

0013 2291 90 (June 3, 2015) – Use of unemployment benefits to pay for travel, clothing, and entertainment did not materially alter the claimant’s position for the worse. Therefore, it would not be “against equity and good conscience” to require the claimant to repay overpaid benefits and she is not entitled to a waiver pursuant to G.L. c. 151A, § 69(c). Where the claimant did not apply for food stamps or other forms of public assistance, but merely asserted that her receipt of unemployment benefits rendered her ineligible, the Board declined to conclude that the claimant “relinquished a valuable right.”

**Board of Review**  
**19 Staniford St., 4<sup>th</sup> Floor**  
**Boston, MA 02114**  
**Phone: 617-626-6400**  
**Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.**  
**Chairman**  
**Stephen M. Linsky, Esq.**  
**Member**  
**Judith M. Neumann, Esq.**  
**Member**

**Issue ID: 0013 2291 90**  
**Claimant ID: 2017782**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny a waiver of recovery of \$21,240.00 in overpaid unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

The claimant requested a waiver of recovery of overpaid benefits, which was denied in a determination issued on March 26, 2014. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by the claimant, the review examiner affirmed the agency’s initial determination and denied the waiver in a decision rendered on June 16, 2014.

The review examiner denied the waiver on the grounds that recovery of the overpaid benefits would not defeat the purpose of benefits otherwise authorized, pursuant to G.L. c. 151A, § 69(c), and 430 CMR 6.03. After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we remanded the case to the review examiner to take additional evidence to: (1) clarify the amount of taxes the claimant pays each month; and (2) have the review examiner take evidence as to whether recovery of the overpaid benefits would be against equity and good conscience. The claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s conclusion that the claimant is not entitled to a waiver is supported by substantial and credible evidence and is free from error of law, where the consolidated findings of fact indicate that the claimant used at least some of the unemployment benefits to buy things which she would not have otherwise purchased if she had not received the benefits, but where those purchases did not result in a change in the claimant’s financial position, as that term is used in the applicable regulations.

## Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant received unemployment benefits totaling \$21,240 during the period of 2/23/13 through 12/28/13. A decision rendered by the Board of Review on 1/27/14 found the claimant ineligible for unemployment benefits. Thus, the claimant was determined to have been overpaid \$21,240.
2. On 3/25/14, the claimant submitted an application for waiver of recovery of the amount of the overpayment.
3. On 3/26/14, the DUA issued a Notice of Disqualification, finding the claimant ineligible for a waiver because she failed to establish that her income or resources were insufficient to enable her to meet her ordinary living expenses and repay the debt.
4. On 4/7/14, the claimant appealed the Notice.
5. The claimant works part-time, averaging 20–25 hours per week; she is paid \$18.50 per hour. The claimant's average weekly income (22.5 hrs X \$18.50) is \$416.25. During the three month period of 12/30/13 through 3/22/14, the claimant earned total wages of \$5235.50. The claimant's actual tax liability on the wages earned during this period included \$612 federal; \$324.60 FICA; \$75.91 Medicare; and \$257.45 state. The average monthly deduction for federal taxes was \$204 per month. The average monthly deduction for state taxes was \$85.82. The average monthly deduction for Medicare was \$25.30. The average monthly deduction for FICA was \$108.20. The claimant's average monthly income for the period of 12/30/13 through 3/22/14 was \$1745.17. The total average deduction for payroll taxes was \$423.32. The claimant did not have any money withheld from her paycheck for deposit to a retirement account. The claimant did not have any other money taken from her paycheck for any other reason.
6. The claimant changed her position for the worse as a result of accepting the unemployment benefits. The claimant used the benefits to provide for her ordinary living expenses and to pay for trips, entertainment, and clothing. The claimant charged more than \$12,000 to her credit card for travel, entertainment, and clothing which she would not have purchased, had she not received the unemployment benefits.
7. The claimant did not apply for food stamps, MA Health, fuel assistance, or any other public assistance while receiving unemployment insurance benefits. The claimant did not apply for any assistance because she concluded that her annual income, (which including the unemployment benefits, exceeded

\$49,000) would make her financially ineligible. The claimant based this conclusion upon her prior work experience in the field of human services.

8. The claimant owns and resides in a multi-unit dwelling. The value of the property is \$85,000; the claimant owes \$64,127 on an outstanding mortgage and her monthly mortgage payment is \$526. The claimant pays \$133 per month for real estate taxes on the property. The claimant has tenants who pay her \$450 per month for rent, which includes heat. The tenants are responsible for paying their other utility bills.
9. The claimant has a 401k account with a balance of \$100,000. The claimant has \$1000 in a personal savings account and \$300 in a checking account.
10. The claimant owes \$7303.70 on an outstanding equity loan. The claimant pays \$50 per month toward the outstanding balance. The claimant is required to pay only the monthly interest on the outstanding balance.
11. The claimant owns a vehicle, a 2003 Mazda Protégé. The value of the vehicle is \$500. The claimant pays \$60 per month for automobile insurance. The claimant pays \$60 per week (\$258 per month) for gas to fuel her vehicle.
12. The claimant pays \$41 per month for her homeowner's insurance policy.
13. The claimant pays \$80 per month for electricity; \$180 per month for her telephone, cable, and internet services; and \$150 per month for water and sewer services. The claimant heats her home with oil. The claimant spent approximately \$2500 in the past year to heat her home. ( $2500/12=\$208.33/\text{month}$ ) The claimant's monthly utilities total \$618.33.
14. The claimant spends \$50 per month on clothing and \$200 per month on food.
15. The claimant has outstanding medical expenses which total \$1806. She has outstanding dental expenses totaling \$2963. The medical and dental expenses total \$4769.
16. The claimant has two credit cards. The total outstanding balance on these cards is \$1000.
17. The claimant's employer pays \$300 per month for the claimant's health insurance. The claimant contributes \$67 per month toward the cost of her health insurance.
18. The claimant's monthly income from her work and rental property totals \$2239.88.

19. The claimant's savings and checking assets total \$101,800. The claimant has equity in her property of \$13,569.30. (\$85,000 value less \$64,127 mortgage = \$20,873 less \$7,303.70 loan)
20. The claimant's income and assets total \$117,609.18.
21. The claimant's monthly expenses and liabilities total \$8,499.03.
22. The claimant's income and assets exceed her expenses and liabilities.

### Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact, with the exception of the first sentence of Finding of Fact # 6, which is a legal conclusion in that it implies an interpretation of DUA regulation, 403 CMR 6.03. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We also affirm the review examiner's initial legal conclusion, prior to remand, that the claimant's overpayment should not be waived.

G. L. c. 151A, § 69(c), provides, in relevant part, as follows:

The commissioner may waive recovery of an overpayment made to any individual, who, in the judgment of the commissioner, is without fault and where, in the judgment of the commissioner such recovery would defeat the purpose of benefits otherwise authorized *or* would be against equity and good conscience.  
(Emphasis supplied)

Under G. L. c. 151A, § 69(c), if the claimant received an overpayment of unemployment benefits without fault, it is her burden to establish either that the recovery of such benefits would defeat the purpose of benefits otherwise authorized or would be against equity and good conscience. At the initial hearing, the review examiner concluded that the claimant had not established that recovery would defeat the purpose of benefits otherwise authorized. She did not address whether recovery would be against equity and good conscience.

As to fault, the review examiner's findings indicate that the overpayment resulted from a decision of the Board of Review to reverse the initial allowance of benefits by the agency. Since the claimant had collected the benefits pursuant to determinations from the agency that she was eligible to do so, and there is no evidence that those determinations resulted from any misrepresentations, the overpayment did not result from the claimant's fault.

As to the waiver, we consider first whether or not the recovery of the overpaid benefits would "defeat the purpose of benefits otherwise authorized," or, in other words, whether the recovery would deprive the claimant of income required for ordinary and necessary living expenses. 430 CMR 6.03 provides, in relevant part, as follows:

Ordinary and necessary living expenses include, but shall not be limited to:

(a) fixed living expenses, such as food and clothing, rent, mortgage payments, utilities, accident and health insurance, taxes, and work-related transportation expenses;

(b) medical and hospitalization expenses;

(c) expenses for the support of others for whom the individual is legally responsible;

(d) other miscellaneous expenses which may reasonably be considered as part of an individual's necessary and ordinary living expenses.

Based on the review examiner's findings of fact, the claimant had necessary and ordinary living expenses of \$1,805.33 per month. This includes: \$526.00 for her mortgage, \$168.00 for various insurance premiums (auto, homeowner's, health), \$200.00 for food, \$50.00 for clothing, \$60.00 for automobile fuel, \$50.00 for an equity loan, \$133.00 for real estate taxes, and \$618.33 for utilities (electric, telephone/cable/internet, water/sewer, and heating oil).<sup>1</sup>

As to income, the review examiner found that the claimant earns, on average, \$1,789.88 gross per month. Subtracting out the payroll deductions made from the claimant's gross pay (federal taxes, state taxes, Medicare, and FICA) gives net wages of \$1,366.55 per month. The claimant also receives rental income of \$450.00 per month, for a total of \$1,816.55 per month. This amount just meets the claimant's necessary and ordinary living expenses.

We note that, even if we use the figure given by the review examiner in Finding of Fact # 5 of a monthly income of \$1,745.17, we are not persuaded that the claimant has carried her burden to show that recovery of the overpaid benefits would defeat the purpose of benefits otherwise authorized. The difference of \$44.71 would bring the claimant's monthly expenses just barely over her net monthly income. However, based on the review examiner's findings regarding the claimant's overall financial circumstances, we do not think that this deficit shows that the claimant cannot meet her monthly living expenses.<sup>2</sup>

We now consider whether waiver may be appropriate on the ground that recovery of the overpaid benefits would be against equity and good conscience. 403 CMR 6.03 provides, in relevant part as follows:

---

<sup>1</sup> We also note that the review examiner found that the claimant owes \$1,000.00 on her credit cards. The review examiner did not make findings about what the claimant used her credit cards to pay for. Therefore, we do not include them in our calculation here. The review examiner also found that the claimant had medical and dental expenses of \$4,769.00. It is unclear when these expenses were incurred, how much the claimant pays toward the bills each month, and what the expenses were for. Therefore, we do not include them as necessary living expenses.

<sup>2</sup> We do note that the review examiner's Findings of Fact # 20 and # 21 may not properly reflect the applicable standards which the Board uses to determine if recovery would deprive an individual of ordinary and necessary living expenses. For example, the \$117,609.18 figure for the claimant's income and assets does not reflect the amount of liquid income she has each month to use to pay her expenses.

Against equity and good conscience means that recovery of an overpayment will be considered inequitable if an overpaid claimant, by reason of the overpayment, relinquished a valuable right or changed his or her position for the worse. In reaching such a decision, the overpaid claimant's financial circumstances are irrelevant.

As noted above, the review examiner did not consider this provision in her initial decision. This constituted a legal error and was one of the reasons for the remand for additional evidence. From the consolidated findings of fact, we cannot conclude that the claimant relinquished a valuable right by accepting the unemployment benefits. The review examiner found that she did not apply for other public benefits, such as food stamps or fuel assistance, because of her own belief that she would not be eligible for them. Thus, the record does not contain any documentation which indicates that the amount of income (from unemployment benefits) would, in fact, have been a basis for the denial of those public benefits. See Milton v. Harris 616 F.2d 968 (973) (7<sup>th</sup> Cir. 1980) (*per curiam*, stating that plaintiff, who did not apply for public assistance, "could not have shown that recovery of the overpayments was inequitable merely because she had subjectively determined" that she did not qualify).<sup>3</sup> Therefore, the record lacks substantial and credible evidence that the claimant actually did relinquish a valuable right to other benefits by accepting the unemployment benefits.

However, the review examiner did make a specific finding that the claimant spent thousands of dollars for travel, entertainment, and clothing, which she would not have purchased but for receiving the unemployment benefits. She took on this extra debt under the assumption that she could use the unemployment benefits to pay for it. We do not believe, however, that, in paying for travel, entertainment, and clothing, the claimant changed her position for the worse, within the meaning of 430 CMR 6.03.

We observe at the outset the general rule, which is that overpaid claimants — even those who were overpaid without fault on their part — are expected to repay their overpaid benefits. This general rule is well grounded in the relevant federal and state unemployment statutes,<sup>4</sup> as well as the regulations imposing upon claimants the burden of proof to obtain a waiver.<sup>5</sup> The simple spending of erroneously paid unemployment benefits cannot in itself amount to a change in one's position for the worse for purposes of the regulation. After all, anyone who spends the benefits would have changed his or her position for the worse (having spent the money, they no longer have it, which is worse than having it). The term "change in *position*" must imply something more than having spent the benefits, or virtually no one would be subject to repayment.

We also reject an interpretation that would permit waiver any time a claimant can demonstrate that she would not have made a particular expenditure but for having received the benefits. This

---

<sup>3</sup> We decline to require that review examiners in every waiver case must decide the question of whether a person has relinquished a valuable right by taking evidence and then applying whatever statutory, regulatory, or administrative eligibility criteria may apply to a particular public benefit. However, to require that a claimant submit documentation as to whether she gave up rights to other public assistance is consistent with the burden which is placed on the claimant to show that she should be granted a waiver.

<sup>4</sup> See e.g. Social Security Act, 42 U.S.C. § 503(g); Trade Adjustment Assistance Extension Act of 2011 (Pub.L.112-40); The Middle Class Tax Relief and Job Creation Act (Pub. L. 112-96); and G.L. c. 151A, § 14Q.

<sup>5</sup> 430 CMR 6.05(a).

would also lead to an overbroad result, at odds with the general rule that overpayments ought to be repaid. It would also be fundamentally inequitable as, almost by definition, it would apply only to discretionary expenditures, rather than those required to meet basic living expenses, and would thus have a pronounced tendency to favor claimants with more financial resources. While the regulation states that “the overpaid claimant’s financial circumstances are irrelevant” in determining whether repayment is against equity and good conscience, this simply means that, unlike the first prong, a claimant can obtain a waiver on this ground whether or not she has the ability to repay the funds. It does not require us to conclude that every claimant who made expenditures they would not otherwise have made thereby “changed his or her position for the worse.” For the foregoing reasons, we decline to construe the language so broadly.

This Board can, however, contemplate certain circumstances in which a claimant’s current and/or ongoing financial position was changed for the worse by a decision that was made possible by receipt of unemployment funds. For example, using erroneously paid benefits to enter into a continuing contractual obligation such as a child’s school tuition or to lease or purchase a car or other property could alter a claimant’s “position” for the worse. In contrast, a one-time consumption of goods or services, such as travel, entertainment or clothing, does not amount to a change in “position” within a reasonable interpretation of the regulation. There is nothing in the record before us indicating that the claimant’s consumption of the relevant goods or services has imposed upon her any present or future obligation, contractual or otherwise, that has materially altered her “position” for the worse.<sup>6</sup>

In reaching our decision in this matter, we have reviewed a wide array of federal case law relative to the overpayment waivers of social security, welfare, disability and workers’ compensation benefits. We recognize that, in these contexts, some federal courts have sanctioned a broader definition of what constitutes a change in “position.” *See, e.g., McConnell v. Dir., Office of Workers’ Compensation Programs, U.S. Dept. of Labor*, 993 F.2d 1454 (10<sup>th</sup> Cir. 1993) (allowed partial overpayment waiver of monies spent on vacation with overpaid worker’s compensation benefits under Black Lung Benefit Act); *Quinlivan v. Sullivan*, 916 F.2d 524 (9<sup>th</sup> Cir. 1990) (granted waiver to claimant, who spent his overpaid disability benefits on clothes, a used truck, and daily living expenses after he got out of prison). In these cases, however, the courts have grounded this broader definition on clear findings of a congressional intent in the relevant statutes, to broaden and facilitate the granting of overpayment waivers.

We discern no such congressional intent in the federal unemployment insurance statutes as most recently amended. Indeed, a plain reading of the relevant provisions of these statutes indicates a clear congressional intent to promote a broader recovery of overpayments. Our reading of the relevant overpayment waiver provisions in this regard is consistent with the statutory construction given by the federal courts. *See, e.g., UAW v. Dole*, 919 F.2d 753 (D.C. Cir. 1990). In *Dole*, the Court upheld the constitutionality of U.S. Labor Department’s Trade Act regulations, which narrowly defined the equity and good conscience circumstances for the granting overpayment waivers. In so holding, the Court observed that the legislative history of

---

<sup>6</sup>Even assuming *arguendo* that the claimant had incurred ongoing credit card or other debt in order to pay for the relevant good and services, this would not constitute a material change in “position.” To hold otherwise would mean that anyone who assumed a debt to pay for goods or services while collecting overpaid benefits would have changed their “position” for the worse. For the reasons set forth in this decision, we decline to construe the waiver language so broadly.

the 1988 Trade Act amendment indicated that Congress passed these amendments in a determined effort to prompt a broader recovery of overpayment and thereby serve the legislators' primary, cost-cutting objective. *Id.* at 759–760. We believe that our limited view as to what constitutes a change in “position” within the meaning of 430 CMR 6.03, is reasonably related to, and consistent with, the clearly expressed congressional intent to facilitate the recovery of overpaid unemployment insurance benefits, and thereby reduce the costs of unemployment programs.

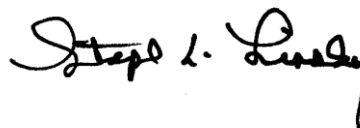
We, therefore, conclude as a matter of law that the review examiner's decision to deny a waiver of recovery of overpaid benefits was correct as a matter of law, as recovery of the overpaid benefits would not be against equity and good conscience, within the meaning of G. L. c. 151A, § 69(c).

The review examiner's decision is affirmed. The claimant is not entitled to a waiver of recovery of unemployment benefits.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 3, 2015**



Paul T. Fitzgerald, Esq.  
Chairman



Stephen M. Linsky, Esq.  
Member



Judith M. Neumann, Esq.  
Member

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT  
COURT OR TO THE BOSTON MUNICIPAL COURT  
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:  
<http://www.mass.gov/courts/court-info/courthouses>

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.