

# New York State Department of Labor

## **A-750-2153**

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NEW YORK STATE DEPARTMENT OF LABOR  
UNEMPLOYMENT INSURANCE DIVISION  
ADJUDICATION SERVICES OFFICE

February, 2015

INTERPRETATION SERVICE-BENEFIT CLAIMS

Availability and Capability  
Total or Partial Unemployment  
Work Without Pay

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Pro Bono Activities and Eligibility for Benefits

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A claimant, who is an attorney, does not necessarily lack total unemployment or is unavailable for work, while performing pro bono legal services.

A.B. 577,763

The Department of Labor issued the initial determinations holding the claimant ineligible to receive benefits, effective October 15, 2012, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$9,315 in benefits recoverable pursuant to Labor Law 597 (4); and reducing the

claimant's right to receive future benefits by 204 effective days on the basis that the claimant made willful misrepresentations to obtain benefits. The claimant requested a hearing.

The Administrative Law Judge held a hearing at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances on behalf of the claimant, the employer, and the Commissioner of Labor. By decision filed April 1, 2014 (A.L.J. Case No. 114-02604), the Administrative Law Judge granted the claimant's application to reopen A.L.J. Case Nos. 113-09973 and 113-06042, modified the initial determination holding the claimant ineligible to receive benefits, effective October 15, 2012, on the basis that the claimant was not totally unemployed, to be effective October 27, 2012, November 7, 2012, November 19, 2012, November 20, 2012, November 26, 2012, December 4, 2012, December 14, 2012, December 28, 2012, January 4, 2013, January 8, 2013, January 18, 2013, February 4, 2013, February 26, 2013, March 6, 2013, March 11, 2013, March 14, 2013, March 18, 2013, March 19, 2013, March 20, 2013, March 26, 2013 and April 3, 2013, and as so modified sustained the initial determination of lack of total unemployment, and referred the amounts of the recoverable overpayment and the forfeiture penalty for willful misrepresentation to the Department of Labor for recalculation in accordance with the decision.

The claimant appealed the Judge's decision to the Appeal Board, insofar as it sustained the initial determinations of lack of total unemployment, recoverable overpayment and willful misrepresentation as modified by the Judge's decision. The Board considered the arguments contained in the written statement submitted on behalf of the claimant.

Based on the record and testimony in this case, the Board makes the following

**FINDINGS OF FACT:** The claimant, a licensed attorney in the State of New York, worked as a municipal executive from January 2008 until May 15, 2012 when she lost her employment in September 2012 under circumstances not at issue. Since 2008 she ended her activities for her private law practice which was based in her home. She did not keep a legal calendar for that period. She did not deduct anything from the law firm on her personal income taxes in 2010, 2011 or 2012. She was listed in official publications as an attorney specializing in municipal planning.

On October 15, 2012, she filed an original claim for benefits online. While receiving benefits, she continued to provide free legal services for two churches she had dealt with in her former city executive capacity. The first church, represented by its own counsel, was scheduled for demolition. The claimant gave assistance on how to use the media to try to halt this. She addressed the municipal zoning board of appeals. She made telephone calls, created e-mails and produced some legal documents for a dispute involving sale of the church's property. The second church was scheduled to be closed by its religious authority. The claimant assisted members of the congregation to articulate and publicize their opposition to this decision. She counseled a long-time, former real estate client, to reduce the asking price to facilitate the sale of his business. She advised an energy entrepreneur trying to open an energy company. Had he succeeded, the claimant may have been hired as a corporate official, not as an attorney. She counseled a long-time female friend who did not have the resources to hire an attorney for her post-divorce, domestic abuse problems. This person was not yet ready to take legal action. The claimant did not receive remuneration for these efforts. On average, she spent an hour or less on these matters for two days a week. She spent several hours on days when she was drawing up legal paperwork for the churches. During the benefit period, she checked two e-mails addresses for her law firm twice a week. She handed out business cards with her

contact information in order to generate the possibility for new business. She did not advertise her legal services. Her pro bono efforts did not produce new business for the law firm because of the impact of the circumstances of her separation from her last employment. She continued to seek work as a municipal official without success. During the benefit period the claimant had three illnesses that reduced her activity level. As of January 2014, the legal matters she was involved in were no longer active and remained incomplete. The claimant acknowledged that on the following days she provided pro bono legal services to the foregoing entities and individuals: October 27, November 7, November 19, November 20, November 26, December 4, December 14, December 28 of 2012; January 4, January 8, January 18, January 28, February 4, February 26, March 6, March 11, March 14, March 18, March 19, March 20, March 26 and April 3 of 2013.

After she filed her claim for benefits, the claimant accessed, printed and read the *Claimant Information Handbook* (hereinafter *Handbook*). On page 9, she read the section entitled, *What is considered work* which stated, You must report all the work that you perform whether it is for yourself, a friend, a relative, an employer, or in connection with a public office that you hold. Any activity that brings in or may bring in income at any time must be reported. You are considered employed on any day when you perform any services, even an hour or less, in self-employment, on a freelance basis, or for someone else. It makes no difference whether this work is in covered employment or whether you get paid for that day . On page 10, she read the section entitled, *What if I do volunteer work?* which stated, You may be eligible for unemployment insurance benefits while volunteering, providing the volunteer work meets the following criteria: volunteer work is for a charitable, or religious, or special organization and you do not receive payment in any form for your volunteer work; if the volunteer work is not a precondition to being hired or rehired into a paid position; and your volunteer duties do not interfere with your ability to search for work and do not affect or limit the number of days and hours you are going to work. You may be considered employed on any day or any part of a day when you perform even minor duties or favors for a friend or relative s business whether you get paid or not. You should call the TCC [Telephone Claims Center] and give all details before claiming benefits. In November 2012, the claimant spoke to a Department of Labor representative in the Division of Employment Services office in Troy, New York (hereinafter DOES) about her certification situation. She was concerned about the effect of the advice she provided to her friend, the energy entrepreneur on her eligibility. The claimant did not expect to be hired by him until the fall of 2013. The claimant was advised that the possibility of work for any company she may have formed was so remote that her services for him would not be considered work for unemployment insurance purposes. She was not verbally advised to call the TCC for information on certification for benefits. She did not expect and was not paid for her pro bono work. For each week during her benefit period, the claimant certified to having done no work in reliance on the criteria articulated in the section entitled, *What if I do volunteer work?* As a result of her weekly certifications, she received \$9,315 in regular unemployment insurance benefits.

OPINION: As the granting of the claimant s application to reopen A.L.J. Case Nos. 113-09973 and 113-06042 has not been appealed, it remains the law of the case that the claimant had good cause not to proceed in the prior hearings.

The credible evidence establishes that during the claimant s benefit period, starting on October 15, 2012 through April 29, 2013, the claimant provided occasional free legal services to individuals and religious organizations. We disagree with the Judge s conclusion that the claimant should have known from the written advice in the *Handbook* under the section *What is considered work?* that her occasional pro bono activities constituted work for unemployment insurance purposes simply because she had an extant though inactive law firm. We find that the claimant s activities fall squarely within the guidelines described in the section *What if I do volunteer work?* Although she handed out her business cards with contact information during these pro bono activities and checked e-mails, neither the cards nor her free services enhanced her ability to generate new business on behalf of her defunct law firm. Significantly, she did not advertise on

behalf of the law firm. She made no court appearances. She earned no money. She also continued her search for work in her chosen field of municipal service. This set of facts stands in contrast with those in *Matter of Moreira-Brown* (36 AD3d 987). That attorney was in the start-up phase of a law firm and expended substantial efforts to acquire legal work. Notably, none of his activities involved rendering free legal services. In the case now before us, we have an inactive law firm which has not generated any income in years since 2008. The Court in *Matter of Haseltine*, 30 AD3d 938, held that a claimant who ceased operating her construction business, stopped performing services because she was working for her employer and had only not terminated the certificate of doing business was held not to stand to gain financially from her defunct business. There was no evidence that she performed substantial activities on behalf of that business while collecting benefits. The same applies to the instant case where the claimant handed out her business card while performing pro bono work but had no success getting any business for her defunct law firm while looking for work as a municipal executive without success. The claimant's free legal activities did not resurrect her law firm as an active, functioning law practice capable of growing and providing an income. As there was no ongoing business, we further conclude that the claimant did not stand to gain financially from her law firm (Compare *Matter of Restivo*, 24 AD3d 1007 wherein that claimant performed minimal activities for an ongoing business and was held to lack total unemployment). Finally, we also note that as an ethical matter, attorneys are now encouraged and may be required to perform such free legal services for individuals and organizations with no means to pay for them.

We recently reconsidered our prior holdings on the matter of performing volunteer services in the context of total unemployment while receiving unemployment benefits and looking for work (See Appeal Board No. 577489). The claimant performed services as a clerical aide for a hospital during his benefit period. As that claimant searched for work, got reimbursed \$5 for meal expenses and received no pay, the Board found that his volunteer work did not interfere with his search for work. The Board cited a case involving an attorney who usually drove cabs for his living, performed pro bono immigration law work on his laptop while in the hospital (See Appeal Board No. 554731). We concluded that the performance of such pro bono work did not affect his total unemployment because it was not in gainful employment, even if the activity might lead the claimant to become employed at some future time. We also concluded that it was neither the intention of the Legislature nor the public policy of this State that unemployment benefits be denied to claimants who engage in such activity in order to improve their chances of obtaining employment (See Appeal Board No. 360187). Therefore, under the facts of this case we conclude that the claimant reasonably interpreted the *Handbook* to infer that her pro bono legal services constituted volunteer work which fell within the stated guidelines. Accordingly, we further conclude that the claimant was totally unemployed and was eligible to receive the benefits she received. It follows and we so conclude that there is no overpayment of benefits.

The credible evidence further establishes that, based upon the foregoing analysis, the claimant accurately certified that she performed no work while searching for work, performing pro bono services and receiving benefits during the period at issue. We note that the claimant asked about the certification process when she reported to the DOES office in Troy. Since the claimant read the pertinent sections in the *Handbook*, asked for advice at the DOES office, believed that she met the criteria under the section, *What if I do volunteer work?* while diligently looking for work, her weekly certifications that she did not work the previous week were accurate. There was no reason why she should have doubted the advice she received when read in conjunction with the *Handbook*. Thus, while the claimant could have called the TCC for advice, there was no apparent reason under these facts to do so. Accordingly, we conclude that the claimant did not make willful misrepresentations in order to receive benefits and that the 204 effective day forfeiture penalty shall not be imposed.

DECISION: The decision of the Administrative Law Judge, insofar as appealed from, is reversed.

The initial determinations, holding the claimant ineligible to receive benefits, effective October 15, 2012, on the basis that the claimant was not totally unemployed; charging the claimant with an overpayment of \$9,315 in benefits recoverable pursuant to Labor Law 597 (4); and reducing the claimant's right to receive future benefits by 204 effective days on the basis that the claimant made willful misrepresentations to obtain benefits, are overruled.

The claimant is allowed benefits with respect to the issues decided herein.

### COMMENTS

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1. This Appeal Board decision is consistent with the principles set forth in Unemployment Insurance Program Letter (UIPL) No. 16-12, Payment of Unemployment Compensation to Individuals who are Volunteering (April 19, 2012). The purpose of this UIPL is to strongly encourage states to both promote volunteerism in their communities, and interpret state law to not disqualify individuals from receipt of Unemployment Compensation (UC) as a result of volunteer activities.
2. This Appeal Board decision is consistent with the Appeal Board's decision in AB 577,849. In that case the Appeal Board held that engaging in volunteer activities, while actively seeking work, does not mandate a finding of ineligibility due to a lack of total unemployment even when the volunteer services lead to employment with the same organization or when the organization reimburses the volunteer for expenses. It should be noted that the Appeal Board's decision in AB 577,849 extends this principle beyond volunteering for charitable and civic purposes to work activities with for profit and not-for-profit employers as well as for individuals.
3. While claimants who engage in volunteer activities may now be, based on this Appeal Board decision, be totally unemployed, there is still the possibility that they may not be available for work. A claimant doing genuine volunteer work who is willing to reschedule or drop the work should it conflict with regular employment, and who is free to make and is making a diligent effort to find employment is eligible for benefits (Field Memo, 11-82 Volunteer Work ). However, if the claimant refuses suitable employment in favor of the volunteer activities he/she is ineligible for benefits. If the claimant is not actively searching for work then he/she is not eligible for benefits.
4. In the instant matter the claimant's pro bono legal activities, which can be characterized as genuine volunteer work, did not interfere with her diligent efforts to find employment.

