


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOHN F. POLICASTRO,  
Appellant,  
vs.  
THE STATE OF NEVADA  
EMPLOYMENT SECURITY DIVISION,  
AND LYNDA PARVEN, IN HER  
CAPACITY AS ADMINISTRATOR OF  
THE EMPLOYMENT SECURITY  
DIVISION; AND J. THOMAS SUSICH,  
IN HIS CAPACITY AS CHAIR OF THE  
EMPLOYMENT SECURITY DIVISION  
BOARD OF REVIEW,  
Respondents.

No. 86369-COA

**FILED**  
JUN 17 2024  
ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY:   
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

John F. Policastro appeals from a district court order denying a petition for judicial review in an unemployment matter. Eighth Judicial District Court, Clark County; Maria A. Gall, Judge.

In 2021, Policastro filed an application for Pandemic Unemployment Assistance (PUA) under the federal Coronavirus Aid, Relief, and Economic Security Act of 2020 (the CARES Act) in which he self-certified that he was a self-employed gig worker who earned \$10,870 in 2020; last worked in November 2020, and had experienced a significant decrease in the services that he usually performed due to the COVID-19 pandemic. Respondent State of Nevada Employment Security Division (ESD) initially determined that Policastro was eligible to receive PUA benefits but indicated that his eligibility would be reevaluated if he failed to produce documentation substantiating his self-employment within 21 days of the date he filed his application. ESD later denied Policastro's

claim, finding that he failed to demonstrate that he was unemployed for pandemic-related reasons. As a result, ESD also issued determinations in which it found that Policastro was liable for overpayments of \$1,448 in PUA benefits as well as \$2,400 in Federal Pandemic Unemployment Compensation (FPUC) benefits, which he received in connection with his claim for PUA benefits.

Policastro appealed the denial of his claim and determination that he was liable for an overpayment of FPUC benefits to an appeals referee,<sup>1</sup> and the matter proceeded to an administrative hearing. During the hearing, Policastro testified that the earnings from 2020 that he reported in his application consisted almost entirely of his social security benefits, although he received approximately \$250 for maintenance work that he performed for his landlord. Policastro further testified that he usually performed gig work as a banquet bartender but did not do so in 2019 because he had dental issues that needed to be addressed and was unable to do so in 2020 due to the pandemic. Policastro also presented a written statement in which he explained that he planned to resume his gig work in February 2020 after healing from “extensive dental work” but could not do so due to the pandemic.

Following the hearing, the appeals referee affirmed ESD’s denial of Policastro’s claim for PUA benefits and determination that he was liable for an overpayment of \$2,400 in FPUC benefits. In reaching that decision, the appeals referee found that, although Policastro self-certified that he earned \$10,870 in 2020 and last worked in November of that year, he failed to produce documentation to substantiate his income and self-

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<sup>1</sup>Policastro did not separately appeal the determination that he was liable for an overpayment of PUA benefits.

employment. As a result, the appeals referee concluded that Policastro failed to demonstrate that he was unemployed for pandemic-related reasons. The appeals referee also determined that, because Policastro indicated that he sequestered the FPUC benefits that he received in a personal bank account, it would not be against equity and good conscience to hold him liable for the overpayment of those benefits. The ESD board of review subsequently declined to review Policastro's appeal from the appeals referee's decision.

Policastro then petitioned the district court for judicial review, naming ESD; Lynda Parven, who is the administrator of ESD; and J. Thomas Susich, who is the chair of the Board of Review, as respondents. In his opening brief for his petition for judicial review, Policastro argued that he demonstrated he was eligible for PUA and FPUC benefits; that he was entitled to the same from the effective date of his application, May 9, 2021, onwards; and that the prior decisions against him in this matter were discriminatory and a violation of his right to procedural due process. Moreover, Policastro asserted that ESD violated his right to procedural due process by failing to provide him with adequate notice of the PUA and FPUC programs at a time when he could have sought benefits under those programs for his unemployment during 2020, and as a result, he maintained that he was entitled to such benefits retroactive to February 2020. Respondents disagreed with Policastro's positions in their answering brief.

Without conducting a hearing, the district court entered an order denying Policastro's petition for judicial review. In so doing, the district court determined that Policastro failed to demonstrate that he was unemployed for pandemic-related reasons, reasoning that, even if he could

not find work in 2020 due to the pandemic, he initially became unemployed due to major dental problems. Further, the district court concluded that Policastro was afforded a full and fair hearing before the appeals referee and was not denied due process. This appeal followed.

The appellate court's role in reviewing an administrative agency's decision is identical to that of the district court. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784, 312 P.3d 479, 482 (2013). The appellate court, therefore, gives no deference to the district court's decision. *Id.* Like the district court, this court reviews the evidence presented to the administrative agency in order to determine whether the agency's decision was arbitrary or capricious and thus an abuse of the agency's discretion. *Langman v. Nev. Adm'rs, Inc.*, 114 Nev. 203, 206-07, 955 P.2d 188, 190 (1998). This court reviews the factual findings of an administrative agency for clear error or an abuse of discretion and will not disturb those findings unless they are unsupported by substantial evidence. *Elizondo*, 129 Nev. at 784, 312 P.3d at 482. Substantial evidence is that which a reasonable person could find adequate to support the agency's decision. *Id.* Although this court normally defers to an agency's conclusions of law that are closely related to the facts, *State v. Talalovich*, 129 Nev. 588, 590, 309 P.3d 43, 44 (2013), we review purely legal issues de novo, *Sierra Pac. Power Co. v. State, Dep't of Tax'n*, 130 Nev. 940, 944, 338 P.3d 1244, 1247 (2014).

PUA was a temporary federal unemployment assistance program offered to claimants who were not eligible for traditional unemployment benefits, but who were nevertheless unemployed or underemployed as a result of the COVID-19 pandemic. See 15 U.S.C. § 9021. Under the CARES Act, an applicant was originally permitted to establish eligibility for PUA benefits by self-certifying that he or she was



unemployed for one of eleven pandemic-related reasons enumerated in the Act. 15 U.S.C. § 9021(a)(3)(A). However, while the self-certification procedure for establishing a pandemic-related reason for unemployment remained in place throughout the period that the PUA program was in effect, Congress eventually bolstered that procedure by requiring applicants to more definitively establish that they had a recent attachment to the workforce that could be affected by the pandemic. U.S. Dep't of Labor, *Unemployment Insurance Program Letter No. 16-20 (UIPL 16-20), Change 4, I-10 to -11* (January 8, 2021) (explaining that the amendment was a tool against fraud that required applicants to establish a recent attachment to the workforce by showing that they were employed or self-employed, or planned to commence employment or self-employment, at some point between the start of the applicable tax year—the year preceding the year in which a PUA application was filed—and the date the application was filed). In particular, the amendment required applicants to provide “documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment” within 21 days of submitting a PUA application or within 21 days of being advised by ESD to submit such documentation, whichever was later, unless the applicant was granted a discretionary extension for good cause.<sup>2</sup> Consolidated Appropriations Act, Pub. L. No. 116-260, 134 Stat. 1182, 1960 (December 27, 2020) (codified at 15 U.S.C. 9021(a)(3)(A)(iii)).

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<sup>2</sup>Because Policastro filed his PUA application after January 31, 2021, he was required to produce substantiating documents within the foregoing timeframe. See U.S. Dep't of Labor, *UIPL 16-20, Change 4, I-9* (discussing the amendment's applicability).

If an individual met the requirements to receive PUA benefits, then he or she was also entitled to receive benefits under the FPUC program, which was another temporary federal unemployment assistance program created by the CARES Act that provided supplemental benefits to individuals receiving various forms of unemployment benefits. 15 U.S.C. § 9021(d)(1) (listing FPUC benefits as part of the benefit amount that an individual who is eligible for PUA benefits is entitled to receive for a week of unemployment, partial unemployment, or inability to work); 15 U.S.C. § 9023(b)(1), (i)(2)(C) (providing for individuals who receive regular unemployment compensation under state law to also receive FPUC benefits, and indicating that any reference in the statute to unemployment benefits includes, as relevant here, PUA benefits).

On appeal, the parties' dispute focuses on whether Policastro established that he was unemployed for the pandemic-related reason set forth in 15 U.S.C. § 9021(a)(3)(A)(ii)(I)(jj), which made an individual eligible to receive benefits if his or her "place of employment [wa]s closed as a direct result of the COVID-19 public health emergency." Policastro specifically contends that he established the foregoing by demonstrating that he did not work in 2019 due to his dental issues and was subsequently unable to find work in 2020 due to the pandemic. As a result, Policastro maintains that he was entitled to PUA benefits as well as FPUC benefits by extension.

However, as discussed above, the version of the CARES Act that was applicable when Policastro applied for PUA benefits required him to produce documentation substantiating that he had a recent attachment to

the workforce that could be affected by the pandemic.<sup>3</sup> See 15 U.S.C. 9021(a)(3)(A)(iii); U.S. Dep't of Labor, *UIPL 16-20, Change 4*, I-10 to -11. In particular, because Policastro sought PUA benefits on the basis that he was unable to find bartending gig work due to the pandemic, he needed to produce documents showing that he performed such gig work at some point between the start of 2020 and the date that he filed his application—May 10, 2021. 15 U.S.C. 9021(a)(3)(A)(iii); U.S. Dep't of Labor, *UIPL 16-20, Change 4*, I-10 to -11. But Policastro did not produce any such documents. Instead, Policastro produced largely irrelevant documents, such as paystubs from Caesars Palace from 2003 and 2004, paystubs from Westgate Las Vegas from August and September 2021, and a 2021 letter from the Unithere Bartenders' and Beverage Dispensers' Union Local 165 stating that Policastro had been registered with the Union since 2007. See NRS 48.015 (defining “relevant evidence” as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence”).<sup>4</sup>

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<sup>3</sup>Thus, although our decision in *Popal v. State, Employment Security Division*, No. 84291-COA, 2022 WL 12455235, at \*2 n.4, \*4 (Nev. Ct. App. Oct. 20, 2022) (Order of Reversal and Remand), required the appeals referee to consider the reasonableness of a break that the appellant took from gig work prior to the pandemic for medical reasons, that case was distinguishable from the present case because there was no question of whether the appellant satisfied the CARES Act's documentation production requirement since his application was filed before the requirement took effect.

<sup>4</sup>Moreover, Policastro specifically testified that, with the exception of \$250 in maintenance work that he performed for his landlord, he did not work in 2020. To the extent Policastro attempts to demonstrate that he satisfied the document production requirement by directing our attention to a copy of his 2020 tax return that he produced to substantiate that he

Given that Policastro failed to demonstrate that he was engaged in bartending gig work from the start of 2020 through the date he filed his application, we conclude that he failed to satisfy the CARES Act's document production requirement. See 15 U.S.C. 9021(a)(3)(A)(iii); U.S. Dep't of Labor, *UIPL No. 16-20, Change 4*, I-10 to -11. Consequently, Policastro did not establish his eligibility for PUA benefits, and FPUC benefits by extension, see 15 U.S.C. § 9021(d)(1); 15 U.S.C. § 9023(b)(1), (i)(2)(C), and ESD was therefore required to deny his application, see U.S. Dep't of Labor, *UIPL No. 16-20, Change 4*, I-10 to -11 (providing that individuals who fail to satisfy the CARES Act's document production requirement within the required timeframe are ineligible for PUA benefits).<sup>5</sup>

Although Policastro further contends that respondents' decisions during the underlying proceeding were discriminatory and made

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received \$250 in income during the 2020 tax year, he has not demonstrated a basis for relief. Indeed, Policastro has never alleged, either below or on appeal, that the pandemic prevented him from doing maintenance work at any point, and he has not directed this court's attention to any legal authority to demonstrate that his de minimis attachment to the workforce in one field during a given tax year may be used to establish eligibility for PUA benefits based on an inability to secure employment in a completely unrelated field. Consequently, we decline to consider that issue. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues unsupported by citation to relevant legal authority).

<sup>5</sup>Because Policastro has not demonstrated that he was eligible to receive PUA and FPUC benefits, we need not consider the parties' arguments concerning whether Policastro's self-certification that he became unemployed due to a pandemic-related business closure was sufficient when considered in the context of the guidance provided by U.S. Dep't of Labor, *UIPL No. 16-20, Change 2*, I-6, Question 14 (July 21, 2020).



in violation of his right to procedural due process, he has not established a basis for relief.<sup>6</sup> Indeed, nothing in the record establishes that Policastro was treated differently from others with whom he was similarly situated or that any unequal treatment was the result of intentional or purposeful discrimination. *See Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001) (explaining that, to establish a violation of the right to equal protection, the plaintiff must show “that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination”). Moreover, the record reflects that Policastro had meaningful notice and an opportunity to be heard at every stage of the underlying proceeding. *See In re Guardianship of Jones*, 139 Nev., Adv. Op. 17, 531 P.3d 1236, 1244 (2023) (explaining that procedural due process requires “notice and a meaningful opportunity to be heard”).

Thus, for the foregoing reasons and because Policastro does not present any separate argument with respect to whether he should be held liable for an FPUC overpayment, we conclude that the district court did not err by denying Policastro’s petition for judicial review of the appeals referee’s determination that he was not entitled to PUA and FPUC benefits

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<sup>6</sup>Aside from asserting that the underlying proceeding was conducted in a manner inconsistent with his right to procedural due process, Policastro contends that ESD violated his procedural due process rights by failing to provide adequate notice of the PUA and FPUC programs during the early stages of the pandemic. We need not reach this argument, however, given Policastro’s failure to demonstrate that he was eligible for PUA and FPUC benefits.

and that he was liable for the FPUC overpayment. Accordingly, we affirm the denial of judicial review in this matter.<sup>7</sup>

It is so ORDERED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Bulla

  
\_\_\_\_\_, J.  
Westbrook

cc: Hon. Maria A. Gall, District Judge  
John F. Policastro  
State of Nevada/DETR - Las Vegas  
State of Nevada/DETR - Carson City  
Eighth District Court Clerk

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<sup>7</sup>Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.