

IN THE UTAH COURT OF APPEALS

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Taniela F. Kivalu,)	MEMORANDUM DECISION
)	(Not For Official Publication)
Petitioner,)	
)	Case No. 20090583-CA
v.)	
)	
Department of Workforce)	F I L E D
Services, Workforce Appeals)	(August 5, 2010)
Board,)	
)	2010 UT App 211
Respondent.)	

Original Proceeding in this Court

Attorneys: Taniela F. Kivalu, Orem, Petitioner Pro Se
 Geoffrey T. Landward, Salt Lake City, for Respondent

Before Judges Thorne, Voros, and Christiansen.

PER CURIAM:

Taniela F. Kivalu seeks review of the Workforce Appeals Board's (the Board) decision denying him benefits and assessing a repayment and a statutory penalty against Kivalu for fraudulently obtaining unemployment benefits. We affirm.

"An agency's findings of fact are . . . accorded substantial deference and will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible." Hurley v. Board of Review of Indus. Comm'n, 767 P.2d 524, 526-27 (Utah 1988). Further, we defer to the Board's determinations concerning the credibility of witnesses and conflicting evidence because the Board is in the best position to judge that evidence. See Questar Pipeline Co. v. Utah State Tax Comm'n, 850 P.2d 1175, 1178 (Utah 1993); Grace Drilling v. Board of Review, 776 P.2d 63, 68 (Utah Ct. App. 1989). Moreover, "we will not disturb the Board's application of law to its factual findings unless its determination exceeds the bounds of reasonableness and rationality." Johnson v. Department of Employment Sec., 782 P.2d 965, 968 (Utah Ct. App. 1989).

A claimant for unemployment benefits is ineligible to receive benefits for any particular week in which the claimant

"made a false statement or representation or knowingly failed to report a material fact to obtain any benefit" under the Employment Security Act. Utah Code Ann. § 35A-4-405(5)(a) (Supp. 2009). As a result, if a claimant obtained unemployment benefits based upon false information to which he was not entitled, the claimant must repay any amounts received. See id. § 35A-4-405(5)(a), (c). Further, the claimant must pay, as a civil penalty, an amount equal to the amounts received as a result of the fraud. See id. § 35A-4-405(5)(c). Upon a finding of fraud, the Board has no discretion to reduce or waive the statutory penalty. See id.

The Department of Workforce Services' (the Department) rules state that "[f]raud requires a willful misrepresentation or concealment of information for the purpose of obtaining unemployment benefits." Utah Admin. Code R994-406-401(2). Thus, in order to establish fraud, the Department must establish materiality of the statement, knowledge, and willfulness. See id. R994-406-401(1). "Materiality is established when a claimant makes false statements or fails to provide accurate information for the purpose of obtaining . . . any benefit payment to which the claimant is not entitled." Id. R994-406-401(1)(a)(i)(A). Knowledge is established when the claimant knew or should have known that the information submitted to the Department was incorrect or that the claimant failed to provide required information. See id. R994-406-401(1)(b). Finally, "[w]illfulness is established when a claimant files claims or other documents containing false statements, responses or deliberate omissions." Id. R994-406-401(1)(c).

Here, the evidence supports the Board's findings. Kivalu initially filed for unemployment insurance benefits on June 26, 2008. Kivalu certified that he received the "Claimant Guide: Unemployment Insurance Benefits" before July 5, 2008. For the week ending July 26, 2008, Kivalu reported that he had worked during the week and reported earnings greater than the weekly benefit he was receiving. However, the following twelve weeks Kivalu reported that he had not worked despite the fact that he had worked at least thirty hours each week. Because these statements were false and were made for the purpose of obtaining benefits for which Kivalu was not eligible, they support findings of materiality and willfulness. Further, because Kivalu knew or should have known that his statements were false, the statements also support a finding of knowledge.

Kivalu argues that he believed that he was excused from filing any weekly reports because he had obtained an education deferment while he was attending school. However, it does not appear that Kivalu raised this argument to either the Administrative Law Judge (ALJ) or the Board. Instead, it appears

that Kivalu's primary argument before the ALJ was that he believed that because he was only a temporary employee due to his probationary status with his new employer, he did not need to report this employment. Kivalu does not raise this issue on appeal. Accordingly, because Kivalu did not appropriately raise the issue of an education deferment with the ALJ or the Board, this court cannot review the issue for the first time on appeal. See In re E.D., 876 P.2d 397, 401 (Utah Ct. App. 1994) (stating that generally the appellate courts of this state do not address issues raised for the first time on appeal).

Kivalu next asserts that the Board should have reduced the penalty imposed on him. However, the Board has no discretion to reduce or waive the statutory penalty. See Utah Code Ann. § 35A-4-405(5)(c).

Finally, Kivalu asserts that the Department inappropriately contacted his current employer about the fraud claim. However, the Board determined that the Department merely conducted a normal investigation into Kivalu's case in order to determine the merits of his arguments. Further, such an issue is not appropriately raised in this petition on appeal, which relates solely to whether the Board erred in finding that Kivalu fraudulently obtained unemployment benefits. The ALJ specifically informed Kivalu that if he believed that the Department improperly contacted his employer during the course of the investigation he should file a complaint with the Department.

Affirmed.

William A. Thorne Jr., Judge

J. Frederic Voros Jr., Judge

Michele M. Christiansen, Judge