IN THE SUPREME COURT

STATE OF NORTH DAKOTA

James P. Sabo and Fun-Co., Inc.,
a North Dakota Corporation,

Petitioners-Appellants,

vs.

Job Service North Dakota,

Respondent-Appellee.

Case No. 20180354

Civil No. 09-2018-CV-00715
(Cass County District Court)

REPLY BRIEF OF PETITIONERS-APPELLANTS

APPEAL FROM THE JUDGMENT OF THE SAID DISTRICT COURT
ENTERED ON AUGUST 3, 2018

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT
HONORABLE FRANK L. RACEK

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[¶1] **ISSUES ON APPEAL**

[¶2] Appellant James P. Sabo ["Sabo"] respectfully submits his stated Issues on Appeal should be addressed by this Court.

[¶3] **STATEMENT OF THE CASE**

[¶4] Job Service North Dakota does not express any dissatisfaction with Sabo's Statement of the Case.

[¶5] **STATEMENT OF FACTS**

[¶6] Citing Appendix pages 32 and 73, Job Service North Dakota writes in ¶5 of its brief, "Sabo had not disclosed his ownership interest in Fun-Co., Inc., when responding to Job Service's initial eligibility questionnaire on his claim for benefits." Appendix page 32 reveals Sabo, after consulting with his accountant, answered "no" concerning the "ownership of the business" because he was considered an employee. As the questions [found on Appendix page 72] are phrased, Sabo's answers are truthful. The first important question asked Sabo, "Do you have any ownership in a business." Sabo can truthfully answer "no" because he only owns all the shares of Fun-Co, Inc., a corporation. The corporate entity owns the business conducted under the name "Bison Turf". Job Service North Dakota did not pose questions to Sabo about whether he was a shareholder in his corporate employer until October 25, 2017. App., ps. 29-37.

[¶7] In ¶6 of its Statement of Facts, the agency confuses "fact" with legal argument. It is a "fact" that the Reconsidered Monetary Determination decided Sabo was entitled to the reduced *Weekly Benefit Amount of* $67.00 effective retroactively to February 18, 2017, because of his "business interest". Appendix, page 39. However, the agency's stated reasons

for its reduction of Sabo's weekly benefit amount are mere conclusions of law – and are not "facts". *Id.* Sabo acknowledges he did not "appeal" the November 9, 2017, Reconsidered Monetary Determination. The administrative record does not contain any testimony, in person or by affidavit, that the November 9, 2017, Reconsidered Monetary Determination was ever mailed to Sabo. App., ps. 81, 113-114. Overruling Sabo's objection to the receipt of the document as an evidentiary exhibit, the Appeals Referee curiously determined, "[t]he issue as to whether the document was mailed by the agency and/or received by the claimant is appropriate to an appeal to the Reconsidered Monetary Decision." App., p. 81. Apparently, the agency relies upon its claimed "presumption" of correct procedure [Brief of Appellee/Respondent, ¶10] when it charges Sabo with constructive [or actual] knowledge that he must "appeal" within twelve (12) days of November 9, 2017, *without any evidence showing the document was ever mailed to Sabo.*

[¶8] **LAW AND ARGUMENT**

[¶9] **Standard of Review**

[¶10] It appears that the agency does not quarrel with Fun-Co., Inc., and Sabo's position that all appellate issues involve questions of law or a mixture of questions of law and fact, and are fully reviewable by this Court. In ¶10 of its brief, the agency argues, "[a] determination of an administrative agency is presumed correct." This presumption lasts until a litigant establishes the agency's decision "was made without appropriate procedure, or that it was made contrary to controlling statutory provisions or established principles of administrative procedure." In re Superior Service Co, 94 N.W.2d 84, 89 (N.D. 1958). There is no "presumption" of correctness if this Court accepts Fun-Co. Inc., and Sabo's appellate

positions. All issues raised by Fun-Co., Inc., and Sabo involve administrative error, as a matter of law, and burst the bubble of the agency's claimed presumption. Further, all issues raised by Fun-Co., Inc., and Sabo are within the appropriate scope of judicial review of an agency's decision under N.D.C.C. § 28-32-46 and N.D.C.C. § 28-32-49. The agency offers no cogent argument to the contrary.

[¶11] **Point 1. Job Service North Dakota's decision is not in accordance with law.**

[¶12] **A. Job Service North Dakota misinterprets N.D.C.C. § 52-06-04(2).**

[¶13] The agency misinterprets Sabo's argument, just as it misinterprets the provisions of N.D.C.C. § 52-06-04(2). Sabo argued, in ¶32 of his brief, that he "qualifies as an 'insured worker' for his first benefit year so long as the *italicized* sentence is limited to the monetary formula set forth in said subsection 2 – as the *italicized* sentence instructs one to do with the included words, 'under this subsection'". The agency's construction of N.D.C.C. § 52-06-04(2) ignores the words, "under this subsection". The agency confuses a monetary eligibility test [with the stated purpose of determining Sabo's status as an "insured worker"] with a determination of Sabo's benefit amount [that is solely calculated under N.D.C.C. § 52-06-04(1) - a different subsection]. There is no statutory language that allows the agency to establish an employee's weekly benefit amount [calculated under an unambiguous formula in N.D.C.C. § 52-06-04(1)] by application of a test to determine an employee's monetary eligibility through the application of N.D.C.C. § 52-06-04(2) - a different subsection].

[¶14] In ¶34 of its brief, the agency states, "Subsection 2, N.D.C.C. § 52-06-04 conveys additional requirements for a claimant to qualify as an 'insured worker'." Sabo agrees with this statement, but by the clear words "under this subsection", found within said subsection

of law, the wages necessary to prove Sabo's monetary eligibility [or status as an "insured worker"] does not affect Sabo's benefit amount calculated by the statutory formula provided in N.D.C.C. § 52-06-04(1) - a different subsection. Without statutory language to support its construction, the agency erroneously interprets subsection 2 as not a test to determine whether Sabo is monetary eligible for benefits, but rather as a statutory limitation upon the amount of benefits due Sabo. See, ¶36 of Brief of Appellee/Respondent [hereafter "Appellee's Brief"].

[¶15] The agency, *not finding any statutory language to support its construction of N.D.C.C. § 52-06-04(2)*, resorts to the ambiguous written testimony, provided by Mitchell Tjaden of Job Service North Dakota, to a senate subcommittee, in 1989. Appellee's Brief, ¶40. The wording of N.D.C.C. § 52-06-04(2) [and Sabo's position concerning the construction of said subsection] is consistent with the first sentence of said written testimony, which reads, "Section 2 of the Bill amends that part of the law dealing with earnings needed to qualify for benefits for certain individuals." There is no language in Senate Bill No. 2122 (1989), nor in N.D.C.C. § 52-06-04(2), which "limits the amount of benefit entitlement" as the subsequent 1989 written testimony suggested.

[¶16] The clear, unambiguous language of N.D.C.C. §52-06-04(2) shows said subsection of law is to establish an employee's monetary *eligibility* – not the employee's *benefit amount*. Since N.D.C.C. §52-06-04(2) is clear and unambiguous as to its stated purpose to establish only a worker's monetary eligibility [or status as an "insured worker"], it is not appropriate to delve into the ambiguous 1989 written testimony to establish legislative intent. Sorenson v. Felton, 2011 ND 33, ¶16, 793 N.W.2d 799. The agency's search for legislative intent,

through an ambiguous letter to the senate, creates ambiguity which does not exist in the pertinent subsection of law. And in so doing, it creates an absurd result. Sabo's wages are taxed as any other employee's wages are taxed. Yet under the agency's mistaken construction, Sabo receives only 10.63% of the benefits due to an agency's circular reasoning. See, Appellee's Brief, ¶43 through ¶45.

[¶17] **B. Under the provisions of N.D.C.C. § 52-06-16, the November 9, 2017, decision cannot be considered a "final" order having res judicata or collateral estoppel respect for a period of two years after the date it was issued.**

[¶18] The agency erroneously suggests Sabo did not address its chief issue that Sabo failed to exhaust his administrative remedies because he did not appeal from the Reconsidered Monetary Determination of November 9, 2017. Appellee's Brief, ¶13. The agency, though, acknowledges it is Sabo's position the Reconsidered Monetary Determination was not a "final" decision and was not entitled to res judicata respect for it was not made by the agency in a trial-like proceeding. Appellee's Brief ¶ 14. Thus, the agency's chief issue is addressed by Sabo's arguments as to the finality and res judicata effect of the Reconsidered Monetary Determination.

[¶19] The agency does not dispute the Reconsidered Monetary Determination was not made in a trial-like setting, and offers no meaningful case law to suggest that the order is entitled to res judicata respect. The agency argues the Reconsidered Monetary Determination becomes a "final" order due to Sabo's failure to appeal said order. Since the Reconsidered Monetary Determination was not made in a trial-like setting, nor on an appeal from a

decision made in a trial-like setting, it becomes "final" solely upon the lapse of time [two or three years]. See, N.D.C.C. § 52-06-16 and N.D.C.C. § 52-06-21. Until two or three years pass, it is subject to agency review, and therefore, is not "final" within the meaning of N.D.C.C. § 52-06-21.

[¶20] **C. Sabo's "appeal" of December 7, 2017, was not a collateral attack of the "Monetary Determination" of November 9, 2017.**

[¶21] The agency fails to present any cogent reasoning how Sabo's position that it is "contrary to equity and good conscience" to require him to refund benefits is a collateral attack of the examiner's Reconsidered Monetary Determination. Demanding repayment from Sabo was not a "right, fact, or matter in issue directly passed upon or necessarily involved in" the examiner's Reconsidered Monetary Determination – even if it is a "final" order. See, N.D.C.C. § 52-06-21.

[¶22] **Point 2. Sabo was denied a fair hearing.**

[¶23] **A. Amount of Overpayment, if any, should have been determined by the Appeals Referee based upon the proper interpretation of N.D.C.C. § 52-06-04(2).**

[¶24] The agency presents no cogent argument why Sabo was not entitled to a determination of the Appeals Referee as to Sabo's liability [legal or equitable] to refund previously paid unemployment compensation benefits. The agency presents no cogent argument why either res judicata or collateral estoppel principles prevent Sabo from receiving a meaningful hearing, before an Appeals Referee, as to whether it is "contrary to equity and good conscience" to require Sabo to refund any monies to the agency.

[¶25] **B. Sabo was denied a fair hearing as to whether recovery of claimed overpayment is "contrary to equity and good conscience."**

[¶26] The agency's argument appears to be that Sabo is not entitled to a trial-like hearing, before an Appeals Referee, as to whether it would be "contrary to equity and good conscience" to require Sabo to repay the agency a portion of the benefits he received. Appellee's Brief, ¶27 and ¶28. Sabo is entitled to a fair hearing before the appeal tribunal under the provisions of N.D.C.C. § 52-06-13. The agency cannot point to any promulgated rule that designates a "Collection Unit" as an appeals tribunal. The agency identifies no promulgated rule that even defines the duties of a "Collection Unit."

[¶27] In ¶28 of its brief concerning the application of the provisions of N.D.C.C. § 52-06-33, the agency argues whether any claimant should be released of liability for an overpayment is "at the discretion of the Job Service", and this Court should not reverse the agency for referring Sabo to its Collections Unit. Sabo was entitled to a decision of an Appeals Referee, based upon the "contrary to equity and good conscience" standard. If the determinations of Appeals Referee are accepted by the agency, Sabo has the right of challenging such findings, in court, under an abuse of discretion standard. See, Ell v. Director, 2916 ND 164, ¶6, 883 N.W.2d 464. See also, Gibson v. Wyoming Div. Of Unemployment Ins., Dept. of Employment, 907 P.2d 1306 (Wy. 1995). It is reversible error for the agency to refer Sabo to a Collection Unit, and deny Sabo his hearing.

[¶28] **Point 3. Job Service North Dakota did not sufficiently address the evidence presented to it by James P. Sabo.**

[¶29] The agency did not address Sabo's argument.

[¶30] **CONCLUSION**

[¶31] Sabo is entitled to one of the alternative forms of relief requested by him in his original brief to this Court.

Respectfully submitted this 28th day of November, 2018.

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AFFIDAVIT OF MAILING

State of North Dakota
County of Cass

[¶1] Pat Doty, being first duly sworn on oath, deposes and says: Affiant is a resident of the City of Fargo, North Dakota, and over the age of eighteen years, and not a party to the above entitled matter.

[¶2] On the 28th day of November, 2018, Affiant deposited in the United States Post Office at Fargo, North Dakota, a true and correct copy of the following documents in the above entitled action: REPLY BRIEF OF PETITIONERS-APPELLANTS.

[¶3] The copies of the foregoing were securely enclosed in an envelope with postage duly prepaid and addressed as follows:

Michael Pitcher
Assistant Attorney General
Office of Attorney General
500 North 9th Street
Bismarck, ND 58501-4509

[¶4] To the best of Affiant's knowledge, the address above given was the actual post office address of the party intended to be so served. The above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Pat Doty
Pat Doty

Subscribed and sworn to before me this 28th day of November, 2018.

DAVID GARAAS
Notary Public
State of North Dakota
My Commission Expires July 19, 2023

Notary Public

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