the overpayment was classified as administrative/departmental. ADES assessed a $13,800 overpayment against Hardwick which included $9,000 of Federal Pandemic Unemployment Compensation.

Hardwick appealed to the ADES Appeal Tribunal and subsequently to the ADES Appeals Board, both of which upheld the deputies' Reconsidered Determination and the overpayment assessment.

In this appeal, Hardwick raises the following ADES errors:

1. After a deputy's initial determination of eligibility becomes final, a deputy can only issue a reconsidered determination under certain circumstances including that the determination is based on "newly discovered evidence that by due diligence could not have been previously discovered." A.R.S. § 23-773(E). Under the standard set forth in *A.C. v. ADES,* 249 Ariz. 387 (App. 2020), the burden is on ADES to show it met these requirements. The notice admits ADES did not timely address

information provided by Hardwick's employer but provided no detail on what information it received or when. At the hearing, ADES failed to meet its burden to show that the Reconsidered Determination was authorized by statute.

2. Where there is no contract in effect at the time of separation, A.R.S. § 23-621(D) provides that severance benefits are to be allocated to the period "following the last day of performance of services, continuing for the number of work days that the pay would cover…." ADES takes the position that severance benefits are to be applied to the period in which the claimant was unemployed and/or receives benefits. But under A.R.S. § 23-621(A), a person may be statutorily "unemployed" but still providing services as long as there is no fault on the individual's part and wages are less than the weekly benefit amount. ADES, therefore, used the incorrect standard for allocating severance. Hardwick informed the Appeals Board that he was prevented from working for competitors and was required to check in weekly with his employer until he was terminated on August 31, 2020, thus constituting services. If severance benefits are to be allocated, they should be allocated beginning August 31, 2020, not May 3, 2020.

3. In the Appeal Tribunal hearing, Hardwick expressed concern he was not represented by counsel which he thought he could not afford. He also demonstrated confusion over the nature of the proceedings. He testified to multiple unsuccessful attempts to obtain help and information from ADES. Under *Martin v. Indust. Comm'n*, 120 Ariz. 616 (App. 1978), the ALJ's failure to provide Hardwick with a continuance and the information regarding legal advocates--which the ALJ only divulged at the end of the hearing—violated Hardwick's due process rights.

As a result of the above errors, Hartwick respectfully requests that this Court: 1) reverse the decision of the Appeals Board, reinstate the original finding of Hardwick's eligibility, and reverse the overpayment determination; or, 2) in the alternative, vacate the Appeals Board order, and order that Hardwick's severance is to be allocated after August 31, 2020.

STATEMENT OF THE CASE AND OF THE FACTS

I. Hardwick, furloughed from FMC on May 1, 2020, applied for, was found eligible for and received unemployment benefits.

On May 3, 2020, Hardwick filed for unemployment insurance, stating that his employer, FMC, had laid him off on May 1, 2020. (1R, Ex. 13, 1)[1] ADES admits it originally found Hardwick eligible for benefits of $240 per week plus the additional federal assistance available at the time. (1R. 2, 2) ADES did not include in the record the notification of eligibility it was statutorily required to issue under A.R.S. § 23-773(B). There is no evidence in the record of any objection by FMC during this period. (*See* Record, generally.)

II. After the furlough, FMC terminated Hardwick's employment effective August 31, 2020, and later paid him sick/vacation pay and severance.

FMC ended the furlough and terminated Hardwick's employment effective August 31, 2020. (1R. 1 12:2-14[2]; Ex. 12, 2-14) Department records reflect that Hardwick was paid vacation/sick pay of $2,200.00 on

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[1] The Index of Record for 1 CA-UB21-0271 is herein referred to as 1R. The Index of Record for 1 CA-UB21-0272 is herein referred to at 2R.

[2] For citations to the hearing transcript, the page number referenced is the page number of the record, not the page number of the transcript. Line numbers are then indicated.

September 3, 2020 (1R., Ex. 7) and severance of $25,500 on October 22, 2020. (1R., Ex. 6).

III. The department deputy subsequently issues a reconsidered determination finding Hardwick ineligible for unemployment insurance from May 3, 2020, through September 12, 2020, and determines Hardwick was overpaid $13,800.

By document entitled "[R]econsidered Determination of Deputy Notice to Claimant" dated December 14, 2020 ("the Reconsidered Determination"), ADES informed Hardwick he is "not eligible for Unemployment Insurance from 05/03/2020 through 09/12/2020." (1R, Ex. 11.) After citing A.R.S. § 23-621 and A.A.C. R6-3-55460, the notice states

> "Payment for unused vacation, holiday, sick pay, severance pay, wages in lieu of notice and for military accrued leave, are earnings. You received one or more of these types of payments. You are not eligible for benefits for the dates shown."

(*Id.*) The notice further states: "[t]he Department did not address the information provided by the employer in a timely manner that resulted in your disqualification." (1R., Ex. 11) The Notice did not mention nor discuss A.R.S. § 23-773(E) which only permits ADES to issue a redetermination after the time permitted to appeal the first ruling under certain circumstances, including that the basis of the redetermination is "newly discovered evidence that by due diligence could not have been

previously discovered…." (1R., Ex. 11) The Notice also stated that ADES "classified your overpayment as administrative/departmental." (*Id.*) Finally, the notice indicates payment from FMC of $25,000.00 covering the period 05/04/2020 to 9/9/2020 with $240 allocated to the benefit week ending 9/19/2020. (*Id.*)

IV. Hardwick appeals to the DES Appeal Tribunal which upholds the deputy's determinations.

A. Hardwick's appeal.

Hardwick appealed from the Reconsidered Determination (1R, 1, 7:8-21; Ex. 8, Ex. 9) indicating he believed the decision was in error. (1R., Ex 9) Among other things, Hardwick specifically requested an explanation of the meaning of "[t]he Department did not address information from my employer in a timely manner," (1R., Ex. 9, 1), an explanation he never received.

B. Summary of the Hearing

The Appeal Tribunal Hearing took place on June 14, 2021, before Administrative Law Judge Richard Ebert ("the ALJ"). (1R. 1, 1-27) Hardwick appeared. (1R 1, 1) FMC did not. (1R. 1, 3:9-10) After the ALJ described certain proposed exhibits, he asked if Hardwick had "any

objection or reason why we should not use them," Hardwick replied, "I guess not that I know of. I feel like I should have had legal counsel for this but can't afford it so…" (1R. 1, 5:20-21). The ALJ responded "All right, that's fine. We normally deal with people who are not represented. Basically, is there any reason we should not discuss them in today's hearing?" (1R. 1, 5:23-6:22) to which Hardwick responded, "Not that I know of." (1R. 1, 6:3) Although Hardwick indicated that he understood the issues to be discussed (1R. 1, 6:12-21), later testimony showed he did not understand the proceedings. (1R. 1, 21:10-14).

After questions about the timeliness of the appeal, not an issue here (1R. 1, 3:3-9:8), the ALJ turned to the issue of "disqualification due to the receipt of vacation, holiday, sick or severance pay." (1R. 1, 10:6-8) In that portion of the hearing, in response to the ALJ's questions, Hardwick testified that he had been employed with FMC since February of 2012 as a mineralogist (1R. 1, 11:15-17, 12:15-23)) He applied for benefits in May 2020 when he went on furlough. (*Id*., 12:5-8)) When he applied for benefits, he did not withhold anything (*Id.,* 21:4-6)) and told them that he was on furlough as opposed to being fired. (*Id.*, 21:7-9) He was then laid off in

August 2020. (*Id.,* 12:9-14, 13:4-12) He was receiving benefits in May 2020. (*Id.*, 15:16-16:2)

Hardwick received around $2200 gross for vacation payout sometime in September (1R. 1, 13:15-14:3) He further testified that he received severance of $25,000 which he believed represented four months' pay. (*Id.*, 14:4-19)

Hardwick testified his last day was August 31, 2020 (1R. 1, 14:20-15:2), and that he had attempted to contact the ADES for the last 6 months without success because he believed they have the wrong date for his last day of work. (*Id.,* 15:9-15). He testified as to other difficulties contacting and receiving responses from ADES, calling them "over 100 times" and having "sent more than 20 emails." (*Id.* 18:15-17)

The ALJ then addressed the issue of overpayment of benefits (1R.1, 19:1-25:6) asking whether the Determination of Overpayment on Exhibit 12, between May 9, 2020 and September 19, 2020, showed he received $13,800 to which Hardwick replied that was likely correct but he was not sure. (*Id.* 20:18-21:1)

The ALJ indicated that this was classified as "Administrative" which "means the fault was on the part of the Department". (R.1, 21:2-4) When

asked if he was aware he could apply for a waiver of repayment with an administrative overpayment, Hardwick replied that he thought that is what this appeal was for. (*Id.* 21:10-14) The ALJ then stated that waiver is a different process through benefit payment control, who would decide if waiver is appropriate, and that determination could be appealed, but that the current hearing was just about the amount. (*Id.* 21:15-22.) Hardwick responded that none of this had been explained to him. (*Id.* 21:23-22:3)

Hardwick then testified that he had tried many times to contact ADES and the best he could understand from the paperwork to request the waiver was to file the appeal. (1R. 1, 22:5-7) The ALJ asked Hardwick if he had ever tried to contact the Claimant or Client Advocate to which Hardwick responded that he had. (*Id.* 23:3-6) When the ALJ stated that "they are supposed to be on your side and explain everything" Hardwick responded "the two times I've gotten them on the phone they took some information and said they [would] give it to a manager for a call back that I never received." (*Id.,* 23:9-11) The ALJ at this point indicated that if Hardwick were to "go into the office they have, our bulletin board has cards for Legal Advocates," (*Id.,* 23:16-21)

Hardwick reiterated that the date seemed incorrect for the overpayment because his last day with FMC was 8/31, not 5/3. (1R. 1, 24:6-9)

C. The Office of Appeals ALJ upholds the determination of ineligibility.

The Appeal Tribunal affirmed the deputy's ruling that Hardwick was "not eligible for benefits from 5/30/2020 through 9/12/2020 due to receiving severance pay." The ALJ made the following findings of fact:

> The claimant was last employed as a mineralogist for the employer, a mining company for approximately eight years until separating from this employment on May 3, 2020. The claimant's rate of pay was $75,000 per year.
>
> The claimant was indefinitely furloughed on or about May 1, 2020. The claimant filed a claim for benefits effective May 3, 2020, and was found monetarily eligible to receive benefits in the amount of $240 plus the federal assistance, per week.
>
> The employer ended the furlough and laid the claimant off August 31, 2020. On September 3, 2020, the claimant received a payment from the last employer in the amount of $2200 for 60 hours of unused vacation, holiday, or sick pay. On October 22, 2020, the claimant received a payment from the last employer in the amount of $25,500 for severance pay, equivalent to 74 days of work.

(1R 2, 2). For the "Reasoning and Conclusions of Law," section, after citing A.R.S. § 23-621 and A.C.C. R6-3-50135.03 of the Arizona Administrative Code, the ALJ stated:

> In this case, the claimant received payments upon separation in the amount of $25,000 representing dismissal or separation (severance) pay and $2200 for unused vacation separation and holiday pay. The unused vacation, holiday, and sick pay represented 60 hours of work while the severance represented 74 days of work.
>
> The claimant argued that the dates of the disqualification were wrong since he was not laid off until August 31, 2020. However, when a claimant files for benefits while on a leave of absence or a furlough, the Department holds that a separation has occurred. The date of separation is considered to be the date the claimant filed for benefits, regardless of his status with the employer. The deputy's determination is correct.
>
> Therefore, I conclude the claimant is not eligible to receive benefits from May 3, 2020 through September 12, 2020.

(1R. 2, 4)

D. <u>The Appeals Tribunal also upheld the deputy's finding of overpayment.</u>

The ALJ also affirmed the determination of overpayment in the amount of $13,800 making the following findings:

> The claimant received benefits in the amount of $13,800 covering the weeks ending May 3, 2020 to September 12, 2020. The claimant filed for benefits on or about May 3, 2020, when he was indefinitely furloughed by his employer. The claimant

> was officially laid off on August 1, 2020. The claimant received payment for unused vacation, holiday or sick pay on September 3, 2020, and a severance payment on October 22, 2020.
>
> Since the claimant filed for benefits while on furlough, the date of filing was considered the separation. When the claimant received the severance payment from the employer, the payment had to be retroactively applied to the claimant's benefit weeks, resulting in this overpayment. The Deputy classified the overpayment as Administrative since it was applied retroactively and due to no fault of the claimant's.

(2R. 2, 2) After quoting A.R.S. § 23-787, and A.A.C. R6-3-1301, the ALJ upheld the classification as administrative and the overpayment amount of $13,800. (2R. 2, 3-4)

V. Hardwick appeals to the Appeals Board which upheld and adopted as its own the decision of the Appeal Tribunal.

A. Hardwick's appeal.

Hardwick appealed to the Appeals Board raising, among other things, that his separation from the FMC was August 31, 2020, that he had signed a contract stating this, and that he was still an employee up to that date, required to follow company policy, check-in and not work for competitors during the furlough. (1R 3, 1-7) He further stated that a group of FMC employees had called ADES and were told that they qualified for unemployment insurance even though they expected to be getting

severance payments at a later date. (1R. 3, 4) He also stated that "this was a court matter with a judge and I was not offered counsel nor do I understand any of this process or paperwork." (1R. 3, 2) He further raised ADES's admission of error stating "I should not be held accountable due to neglect on DES's part, "and "[t]hey admitted this was an administrative fault on their end." (*Id.*)

B. The ADES Appeals Board affirms the Appeal Tribunal on eligibility.

The ADES Appeals Board affirmed the Decision of the Appeal Tribunal. (1R 5, 1-4) After finding the petition for review had been timely filed (1R5, 2) the Appeals Board stated:

> In the petition for review, the Claimant contends that he has a signed agreement with the Employer that specifies that his separation date was August 31, 2020. However, the parties' agreement does not control whether the claimant was unemployed during the period in question in this case. The evidence of record established that the claimant neither worked nor earned wages from May 3, 2020 through September 12, 2020. Under Arizona Revised Statutes Section 23-621A, the Claimant was considered unemployed. In addition, the Claimant filed an unemployment insurance claim on May 3, 2020, certifying to the Department that he was unemployed and entitled to receive benefits. Although the Claimant may have had an ongoing relationship with the Employer between May and September 2020, he was deemed unemployed during that time for purposes of eligibility for unemployment insurance benefits.

***

The Claimant also contends that this was a court proceeding and he was not afforded counsel. He also states that he did not understand the process or paperwork. The claim and did not raise either of these issues during the Appeal Tribunal hearing. The Notice of Hearing in this matter advised the Claimant of his right to be represented in the hearing, and that the Department does not provide representatives to parties. During the hearing, the Claimant did not ask the Appeal Tribunal any questions about the hearing process or the paperwork. The Claimant had an opportunity to address questions about the process and paperwork prior to the hearing or during the hearing and did not do so. He has not established any due process violation.

We have carefully reviewed the record in this case and have considered the contentions raised by the parties.

THE APPEALS BOARD FINDS no material error in the Appeal Tribunal's findings of fact. The reasons and conclusions of law upon which the decision rests are founded upon a proper application of the law to the facts. We adopt the findings of fact, reasoning, and conclusions of law as our own.

(1R5, 2)

C. <u>The Appeals Board affirms the Appeal Tribunal on Overpayment.</u>

The Appeals Board also upheld the Appeal Tribunal's ruling on the Decision of Overpayment. (2R. 5) The Appeals Board stated:

The CLAIMANT petitions for review of the Decision of appeal Tribunal issued on June 14, 2021, which affirmed the December 18, 2020 Determination of Overpayment, and held that the Claimant was overpaid benefits in the amount of $13,800 for the

benefit weeks ending May 9, 2020 through September 19, 2020 and classified the overpayment as Administrative/ Departmental.

The petition has been timely filed, and the Appeals Board has jurisdiction under A.R.S. §§ 23-671 and 23-672.

In the petition for review, the claimant contends that because the Department stated that it did not address information provided in a timely manner, he should not be held accountable. He also contends that he tried repeatedly during the weeks in which he received benefits to contact the Department but received either inadequate information or no information. We infer the claimant argues that because the Department's response was delayed he should be entitled to keep the benefits he received, even though he was not eligible to receive them. The Claimant provides no legal basis for this argument. The Department classified the overpayment as administrative/departmental, a classification that permits the claimant to apply for a waiver of overpayment from the Department. Both the Determination of Overpayment and the Appeal Tribunal decision provided information about the process of applying for a waiver of overpayment. We repeat that information here:

***

We have carefully reviewed the record in this case and have considered the contentions raised by the parties.

THE APPEALS BOARD FINDS no material error in the Appeal Tribunal's findings of fact. The reasons and conclusions of law upon which the decision rests are founded upon a proper application of the law to the facts. We adopt the findings of fact, reasoning and conclusions of law as our own.

(2R.5, 2)

VI. Hardwick's application for appeal which was granted by this Court.

On September 13, 2021, Hardwick filed an Application for Appeals to this Court raising several issues. (R.6, 3-15) This Court granted Hardwick's application for appeal in 1-CA-UB 21-0271 and 1 CA-UB 21-0272 on May 10, 2022, pursuant to A.R.S. § 41-1993.

STATEMENT OF THE ISSUES

1. Did the Appeals Board and the Appeal Tribunal erroneously fail to consider whether ADES proved its deputy met the criteria under A.R.S. § 23-773(E) required for issuing a reconsidered determination of the prior ruling that Hardwick was eligible for benefits, and did ADES fail to meet that burden?

2. Did the Appeals Board and the Appeal Tribunal erroneously apply Hardwick's severance to the first date he was "unemployed" rather than the "last day of performance of services" as required by A.R.S. § 23-621(C)(2) and was Hardwick's last day of performance of services August 31, 2020?

3. Did the Appeals Board erroneously find no violation of Hardwick's due process rights in the Appeal Tribunal hearing?

4. Should the determination of overpayment be reversed?

ARGUMENT

I. The deputy, Appeals Tribunal and Appeals Board all failed to establish that the deputy met the requirements of A.R.S. § 23-773(E) to issue the "reconsidered" determination.

A. The finality of a deputy's initial determination under A.R.S. § 23-773.

When a UI claim is made, an ADES deputy must, by statute, promptly examine the claim, determine its validity, and "promptly notify the claimant and any other interested party of the validity determination and the reasons on which it was based." A.R.S. § 23-773(A) and (B). Unless the claimant or other interested party files an appeal or requests reconsideration within 7 days from delivery or 15 days from mailing to the last known address, the determination "shall become final, and benefits shall be paid or denied in accordance with the determination." A.R.S. § 23-773(B) and (D).

B. The circumstances under which ADES or its deputy may issue a reconsidered determination are limited by A.R.S. § 23-773.

A.R.S. § 23-773 also specifies the circumstances under which a reconsidered determination can be made. A reconsidered determination can be made at the request of an interested party before the expiration of the appeal time (A.R.S. § 23-773(D). If no appeal has been filed, before the

appeal time expires, ADES on its own motion may issue a reconsidered determination. (A.R.S. § 23-773(E)) But once the appeal time has expired, ADES's authorization to issue a reconsidered determination is subject to limitations: 1) it must be filed within one year of the issuance of the original determination (unless the redetermination is based on fraud); 2) it must be authorized by the unemployment insurance program administrator; 3) it must be "on the basis of newly discovered evidence that by due diligence could not have been previously discovered"; and 4) no administrative or judicial review has occurred or is pending on the original determination. A.R.S. § 23-773(E). ADES is required to promptly notify all interested parties of any reconsidered determination under subsection E "and the reasons for reconsideration." A.R.S. § 23-773(F).

C. The burden is on ADES to show the deputy's reconsidered determination was authorized under A.R.S. § 23-773(E).

While neither A.R.S. § 23-773 nor ADES regulations directly address the burden of proof to show that the deputy's reconsidered determination satisfies the requirements of the statute, that burden clearly rests with ADES under the considerations set forth in *A.C. v. Ariz. Dep't of Econ. Sec.*, 249 Ariz. 387, (App. 2020). There, in finding ADES had the burden on a

notice provision involving termination of developmental disabilities services, this Court stated: "[g]iven the silence in the applicable statutes and regulations, it is appropriate to 'resort to other principles of construction' focusing 'on what is fair, what is convenient, who is seeking to change the status quo, and policy considerations such as those disfavoring certain defenses." *A.C.*, 249 Ariz. at 393 ¶ 22 (citations omitted). Here, ADES seeks to change the status quo by redetermining eligibility, a factor that weighs heavily in favor of imposing the burden on ADES. *Id.* It is within ADES's purview to demonstrate that the new information could not have previously been obtained. That the deputy had authorization from the unemployment insurance administrator to issue the reconsidered determination is also within ADES's knowledge and control. In short, the burden should be on ADES to demonstrate that the deputy was authorized by statute to issue the redetermined decision.

D. ADES failed to meet its burden to show the deputy was authorized to issue the reconsidered determination.

ADES did not meet its burden to show that the deputy was authorized to issue the Reconsidered Determination. ADES failed both to identify under which provision of A.R.S. § 23-773 it was issuing the

reconsidered determination, and to meet the burden of proof that it has satisfied the requirements of any such provision.

The Reconsidered Determination does not indicate under which subsection of A.R.S. § 23-773 the redetermined decision is being issued. (1R Ex 11) It does not state that it is based on newly discovered evidence that could not have been previously discovered. On the contrary, it admits that ADES did not timely address information from the employer. (1R Ex. 11)

Further, neither the deputy nor anyone from ADES other than the ALJ appeared at the hearing. The exhibits provided by ADES were sparse at best and incomplete. There was also nothing from the sparse records from which one could determine in what manner ADES had failed to timely act on the employer's information as it admitted in the Reconsidered Determination.

Presumably, the applicable provision here is the portion of § 23-773(E) dealing with the time after the appeal on the original determination has expired but within one year of the original determination. But ADES did not include in the record the original notice of determination by the deputy that Hardwick was eligible for UI, a notice ADES was statutorily required to promptly send after its initial determination of eligibility in

May of 2020, and which would have become final no later than 15 days after it was sent. A.R.S. § 23-773(A). Although ADES did not include the original determination notice as an exhibit, the ALJ found that "[t]he claimant filed a claim for benefits effective May 3, 2020 and was found monetarily eligible to receive benefits in the amount of $240, plus the federal assistance per week." (1R2, 2) There is evidence in the record that ADES investigated the facts after Hardwick made his claim, including verifying with FMC that Hardwick had been furloughed due to COVID-19. It is also undisputed that Hardwick received benefits dating back to early May 2020. And, the December 14, 2020, notice at issue here is called a "reconsidered" notice, suggesting an original notice.

Under these circumstances, it was incumbent on ADES to show that its decision was based on "newly discovered evidence that by due diligence could not have been previously discovered." A.R.S. § 23-773. But the only explanation the deputy gave in the Reconsidered Determination was to the contrary—that ADES had not timely acted on information from

the employer.[3] ADES failed to meet its burden to show that the Reconsidered Determination was authorized.

E. Neither the Appeal Tribunal nor the Appeals Board addressed the issue of whether the deputy was authorized to issue the reconsidered determination.

Hardwick raised the issue of ADES's admission of untimeliness in his appeals to the Appeal Tribunal and the Appeal Board. (1R. 9, 1; 1R. 3, 2) Neither the Appeal Tribunal nor the Appeals Board addressed the fundamental issue of whether the deputy was authorized to issue the reconsidered determination under A.R.S. § 23-773(E).

The Appeal Tribunal did not address the admission of untimeliness by ADES at all in its ruling (2R. 2), even though the issue was directly raised by Hardwick in his appeal. (1R., Ex. 9, 1) Instead, the Appeal Tribunal erroneously held that the deputy had "classified the overpayment as Administrative since it was applied retroactively and due to no fault of the claimants." (2R, 2, 2) This finding was contrary to the explanation of untimeliness provided in the Reconsidered Determination. Further, the

[3] If ADES did not include the original notice because it failed to issue one, in violation of the statutory requirements of A.R.S. § 23-773(B), the burden would still be on ADES to show it was authorized to issue a "reconsidered determination" under these circumstances, which it did not do.

deputy classified the overpayment as administrative/departmental, not simply administrative. (1R., Ex. 11) ADES regulations distinguish between overpayments due to "department" error and those classified as "administrative". *Compare* A.C.C. R6-3-1301(5) with (6). While the classification was administrative, and certainly not due to Hardwick's fault, the deputy had also admitted fault on the part of ADES in not timely acting on information from the employer. To the extent this information was ascertainable before the finalization of the initial determination, ADES would be foreclosed from reopening that determination. It was incumbent on ADES to provide the circumstances.

The Appeals Board did not ignore Hardwick's untimeliness argument. It simply dismissed it. The Appeals Board stated, "[w]e infer the Claimant argues that because the department's response was delayed, he should be entitled to keep the benefits he received, even though he was not eligible to receive them." (*Id.*) The Appeals Board found no merit in this argument, but, again, failed to address the basic issue of the authority of the deputy under A.R.S. § 23-773 to issue the reconsidered determination in these circumstances. (*Id.*)

F. Because ADES failed to meet its burden the decision upholding the Reconsidered Determination should be reversed.

Because ADES failed to meet its burden to show the deputy had the statutory authority to issue a reconsidered determination, the decision of the appeals board incorporating the appeal tribunal ruling which in turn upheld the deputy's determination should be reversed, and the original determination of Hardwick's eligibility reinstated.

II. The Appeals Board and the Appeal Tribunal erroneously allocated Hardwick's severance to May 3, 2020, when any allocation should not have started earlier than September 1, 2020.

Apart from the failure of ADES to show the basis upon which a redetermination could be made under A.R.S. § 23-773(E), the Appeals Board erroneously upheld the ALJ's determination that Hardwick's severance should be applied to the period of May 3, 2020, through September 12, 2020. The allocation should have commenced no earlier than September 1, 2020.

A. Standard of Review

This Court reviews *de novo* the classification of payments affecting eligibility for unemployment compensation. *Capitol Castings, Inc. v. Ariz. Dep't of Econ. Sec.*, 171 Ariz. 57, 60 (App. 1992).

B. Where there is no written agreement in effect at the time of separation, severance is allocated to the period immediately following the performance of services.

A.R.S. § 23-621 provides that "[a]n individual shall not be deemed 'unemployed' if the individual is receiving wages in lieu of notice, or severance pay." A.R.S. § 23-621(C) (emphasis added). Where there is severance pay or wages in lieu of notice, the statute provides that the period for which those payments are allocated is determined by the following:

> 1. If there was a written contract between the employer and the claimant in effect at the time of separation, allocate to the appropriate period in accordance with the contract, continuing for the number of work days that the pay would cover at the regular wage or salary rate.
>
> 2. If no written contract was in effect at the time of separation, allocate to the appropriate period following the last day of performance of services, continuing for the number of work days that the pay would cover at the regular wage rate.

A.R.S. § 23-621(C).

Here, there is no evidence of a written contract in effect at the time of separation. Therefore, the severance should be applied to "the appropriate period following the last day of performance of services…." A.R.S. § 23-621(C).

C. ADES's determination that the date of "separation" is the operative date for the reallocation of severance is erroneous.

The ALJ held that May 3, 2020, was the date allocation should begin stating, "when a claimant files for benefits while on a leave of absence or a furlough, the Department holds that a separation has occurred" and "[t]he date of separation is considered to be the date the claimant filed for benefits, regardless of his status with the employer." (1R.2, 4)

However, A.R.S. § 23-621(C) states that the allocation begins not on the date unemployment begins or the date of "separation,"[4] but after the "last day of the performance of services."

A claimant may be unemployed for purposes of the statutory definition allowing for benefits during a particular week, but still performing services. A claimant is "unemployed" "with respect to any week of less than full-time work without any fault on the individual's part if the wages payable to the individual with respect to the week are less

[4]Hardwick does not agree with ADES's interpretation of "separation," as occurring whenever a claim is made for UI benefits. No such definition exists in the statutes or regulations. But that issue is not pertinent to the determination of allocation of severance except to determine if a contract is in effect as of the date of separation. Here, no such contract was in effect under at the time of separation, no matter how defined.

than the individual's weekly benefit amount." A.R.S. § 23-621(A) Thus, an employee may be unemployed for purposes of eligibility for benefits, but still providing services as long as the wages payable during the week are less than the claimant's weekly benefit amount.

The Appeals Board adopted the Appeal Tribunal's finding that "when a claimant files for benefits while on leave of absence or a furlough, the Department holds that a separation has occurred" and "the date of separation is considered to be the date the claimant filed for benefits regardless of his status with the employer." (1R 2, 4) Likewise, the Appeals Board adopted the Appeal Tribunal's findings that "when the claimant received the severance payment from the employer, the payment had to be retroactively applied to the claimant's benefit weeks, resulting in this overpayment." (2R. 2, 2) Neither the Appeal Tribunal nor the Appeals Board cites authority to support this position.

On the contrary, "the date of separation" is not a concept used in the statutory provision which determines how severance payments are to be allocated. A.R.S. § 23-621(C). Rather, where there was no written contract in effect, allocation is made to the period "following the last day of performance of services…." *Id.* As set forth above, one may still be

unemployed for purposes of qualifying for UI, but still performing part-time work or services, if the wages do not exceed the benefit amount. A.R.S. § 23-621(A) Had the legislature intended to use "the date of separation" or to the weeks when the claimant received benefits, they presumably would have used that language.

In its ruling, the Appeals Board's observations that Hardwick was unemployed between May 3, 2020, and September 12, 2020, as defined by A.R.S. § 23-621(A), and that he certified to ADES in his application that he was unemployed and entitled to receive benefits, do not have a bearing on the allocation of his severance, which is tied not to unemployment, but the last date of performance of services, and which could take place while he was "unemployed" under the statutory definition. As Hardwick argued to the appeals board, he was required to continue to check in with his employer during the furlough and to refrain from working for an employer—performance of services.

While deference is usually accorded to an agency's interpretation of legislation it is charged with implementing, this interpretation "is not infallible" and "courts must remain the final authority on critical questions of statutory construction." *Robbins v. Ariz. Dep't of Econ. Sec.*, 232 Ariz. 21,

24 ¶ 7 (App. 2013). Clear and unambiguous statutory language is applied without resorting to other tools of statutory construction. *Robbins,* 232 Ariz. at 23 ¶ 8. Here, although the statute uses the term "in effect at the time of separation" with regard to whether a written contract was in effect, it uses a different concept: "following the last day of the performance of services" for determining the allocation of severance. Performance of services may take place even when one is statutorily unemployed.

D. Hardwick was still providing services until August 31, 2020.

Here, Hardwick, in addition to repeatedly telling the ALJ that his employment lasted until August 31, 2020, informed the Appeals Board that during this period, he was required by the company to check in weekly and was prohibited from working for a competitor. He was therefore providing some minimal services. Further, Hardwick was receiving no payable wages, so he was receiving less than his weekly benefit amount. Hardwick was therefore providing services, albeit minimal services, until August 31, 2020, when his employment was terminated.

Allocation here makes a significant difference to Hardwick. When collecting UI starting in May of 2020, he was entitled to the $600 additional weekly payments under the Federal Pandemic Unemployment

Compensation ("FPUC") Program of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020. 15 U.S.C.A. § 9023(b)(3)(i). Indeed, $9,000 of the $13,800 "overpayment" is attributable to the federal payments. (2R. Ex. 12, 1) The FPUC $600 payments ended on July 31, 2020. 15 U.S.C.A. § 9023(b)(3)(i). Thus, there is a significant difference to Hardwick if the allocation takes place before or after those funds were available. Entitlement to the funds is handled under the state system for entitlement for UI benefits. See 15 U.S.C.A. § 9023(b)(1), (f)(2), (3) and (4).

E. The erroneous allocation decision by ADES should be vacated.

The Appeals Board and the Appeal Tribunal erroneously held that severance must be applied to the period of unemployment/receipt of UI benefits. If severance is to be allocated here, it should be allocated no earlier than September 1, 2020, the date following the last day of performance of services.

III. The Appeals Board erroneously found that Hardwick failed to raise his concerns about lack of counsel or his lack of understanding of the proceedings, and erroneously held there was no violation of his due process rights.

In addition to the arguments set forth above, the Appeals Board decision should be reversed based on the denial of Hardwick's

constitutional due process rights regarding his expressed concern regarding lack of counsel, his confusion regarding the hearing, and the failure of ADES to postpone the hearing until Hardwick could obtain counsel and gain an understanding of the process.

A. Standard of Review

This Court reviews *de novo* constitutional claims raised on appeal. *Hobson v. Mid-Century Ins. Co.*, 199 Ariz. 525, 528 ¶ 6 (App. 2001).

B. Hardwick's interest in unemployment benefits is a property interest implicating constitutional due process.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Gallarzo v. Ariz. Dep't of Economic Security*, 245 Ariz. 318, 320-21 ¶ 8 (App. 2018) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976)). Claimant's interest in unemployment benefits involves property interests that implicate due process. *Gallarzo,* 245 Ariz. at 321 ¶ 9 (App. 2018). This right is often meaningless without the assistance of counsel. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970).

In *Martin v. Indus. Comm'n*, 120 Ariz. 616, 617 (App. 1978), this Court held that Martin's due process rights had been violated where the record showed she was confused about the administrative proceedings in which she was involved and had indicated that she thought she needed an attorney. 120 Ariz. at 618. Hardwick found himself, here, in a similar position.

C. Contrary to the Appeal Board's findings, Hardwick's issues of lack of counsel and lack of understanding of the process were raised in the hearing before the ALJ.

The record does not support the Appeals Board's findings that Hardwick had neither raised the issue of lack of counsel (R.5, 2) nor sought assistance in understanding the hearing process and paperwork (*Id.*). Near the outset of the hearing, when the ALJ asked if Hardwick had any objections to admission into evidence of ADES's exhibits, Hardwick stated: "I feel like I should have had legal counsel for this, but can't afford it so…." (R.1, 5:20-22)

Hardwick also testified about the many times he had attempted to obtain assistance from ADES on this matter without success. (1R.1, 15:9-12) ("I've tried to call, contact the Unemployment Office. I've been trying to contact them for the last six months and I've still not gotten any contact

with them about this"); 17:12-18)("I've called a hundred, over a hundred times and sent more than 20 emails"); (In response to the ALJ's question of whether Hardwick had tried to contact the Claimant or Client Advocate, Hardwick testified that he had but "[t]he two times I've gotten them on the phone they took some information and said they would give it to a Manager for a call back that I never received.")

Toward the end of the hearing, when the ALJ asked Hardwick if he was aware he could apply for a waiver of repayment, he responded "Yes, I thought that was what this appeal was for." (R. 1, 21:10-14). He told the ALJ that waiver being a separate process had not been explained to him and stated, "I have tried to call a lot of times and the best I could get from the paperwork was to request a Waiver was to file an Appeal." (R.1, 22:6-7)

D. Given Hardwick's repeated attempts to obtain information from ADES and his expressed concern about needing counsel he could not afford, the ALJ violated Hardwicks due process rights by not informing him of the availability of legal advocates and other department resources and postponed the hearing until he had access.

Toward the end of the hearing, the ALJ informed Hardwick that he called the front office, they have a bulletin board of "Legal Advocates", and that he could get a phone number of one of these Advocates off the bulletin

board who might be able to help him. (R. 1, 23 (22:16-23:1) The ALJ could have and should have provided this information to Hardwick at the beginning of the hearing when Hardwick stated that he thought he should be represented by counsel. No other parties were attending the hearing, so there was no reason the ALJ could not have informed Hardwick of the possibility of using a Legal Advocate and postponed the hearing until he had a chance to do so. By not inquiring further when Hardwick indicate he thought he should have counsel and providing Hardwick with the information about the Legal Advocates, the ALJ deprived Hardwick of his due process rights by proceeding with the hearing.

For the same reasons set forth in *Martin v. Indus. Comm'n*, 120 Ariz. at 617, Hardwick's due process rights were violated.

E. The violation of Hardwick's due process rights caused him prejudice and should be reversed.

This Court will reverse for a violation of due process which results in prejudice and injures a party's substantial rights. *Emp't Sec. Comm'n v. Dougherty,* 13 Ariz. App. 494, 496 (1970). Here by being deprived of counsel and other resources, despite multiple attempts to obtain help,

Hardwick would be prejudiced to the extent any issue raised here is deemed not sufficiently raised below or otherwise appealable.

To the extent the issues in this appeal are not conclusively resolved in Hardwick's favor as determined by other arguments, the case should be remanded for retrial after Hardwick is given access to counsel.

IV. The Overpayment order should be reversed.

As set forth above, the rulings of ineligibility that underlie the overpayment ruling were erroneously entered. Therefore, the overpayment ruling should also be reversed.

CONCLUSION

For the foregoing reasons, Appellant Ryan Hardwick respectfully requests that this Court reverse the decision of the Appeals Board, find that ADES failed to meet its burden to show authorization to enter the Reconsidered Determination, reinstate the determination of eligibility and vacate the overpayment order, and remand to ADES for further actions consistent with this Court's ruling. In the alternative, Appellant respectfully requests that this Court reverse the decision of the Appeals Board and order that severance be applied starting September 1, 2020, and remand to ADES for further actions consistent with this Court's ruling.

RESPECTFULLY SUBMITTED this 6th day of September, 2022.

MARK J. DEPASQUALE P.C.

/s/ Mark J. DePasquale

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CERTIFICATE OF COMPLIANCE

1. This certificate of compliance concerns a brief, and is submitted under ARCAP Rule 14(a)(5).

2. The undersigned certifies that the brief to which this Certificate is attached uses type of at least 14 points, is double-spaced and contains 6,761 words.

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Mark J. DePasquale