



IN THE COURT OF APPEALS OF THE STATE OF NEVADA

WILLIAM CUCCURULLO, AN  
INDIVIDUAL,  
Appellant,  
vs.  
NEVADA EMPLOYMENT SECURITY  
DIVISION, STATE OF NEVADA;  
KRISTINE NELSON, 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. 89404-COA

*ORDER OF AFFIRMANCE*

William Cuccurullo appeals from a district court order denying a petition for judicial review in an unemployment compensation matter. Eighth Judicial District Court, Clark County; Hon. Monica Trujillo, Judge.

Cuccurullo sought and received both regular unemployment compensation and Pandemic Unemployment Assistance (PUA) benefits, including Federal Pandemic Unemployment Compensation (FPUC) in May 2020. The Division of Employment Training and Rehabilitation (DETR) subsequently determined that Cuccurullo was ineligible to receive PUA benefits because he was determined to have other program eligibility and notified him of the disqualifications and the overpayment amounts. Cuccurullo appealed, and an appeals referee affirmed the DETR determinations and concluded that Cuccurullo was liable for the overpayments. The Board of

Review declined further review of that decision, and Cuccurullo did not pursue judicial review of the decision.

Cuccurullo filed requests for a waiver of the overpayment amounts, which DETR denied. After appealing the denials, Cuccurullo appeared at a hearing before an appeals referee, who issued a written decision affirming the denials of his waiver requests. The referee found that while repayment may cause Cuccurullo a temporary hardship, repayment would not be contrary to equity and good conscience. As such, the referee determined Cuccurullo was liable for the overpayments. Cuccurullo appealed, and the Board of Review declined further review.

Cuccurullo filed a petition for judicial review, which the district court ultimately denied. This appeal followed.

On appeal, Cuccurullo challenges the appeals referee's affirmance of the denials of his waiver requests. Cuccurullo argues the appeals referee did not consider the nature of his seasonal employment and actual income. He also argues that a waiver of the overpayment amount was warranted given the circumstances in this matter.

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 will not disturb those findings unless they are not supported 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.* In this case, we examine the appeals referee's decision for an abuse of discretion because the Board of Review declined further review of the referee's decision and thereby adopted the referee's factual findings and reasoning. *See Nev. Emp. Sec. Dep't v. Holmes*, 112 Nev. 275, 279-80, 914 P.2d 611, 614(1996).

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. The CARES Act has a recoupment provision for overpaid PUA benefits but permits a discretionary waiver of recoupment in certain circumstances. 15 U.S.C. § 9021(d)(4). Section 2102(d)(4) of the CARES Act provides that states must require individuals to repay PUA benefits if they have received amounts to which they were not entitled. *Id.* However, a state agency "may waive such repayment if it determines that (A) the payment of such [PUA] was without fault on the part of any such individual; and (B) such repayment would be contrary to equity and good conscience." *Id.* Both conditions must be satisfied in order for the agency to grant an overpayment waiver. Unemployment Insurance Program Letter (UIPL) No. 20-21, Change 1, at 4(c)(i) (February 7, 2022). Whether to grant a waiver is a matter of discretion for the state agency. UIPL No. 20-21, at (4)(d) (May 5, 2021).

The Employment and Training Administration (ETA) of the Department of Labor has advised that recovery of an overpayment would be contrary to equity and good conscience where at least one of the following three circumstances exists: "(1) recovery would cause financial hardship to the

person from whom it is sought; (2) the recipient of the overpayment can show (regardless of their financial situation) that due to the notice that such payment would be made or because of the incorrect payment, either they have relinquished a valuable right or changed positions for the worse; or (3) recovery would be unconscionable under the circumstances.” UIPL No. 20-21, Change 1, at 4(c)(i)(B). The ETA has explained that financial hardship may be demonstrated where a review of an individual’s income and debts, including copies of pay records and bills, reflect that repayment would cause a hardship because “the individual needs much of their current income to meet ordinary and necessary living expenses and liabilities.” *Id.* at 4(c)(i)(B), Figure 1.

Here, the appeals referee upheld the denial of Cuccurullo’s waiver request and found that while repayment may cause him to experience a temporary hardship, it would not be contrary to equity and good conscience. In making this determination, the referee found Cuccurullo was currently employed, was not forthcoming about his income, and did not receive any government benefits. We conclude Cuccurullo fails to demonstrate the appeals referee abused its discretion. *See Langman*, 114 Nev. at 206-07, 955 P.2d at 190; *see also* NRS 233B.135(2) (providing that the burden of proof is on the party attacking the agency decision to show that the final decision is invalid).

Although Cuccurullo testified he was unable to pay the overpayment amounts and that he was a non-continuous gig worker, he presented no evidence that he was unable to obtain full-time employment to show that repayment would cause him financial hardship or render recovery unconscionable such that it would be against equity and good conscience. *See* UIPL No. 20-21, Change 1, at 4(c)(i)(B). And, importantly, Cuccurullo gave inconsistent testimony regarding his income and expenses. He testified that

he was a non-continuous gig worker but received W-2 wages and had last worked approximately a month and a half prior to the November 2023 hearing. He further testified his gross income for 2023 was about \$12,000 as of the November 2023 hearing, but when the appeals officer informed him that his employer reported that he had earned approximately \$19,000 for the first two quarters of 2023, he testified that he mistakenly gave his net income. This testimony shows that Cuccurullo was still working in the latter part of 2023, and therefore earning income past the second quarter of 2023, but he failed to provide his actual income beyond the second quarter. The aforementioned inconsistencies and Cuccurullo's failure to provide information concerning all of his income support the appeals referee's determination that he was not forthcoming regarding his income. While Cuccurullo challenges the appeals referee's findings and asserts that the referee should have focused on evidence that was favorable to him, including the nature of his gig work and his assertion that he only made \$12,000, this court is not at liberty to reweigh the evidence or the referee's credibility determinations. *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009) (refusing to reweigh evidence and credibility determinations on appeal).

Additionally, Cuccurullo testified that his monthly expenses totaled approximately \$4,000, which vastly exceeded his purported income. While this could potentially demonstrate financial hardship under the ETA's guidance, the record does not reflect he provided copies of bills or other similar documentation to corroborate his alleged monthly expenses and, as previously discussed, his testimony reveals he did not accurately report his income, particularly for the latter part of 2023 when he was admittedly still working, albeit non-continuously. *See* UIPL No. 20-21, Change 1, at 4(c)(i)(B), Figure 1

(explaining that a review of an individual's income for a financial hardship analysis includes copies of pay records and bills). As such, Cuccurullo failed to sufficiently show he would suffer financial hardship by having to repay the overpayments. *See id.* Therefore, under these circumstances, we conclude that the appeals officer did not abuse his discretion by finding repayment would be allowed by law and was not contrary to equity or good conscience. *See Langman*, 114 Nev. at 206-07, 955 P.2d at 190. And because Cuccurullo did not satisfy the equity and good conscience condition of the two-part waiver analysis, he fails to demonstrate the appeals referee was required to make additional findings regarding whether he was at fault for the overpayment. *See* UIPL No. 20-21, Change 1, at 4(c)(i) (explaining that waiver may only be granted if the state determines both conditions are satisfied).

Moreover, although Cuccurullo argues that waiver was required under these circumstances, he overlooks the fact that whether to grant a waiver, even if both eligibility conditions are met, is within the appeals referee's discretion. *See* UIPL No. 20-21, at (4)(d) (May 5, 2021); *see also* 15 U.S.C. § 9021(d)(4) (providing that a state "may" waive overpayment in the event the state determines the individual was without fault and repayment would not be contrary to equity and good conscience); *Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 627, 310 P.3d 560, 566 (2013) ("It is a well-settled principle of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those that employ the term 'shall' are presumptively mandatory." (internal quotation marks omitted)). Thus, even if the appeals referee made waiver findings in his favor, it was not required to grant his waiver request.

In light of the foregoing, Cuccurullo fails to demonstrate that the appeals referee abused its discretion in denying his request for a waiver of the overpayment amount and he likewise fails to demonstrate the district court erred by denying the petition for judicial review. We, therefore,

ORDER the judgment of the district court AFFIRMED.<sup>1</sup>



Bulla, C.J.



Gibbons, J.



Westbrook, J.

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<sup>1</sup>To the extent Cuccurullo challenges the eligibility and overpayment determinations, those decisions are not properly before us because Cuccurullo failed to fully challenge the earlier agency decision finding he was ineligible and liable for the overpayment amounts as he did not pursue judicial review of that decision. *Cf. Malecon Tobacco, LLC v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002) (“Ordinarily, before availing oneself of district court relief from an agency decision, one must first exhaust available administrative remedies.”).

Moreover, we are unpersuaded by Cuccurullo’s argument that the district court erred by failing to independently evaluate his waiver eligibility. As previously noted, the district court’s role is not to reweigh the evidence before the appeals referee; rather, its role is to review 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. *See Langman*, 114 Nev. at 206-07, 955 P.2d at 190.

cc: Hon. Monica Trujillo, District Judge  
State of Nevada/DETR - Carson City  
William Cuccurullo  
Eighth District Court Clerk