

STATE OF MICHIGAN
UNEMPLOYMENT INSURANCE APPEALS COMMISSION

In the Matter of

[REDACTED]

[REDACTED]-23-003787

Claimant,

[REDACTED]

[REDACTED]

[REDACTED]

Employer.

DECISION OF UNEMPLOYMENT INSURANCE APPEALS COMMISSION

This matter is before the Unemployment Insurance Appeals Commission (Commission) pursuant to the Unemployment Insurance Agency's (Agency) timely appeal from a September 1, 2023 decision by an Administrative Law Judge (ALJ).

The Commission received a timely request from the claimant to submit written argument in this matter. In light of the well-developed record, the Commission concludes it is not necessary. Therefore, the request is denied.

The question we consider in this case is whether the underlying determination is a valid *restitution* determination such that the Agency can use it to recover benefits from the claimant. For the reasons we discuss below, we find that it is not.

We issue this as an *en banc* decision because it appears to this Commission that in other similar circumstances, the Agency may be using determinations of this type as restitution determinations and thus as the basis for recovering benefits from claimants.

As to the facts of this case, on May 31, 2022, the Agency issued a non-monetary determination (determination) that held the claimant voluntarily left employment on April 6, 2020, without good cause attributable to the employer. Thus, the determination disqualified the claimant for benefits under the voluntary leaving provision of the Michigan Employment Security Act (Act), Section 29(1)(a).

Notably, the determination did not cite Section 62(a), the section of the Act that authorizes the Agency to recover overpayments. We are aware that in years past when the Agency sought to collect overpayments, it included an assertion that the claimant was overpaid benefits in a particular period *and* a citation to Section 62(a). In some cases, it continues this practice.

The determination in this case was accompanied by a document titled "Weeks of Overpayment" (1301 Form), with the same mailing date as the determination. The 1301 Form states in part, "This is a list of the week(s) that you were overpaid benefits." It itemizes the weeks and benefit amounts

paid to the claimant for weeks ending April 11, 2020 through July 17, 2021, for a total amount of \$36,544.00. Like the determination, the 1301 Form does not cite Section 62(a).

The claimant protested the determination on November 10, 2022, which was untimely. In response, the Agency issued a redetermination on December 9, 2022, which held the claimant failed to establish good cause under Section 32a(2) of the Act for her late protest. As a result, the earlier determination became final and the claimant remained disqualified.

The claimant timely appealed the redetermination and a hearing was held before an Administrative Judge (ALJ) on August 29, 2023. The claimant and employer appeared for the hearing and presented evidence. The Agency did not appear.

Following the hearing, the ALJ issued a decision on September 1, 2023, which affirmed the redetermination and held the claimant did not establish good cause under Section 32a(2) for her late protest. Thus, the underlying Agency determination was final and the claimant was disqualified for benefits under Section 29(1)(a).

The ALJ also addressed the matter of overpayment amounts set forth in the 1301 Form, noting that her finding on the (re)determination “does not dispose of the issue of restitution of alleged overpayments.” As to that issue, the ALJ held that pursuant to Sections 32(f) and 32a(2) of the Act, the claimant was not subject to restitution for the weeks ending April 11, 2020 through July 17, 2021, and was not required to repay those benefits.

As noted above, the Agency timely appealed, placing the case before this Commission. The Agency maintains that the ALJ erred by reaching the merits of the determination—which it defines as both whether the claimant was (1) disqualified and (2) subject to restitution. The Agency argues, “The Order lacked jurisdiction to waive restitution because the Order found Claimant did not have good cause for late protest.” It is this portion of the appeal that leads this Commission to conclude that the Agency considers the May 31, 2022 adjudication, a determination on the claimant’s qualification for benefits *as well as* a Section 62(a) determination that she is required to repay the amounts itemized on the 1301 Form.

After reviewing the record, we find the ALJ’s decision must be affirmed. We agree with the ALJ’s finding that the claimant failed to establish good cause under Section 32a(2) of the Act for her late protest of the determination. We, therefore, agree with the ALJ’s conclusion that the underlying Section 29(1)(a) disqualification became final.

As to the matter of restitution, we affirm with a modification.¹ We hold that the underlying May 31, 2022 adjudication was a determination *only* as to the matter of the claimant’s qualification for benefits. It did not cite Section 62(a) or properly determine the separate issue – which is whether the claimant was paid benefits to which she was not entitled. Thus, the Agency may not use the May 31, 2022 determination to utilize any of the tools set forth in Section 62(a) to collect from the claimant.

We start our analysis with the basics -- an examination of the Agency’s duty to issue determinations

¹ We decline to adopt the ALJ’s rationale as to restitution.

as to a claimant’s eligibility for benefits. Under Section 32(a), the Agency must promptly examine claims and make a “determination” on the facts. This duty is broken out into two parts. First, under Section 32(b), the Agency must make a determination on whether the claimant is *monetarily* eligible. Second, under Section 32(c), the Agency must determine whether the claimant’s separation from employment is disqualifying. This is the *non-monetary* determination.²

Within that context, we examine the underlying May 31, 2022 non-monetary determination. It states:

Issues and Sections of Michigan Employment Security (MES) Act involved:
 Voluntary Quit and 29(1)(a). You quit your job with EXPRESS EMPLOYMENT PROFESSIONALS on April 06, 2020 due to other personal reasons.

Your leaving was voluntary and not attributable to the employer.

You are disqualified for benefits under MES Act, Section 29(1)(a).

The text of the determination evidences that the Agency examined the circumstances of the claimant’s separation from her employer in April 2020 and determined that it constituted a disqualifying separation. As such, the determination fulfilled the Agency’s mandate to issue a Section 32(c) *non-monetary* determination.^{3 4}

For recovery of benefits that were improperly paid, we turn Section 62(a) which establishes the parameters for the Agency’s authority to collect sums from claimants. Section 62(a) does three things relevant to our discussion. First, it establishes that the mechanism for recovering overpayments is a “restitution determination;” second, it establishes various limitations periods for issuance of restitution determinations; and third, it mandates waiver of restitution if repayment would be contrary to equity and good conscience:⁵

421.62 Recovery of improperly paid benefits.

Sec. 62.

- (a) If the unemployment agency determines that an individual has obtained benefits to which the individual is not entitled, or a subsequent determination by the agency or a decision of an appellate authority reverses a prior qualification for benefits, the agency may recover a sum equal to the amount received plus interest pursuant to section 15(a) by 1 or more of the following methods: deduction from benefits or wages payable to the individual, payment by the individual in cash, or deduction from a tax refund payable to the

² See UIAC Docket No 23-004454 (March 22, 2024), p 2-4 for the statutory framework for benefit determinations. [Order---2024-03-22T115010086_Redacted.pdf (michigan.gov)]

³ Section 32(a) also requires the Agency to “promptly” make determinations. We cannot say the Agency fulfilled that obligation, considering the over two-year span from that date of her application (April 7, 2020-see the Monetary Determination) to May 31, 2022, the date of the determination. That issue, however, is not before us today.

⁴ The Agency also fulfilled its duty under Section 32(b) by issuing the April 8, 2020 *monetary* determination.

⁵ Equity and good conscience are defined in Section 62(a)(i)-(iii).

individual as provided under section 30a of 1941 PA 122, MCL 205.30a. Deduction from benefits or wages payable to the individual is limited to not more than 50% of each payment due the claimant. **The unemployment agency shall issue a determination requiring restitution within 3 years after the date of finality of a determination, redetermination, or decision reversing a previous finding of benefit entitlement.** Except in the case of benefits improperly paid because of suspected identity fraud, the unemployment agency shall not initiate administrative or court action to recover improperly paid benefits from an individual more than 3 years after the date that the last determination, redetermination, or decision establishing restitution is final. Except in the case of benefits improperly paid because of suspected identity fraud, **the unemployment agency shall issue a restitution determination on an issue within 3 years from the date the claimant first received benefits in the benefit year in which the issue arose**, or in the case of an issue of intentional false statement, misrepresentation, or concealment of material information **in violation of section 54(a) or (b) or sections 54a to 54c, within 3 years after the receipt of the improperly paid benefits** unless the unemployment agency filed a civil action in a court within the 3-year period; the individual made an intentional false statement, misrepresentation, or concealment of material information to obtain the benefits; or the unemployment agency issued a determination requiring restitution within the 3-year period...[Emphasis added. ⁶]

We also note the powerful tools granted to the Agency to collect overpayments from claimants as set forth above, including the authority to garnish wages and tax refunds, and to deduct sums from future unemployment benefit claims. Section 62(a).

We return to the principle underlying Section 62(a) -- that the issuance of the restitution determination is the mechanism by which the Agency is authorized to recover benefits. Sentence one of Section 62(a) specifies: “*If the unemployment agency determines that an individual has obtained*” benefits to which they are not entitled, then the Agency is authorized to “recover a sum equal to the amount received...” (emphasis added). As to reversals of entitlement determinations, it states the Agency “shall issue a **determination requiring restitution**” within the limitations period set forth therein (emphasis added). And, as to overpayments made in the absence of an entitlement determination, it “shall issue a **restitution determination** on an issue within 3 years from the date the claimant received benefits in the benefit year in which the issue arose” (emphasis added).⁷

⁶ Emphasis added in the text to highlight the different limitations period for restitution determinations. The first period governs cases where an Agency benefit entitlement determination is later reversed, in which case the period is three years *after* the date of finality of the decision reversing that determination. The second period governs cases, like this one, in which it appears as if the Agency paid benefits in the absence of benefit entitlement determination, in which case the limitations period is “3 years from the date the claimant *first* received benefits in the benefit year in which the issue arose.” The period for Section 54(a) or (b) fraud is longer, “within 3 years *after* the receipt of benefits,” with an exception for circuit court filings.

⁷ Returning to the Agency’s appeal, it also cites this portion of Section 62(a) for authority that the ALJ’s restitution determination should be reversed. Indeed, it argues that the May 31, 2022 determination is on a “new” issue entitling it to collect against the claimant under the limitations period set forth as to this set of Section 62(a) cases. While we

This is consistent with the overall structure of the Act. As explained by the Court in *Dep't of Licensing & Regulatory Affairs/Unemployment Ins Agency v Lucente*, the Agency acts through its determinations:

The MESA does not define the term “determination,” but the act tells us in what circumstances a “determination” can be made. In the context of a claim for benefits, a “determination” is an official decision by the Agency that involves agency fact-finding and application of law (the MESA) to those facts. See *Black's Law Dictionary* (11th ed.) (defining “determination” as “[t]he act of deciding something officially”). [508 Mich 209, 218; 973 NW2d 90, 94 (2021).]

We also note that Section 62 determinations are subject to appeal procedures under Section 32a, the same as any other determination, and can become final, just like any other determination. Section 62(d).

For all types of determinations, the Act grants claimants fundamental due process rights, which include notice of the determination and the reasons for the determination. Section 32(a) specifies:

The claimant and other interested parties shall be promptly notified of the determination and the reasons for the determination.

See also *Lucente* at 218.

As to the nature of that notice, due process and the Michigan Administrative Procedures Act (MCL 24.201 *et seq*) require that a party in a contested case be given timely and **adequate notice detailing reasons for proposed administrative action**. *Hardges v Dep't of Social Servs*, 177 Mich App 698, 442 NW2d 752 (1989).

Governmental agencies are required to provide information “specific enough to inform the recipient how the agency’s decision was reached.” *Tripp v Coler*, 640 F Supp 848, 858 (ND IL, 1986). When the Agency does no more than “parrot” the broad language of the regulations in its communication to a claimant, it has failed to provide adequate notice. *Bilington v Underwood*, 613 F2d 91, 94 (CA 5, 1980).

These due process requirements have been made explicit for the collection of unemployment benefit overpayments. The United States Department of Labor exercises oversight of state unemployment agencies under Section 303(a)(1) of the Social Security Act, as a condition of funding state administrative grants for their unemployment programs. Unemployment Insurance Program Letter (UIPL) 01-16 (10/1/15) is titled, “Federal Requirements to Protect Individual Rights in State Unemployment Compensation Overpayment Prevention and Recovery Procedures.”

reject this argument for the reasons set forth above, it is yet another indicator that the Agency considers the May 31, 2022 determination to be a restitution determination—despite not citing Section 62(a) therein.

UIPL 01-16 at 2-4 provides in pertinent part:

4. Discussion.

- a. Federal Law Requirements Overview. As a condition for receiving UC administrative grants, state laws must, under Section 303(a)(1), SSA, provide for “such methods of administration...as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due.”... Thus, in order to be eligible to receive administrative grants, a state must do the following in the context of identifying and establishing improper payments, including when an improper payment is identified through the Benefit Accuracy Measurement program:

- **for all determinations, including overpayments** and fraud, the individual **must be provided with a written determination which provides sufficient information to understand the basis for the determination and how/when an appeal must be filed and must also include the facts on which the determination is based**, the reason for allowing or denying benefits, **the legal basis for the determination**, and potential penalties or consequences;

- d. **Recovery of Overpayments.** **States may not initiate recovery of an overpayment until an official determination of the overpayment has been made, consistent with Federal law requirements.** States should have clear written procedures that provide for appropriate factfinding and independent verification of information as needed in the official determination process. State law may prohibit recovery of an overpayment until the overpayment determination, including any appeal, has become final under state law. [Emphasis added.]

Thus, it is clear that the Agency must conduct appropriate fact finding resulting in a restitution determination that sets forth the facts on which the determination is based *and* the legal basis for the determination.

Plain and clear notice of the state’s intention is particularly important given the tremendous power the state wields to collect against individuals. As noted above, Section 62(a) authorizes the state to garnish wages and tax refunds.

Further, where a state law provides for waiver of overpayments, the restitution determination must also provide the claimant notice of the circumstances under which a waiver may be granted and how to request a waiver.

In addition, if state law provides for a waiver of recovery of an overpayment, the notice of the overpayment determination must provide enough information to enable the individual to understand under what circumstances a waiver may be granted and how to request such a waiver. (See UIPL No. 23-80.) [UIPL 01-16 at 4.] [Emphasis added.]

This carries over from the overarching rule set forth in 1980 in UIPL 23-80 (3/11/80),⁸ titled “Implementation of Waiver of Overpayment Provisions in State UI Laws.” For waivers, the state has two options. It must either adjudicate claimants’ entitlement to waiver or provide notice of the right to waiver and the procedure to obtain a waiver:

5. Procedures and Implementation. ... The State may, depending upon the content and interpretation of its law choose between two basic methods of implementing the waiver provisions, they are:

- (1) To make a determination as to applicability of the waiver provision a part of the determination process on every overpayment case; or
- (2) **Provide, as a part of each overpayment determination, information about State law provisions concerning waiver, and provide that claimants may request consideration of waiver and receive an appeal determination on the action taken. When following this method, it is important that the notice of determination provide specific information for making such a request since that information is deemed necessary for individuals to know and protect their rights under the unemployment compensation law of the State.**

We recommend that the second option be followed where State law permits, when it appears to be the more manageable and economical approach. Note that when it has been determined that claimant fault is involved, the first determination can include denial of waiver for this reason the option for the claimant to request waiver would be afforded only in nonfault cases. [Emphasis added.]

Now we return to an examination of the May 31, 2022 determination. As we noted above, it does not cite Section 62(a). Nor does it include an assertion that the claimant was overpaid benefits supported with facts. As such, it fails the requirements of Section 32(a) to set forth the determination that there was an overpayment and the reasons for the determination. It likewise fails to meet due process requirements by failing to provide information “specific enough to inform the recipient how the agency’s decision was reached.” *Tripp* at 858. Indeed, it did not even “parrot” the information.

The failure to cite Section 62(a) is especially problematic because the claimant would have no idea how to research the very section of the Act that sets limits on the Agency’s authority to recover

⁸ UIPL 23-80 has a listed expiration date of 2/28/81, however, it was extended pursuant to the “active beyond the original expiration date of the advisory” under TEN 14-23 (12/11/23).

overpayments - - including the limitations period and the requirement to grant waivers in certain circumstances. This is particularly important in this benefits rights realm where claimants are often unrepresented and face a complex administrative scheme. As such, we find that the determination cannot be considered a Section 62(a) restitution determination. The determination also fails to adjudicate claimant's entitlement to a waiver, or as alternatively permitted under the DOL UIPLs, provide notice of the circumstances under which a waiver may be granted and information on how to request a waiver. The adjudication utterly fails the requirements to be considered a Section 62 restitution determination.

Reading the adjudication along with the 1301 Form does not cure the failure. Rather, it creates confusion. The determination refers to the 1301 Form, but the text of the reference is in the conditional:

If applicable, principal and penalty amounts are shown on Form UIA 1301 Weeks of Overpayments. [Emphasis added.]

It's true that the 1301 Form states in part, "This is a list of the week(s) that you were overpaid benefits," and it itemizes a series of weeks along with principal amounts and a total of those amounts. But uncertainty is created by the bolded text directly underneath the title, which states, "This is not a bill." Later, in the body, but in small text, it states, "This is not a bill and may not reflect your total amount due." As such, it lacks a clear assertion as to overpayments and the Agency's intentions thereto. Moreover, like the determination, the 1301 Form lacks a citation to Section 62(a). As to the parameters for waiver, like the determination, there is no information.

Further, the appeal rights set forth in the 1301 Form violate the claimant's rights under Sections 62(c) and 32a. They limit a claimant's appeal to, "Only the **calculation** of the principal and penalty." See 1301 Form at 3, Protest Rights. The claimant is not permitted to challenge the facts or the law (even if they had been included) on which the "overpayments" are based.

Under Section 62(c), claimants are granted appeal rights as outlined in Section 32a, the same as for any other determination. And Section 32a does not limit a party to appealing only a portion of the determination.

But under the appeal rights set forth in the 1301 Form, the claimant would be precluded from challenging even the fundamental assertion therein, that the Agency made the benefit payments to claimant. But assertions in Agency adjudications are not evidence. *Ashford v Unemployment Compensation Comm*, 328 Mich 428, 433; 43 NW2d 428 (1950). Indeed, whether the Agency paid benefits was the key fact at issue in *Lawrence v Mich Unemployment Ins Agency*, 320 Mich App 422; 906 NW2d 482 (2017), where the Agency sought to recover two weeks of benefits and the claimant disputed ever receiving those benefits. The Court reversed the underlying decision against the claimant, finding there was not a scintilla of evidence that the Agency had paid benefits:

There is simply no evidence in the record to prove that the MUIA issued two benefit payments of \$79, or any other amount, to Lawrence for the weeks of her conceded ineligibility. Such evidence might consist of a cancelled check, a check stub, a notice of electronic funds transfer, or a bank statement. The MUIA has failed to

offer even an agency accounting indicating that it issued the contested payment(s) to Lawrence. [*Lawrence* at 439.]

The narrow appeal rights set forth in the 1301 Form do not comport with the rights established in Section 62(c). Allowing the Agency to proceed to collect against claimants using these documents would deprive claimants of mandated protections.

In sum, the May 31, 2022 determination is not a Section 62(a) restitution determination. It does not assert there was an overpayment, provide any supporting facts or a citation to Section 62(a). As a mechanism to collect restitution, it violates claimant's statutory rights under Section 32(a) and her due process rights. In practical terms, without a citation to Section 62(a), the claimant would not know the legal basis for the Agency's assertion as to restitution and, thus, would not be aware of the limitations period for Agency action or the waiver provisions under that section of the Act. It further fails to comport with UIPL 01-16 and 23-80.

Thus, for all the reasons set forth above, the determination, even when combined with the 1301 Form, cannot be considered a Section 62 restitution determination. As such, we cannot reverse the ALJ as requested by the Agency.⁹ The ALJ correctly held that the claimant is not subject to restitution, although our holding is on different grounds.

Therefore,

IT IS ORDERED that the ALJ's decision is affirmed for the reasons outlined herein.

The claimant failed to establish good cause under Section 32a(2) of the Act for her late protest of the May 31, 2022 determination.

The May 31, 2022 determination became final and the claimant is disqualified for benefits under Section 29(1)(a) of the Act.

The claimant is not subject to restitution under Section 62(a) of the Act on the basis of the May 31, 2022 determination. The Agency may not use it, even combined with the 1301 Form, to employ any of the tools set forth in Section 62(a) to collect against the claimant.

This matter is referred to the Agency for action consistent with this decision.

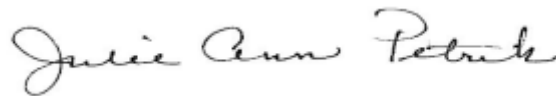


Alejandra Del Pino, Commissioner



George Wyatt III, Commissioner

⁹ However, if the Agency has issued a separate Section 62(a) restitution determination, it should forward it to this Commission in its rehearing request.



Julie A. Petrik, Chairperson



Lester A. Owczarski, Commissioner



Mikhail Albuseiri, Commissioner



William J. Runco, Commissioner

ANDREA C. ROSSI COMMISSIONER, CONCURRING IN PART AND DISSENTING IN PART:

I agree with the Commission majority in denying the claimant’s written argument request. I also agree that the claimant failed to establish good cause under Section 32a(2) of the Act for her late protest; and that as a result of that late protest the determination that claimant is disqualified under Section 29(1)(a) becomes final.

With respect, I depart from the majority on whether there is a controversy about the nature of the notices. The majority considers whether the determination, redetermination, and 1301 Form in this case constitute restitution notices or not. I agree, without comment on the majority’s analysis, that the determination and redetermination in this case, and 1301 Forms in **any** case, are **not** Section 62(a) restitution notices. However, the Agency appeal objects to the part of the ALJ’s ruling that **waives restitution**.

Regarding waiver, I would remand to the ALJ for additional evidence to determine which overpayment weeks are a direct result of this case. I would direct the ALJ to adjudicate whether the claimant is entitled to a waiver of restitution for those weeks **under Section 62(a)(iii)** of the Act. My reasons are as follows:

The April 8, 2020 monetary determination reflects that the claimant was “laid off” from employment with the involved employer. However, the May 31, 2022 determination was not issued until more than two years later.

Section 32(a) requires that the Agency “designate representatives who shall **promptly** examine claims and make a determination on the facts... [and] [t]he claimant and other interested parties shall be **promptly notified** of the determination and the reasons for the determination. (Emphasis added).

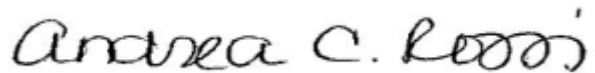
It is unknown why there was such a delay in issuing the determination. The employer’s copy of the May 31, 2022 determination provides in part, “[y]our response to the fact finding request was

found to be both timely and adequate.” The ALJ should secure Agency testimony to determine if there was Agency administrative or clerical error to warrant waiver under Section 62(a)(iii).

The relevant portion of Section 62(a) of the Act authorizes the Agency or an appellate authority to waive collection of restitution and interest under Section 62(a)(iii) of the Act. The ALJ and the Commission are appellate authorities **and the factors relevant to a 62(a)(iii) inquiry are ripe for consideration at the same time and stage that the source of the overpayments (in this case this is the Section 29(1)(a) issue) is being adjudicated.**

While Section 62 provides the Agency with powers to issue restitution notices, those powers are distinct from, and not foreclosed or violated by, a Section 62(a)(iii) inquiry and adjudication. A waiver under Section 62(a)(iii) would simply render the restitution waived.

Based on the foregoing, I would remand this matter to the ALJ for additional evidence to adjudicate whether the claimant is entitled to a waiver of restitution in this case under Section 62(a)(iii) of the Act. Since the Commission majority has chosen to do otherwise, I respectfully dissent.



Andrea C. Rossi, Commissioner

MAILED AT LANSING, MICHIGAN June 28, 2024

This decision shall be final unless EITHER (1) the Unemployment Insurance Appeals Commission RECEIVES a written request for rehearing on or before the deadline, OR (2) the appropriate circuit court RECEIVES an appeal on or before the deadline. The deadline is:

TO PROTECT YOUR RIGHTS, YOU MUST BE ON TIME. July 29, 2024