Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2005-040

JUNE TERM, 2005

Patricia Garvey	}	APPEALED FROM:
	}	
v.	}	Employment Security Board
	}	
Department of Employment & Training	}	
(Burlington Public Schools)	}	DOCKET NO. 09-04-048-06

In the above-entitled cause, the Clerk will enter:

Claimant Patricia Garvey appeals pro se from the Employment Security Board=s determination that she must reimburse the Department of Employment & Training for an overpayment of unemployment compensation benefits that she received. We affirm in part, and reverse and remand in part.

The following facts were found by the administrative law judge and adopted by the Board. Claimant worked as a paraprofessional for the Burlington School District between January and June 2004. On June 28, 2004, she filed a claim for unemployment benefits. She was notified by letter that she was entitled to benefits because she did not at that time have a Areasonable assurance@ of returning to academic employment the following school year. The letter specifically provided that A[i]f you are offered a verbal or written assurance with an educational institution over the summer, you must notify the Department immediately. Failure to do so may result in an overpayment of benefits.@

On July 21, 2004, the Burlington School District mailed claimant a contract to perform services as an individual paraeducator during the 2004-2005 school year. The terms of the contract were essentially the same as the previous year. Claimant did not open the letter when it arrived because she was dealing with some personal issues and was not attentive to her mail. At some point, claimant contacted the school to inquire about her insurance policy, and she was informed that she had been sent an employment contract. Claimant chose not to open the letter from the school district, although she knew it contained a contract, until August 13, 2004, the deadline for its return. On that date, claimant signed the contract and faxed it to the school district. Claimant did not contact the Department to report that she had been offered an employment contract until August 24, 2004. Claimant received unemployment benefits totaling $965.00 for the weeks ending July 24 through August 21, 2004.

After the Department received notice of the employment contract, a claims adjudicator determined that claimant was disqualified for benefits beginning the week that ended July 24, 2004. The claims adjudicator concluded that claimant was obligated to repay the Department $965.00 because the overpayment of benefits had resulted from nondisclosure or misrepresentation of a material fact. Claimant appealed this decision to an administrative law judge (ALJ). After a hearing, the ALJ made findings of fact and sustained the decision of the claims adjudicator. Claimant then appealed to the Board, which adopted the findings made by the ALJ and sustained the ALJ=s decision.

In reaching its conclusion, the Board explained that claimant had performed services for an educational institution during the 2003-2004 school year and was offered, and accepted, a contract to provide the same or similar services during the 2004-2005 academic year. It concluded that pursuant to 21 V.S.A. ' 1343(c)(1), claimant was not entitled to benefits from the point when she was offered a contract for the next academic year. The Board explained that, although claimant had not opened the letter containing the contract until August 13, 2004, it was reasonable to conclude that the

contract was in her possession during the week ending July 24, 2004. The contract had been mailed within the State of Vermont on a Wednesday, and claimant presented no evidence to suggest that it was not delivered within three mailing days. The Board found that the fact that claimant had been focusing her attention on family matters at that time did not alter the fact that she had Areasonable assurance@ of employment as soon as the contract arrived. The Board similarly found that claimant=s decision not to open the envelope once she knew it contained a contract did not have any bearing on the effective date of the Areasonable assurance.@ As the Board explained, the critical point was not when the contract was returned but when it was offered.

The Board thus concluded that claimant had been overpaid $965.00 in benefits. It explained that pursuant to 21 V.S.A. ' 1347(a), when an individual received benefits to which she was not entitled as a result of her failure to disclose a material fact, she must repay those benefits to the Department. The Board found that claimant had been clearly put on notice that she needed to notify the Department immediately if any educational institution offered her employment, and claimant knew that she had been sent a contract weeks before she notified the Department. Accordingly, the Board ordered claimant to repay the benefits that she received between the weeks ending July 24, 2004 and August 21, 2004. Claimant appealed.*

On appeal, claimant argues that she should not have to repay the benefits that she received because she did not have a Areasonable reassurance@ of returning to her position, nor was she Aaware of@ the employment contract, until August 13, 2004. She notes that the school district did not put a return address on the envelope, it did not send the letter by certified mail, nor did it telephone her to notify her of its presence. Claimant acknowledges that she should have informed the Department once she signed the employment contract, but she asserts that she mistakenly believed that she did not need to inform them of her status until she actually started working.

On review, we will uphold the Board=s decision unless it can be demonstrated that its findings and conclusions are erroneous. Trombley v. Dep=t of Employment & Training, 146 Vt. 332, 334 (1985). AFindings will be affirmed if supported by credible evidence, even in the presence of substantial evidence to the contrary.@ Id. (internal quotation marks and citations omitted). Absent a compelling indication of error, we defer to the Board=s interpretation of a statute that it is charged with executing. Sec=y, Agency of Natural Res. v. Upper Valley Reg=l Landfill Corp., 167 Vt. 228, 238 (1997). We find no error here.

An individual, such as claimant, who performs services in an instructional capacity for an educational institution is not entitled to unemployment benefits based on such services between successive academic years if the individual performs such services in the first academic year and has a Areasonable assurance@ that she will perform such services in the second of such academic years. 21 V.S.A. ' 1343(c)(1). The Board reasonably concluded that claimant had Areasonable assurance@ of being reemployed once she received an employment contract from the school. Claimant=s decision not to open her mail does not obviate the assurance of employment offered by the school district. To hold otherwise would allow claimant to evade the statutory requirement and claim benefits to which she was not entitled.

The Board concluded that claimant=s failure to inform the Department that she had received an employment contract was a material nondisclosure that rendered her liable to the Department for $965.00. See 21 V.S.A. ' 1347(a) (individual who receives benefits to which she is not entitled as the result of her nondisclosure or misrepresentation of a material fact, irrespective of whether such nondisclosure or misrepresentation was known or fraudulent, is liable to Department for benefits paid). While we agree that claimant was ineligible for benefits as of the date that she received her employment contract, we do not agree that she must therefore repay the Department for all of the benefits that she received after that date. See In re Prouty, 131 Vt. 504, 509 (1973) (claimant not obligated to repay benefits in the absence of evidence of nondisclosure or misrepresentation). The Board=s findings indicate that claimant became aware of her employment contract as of the date of her telephone call to the school district. At that point, she became liable to the Department for the overpayment of benefits due to her failure to disclose a material fact. We therefore reverse and remand the Board=s decision for a finding as to the date that the telephone call occurred.

Affirmed in part and reversed and remanded in part.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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[*] The Board rendered its decision on December 21, 2004. Claimant did not file a notice of appeal until January 21, 2005, one day outside of the thirty-day appeal period. It appears that on that date, claimant asked the Board for an extension of time in which to file her appeal based on medical reasons; it does not appear that the Board ruled on her request. Given claimant=s request for an extension below, arguably based on excusable neglect, we find the appeal timely under V.R.A.P. 4. We note that the Department does not challenge the timeliness of claimant=s appeal.