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**OFFICE OF
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A23-1544

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Christopher Thigpen

Relator,

vs.

Best Home Care, LLC,

and

Department of Employment
and Economic Development,

Respondents.

RELATOR'S BRIEF AND ADDENDUM

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STATEMENT OF LEGAL ISSUES

- I. Was the determination that Relator Christopher Thigpen committed unemployment misrepresentation supported by substantial evidence, given that he initially reported his job as a PCA and was under a good-faith belief that he only needed to report income from employment he had not already reported?

DEED ruled: Mr. Thigpen committed unemployment misrepresentation. (Add. 9, 21, 33).

Issue preserved for appeal: Relator timely filed a petition for a writ of certiorari.

Most apposite authorities: *Bahr v. Capella Univ.*, 788 N.W.2d 76, 82 (Minn. 2010); *Cable Commc'ns Bd. v. Nor-W. Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984); Minn. Stat. § 268.18, subd. 2(a).

- II. Does due process require that DEED bear the burden of proving that an applicant committed unemployment misrepresentation, or does it require that DEED make such a determination without regard to any burden of proof?

DEED ruled: This is a Constitutional issue raised for the first time on appeal.

Issue preserved for appeal: Relator timely filed a petition for a writ of certiorari.

Most apposite authorities: *Mathews v. Eldridge* 424 U.S. 319, 335 (1976); Minn. Stat. § 268.09, subd. 2.

III. Because a misrepresentation determination is quasi-criminal in nature, is DEED required to apply a clear and convincing evidence standard when making this determination to satisfy due process?

DEED ruled: Mr. Thigpen committed unemployment misrepresentation by a preponderance of the evidence. (Add. 9, 21, 33)

Issue preserved for appeal: Relator timely filed a petition for a writ of certiorari.

Most apposite authorities: *Christie v. Estate of Christie*, 911 N.W.2d 833, 839 (Minn. 2018); *Garcia-Mendoza v. 2003 Chevy Tahoe*, VIN No. 1GNEC13V23R143453, Plate No. 235JBM, 852 N.W.2d 659, 666 (Minn. 2014); *State by Humphrey v. Alpine Air Prod., Inc.*, 500 N.W.2d 788, 792 (Minn. 1993).

IV. Do the misrepresentation penalties in Minnesota, which add an additional 40 percent to the original overpayment and require disqualification from receiving unemployment benefits while any overpayment balance remains, violate state and federal constitutional guarantees against excessive fines?

DEED ruled: This is a Constitutional issue raised for the first time on appeal.

Issue preserved for appeal: Relator timely filed a petition for a writ of certiorari.

Most apposite authorities: *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001 (1983); *Miller v. One 2001 Pontiac Aztek*, 669 N.W.2d 893, 895 (Minn. 2003); *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014).

STATEMENT OF THE CASE

Relator Christopher Thigpen left his job at Target at the start of the COVID-19 pandemic in 2020. (Tr.¹ 83). After losing his job, he applied for unemployment benefits. (Tr. 83). His application was approved and he received unemployment benefits from March 20, 2020, through March 19, 2022. Respondent Minnesota Department of Employment and Economic Development (DEED) subsequently issued a determination of ineligibility on July 15, 2022, finding that Mr. Thigpen had been ineligible for the majority of benefits he had received based on unreported income. (I.L.² 1A) Mr. Thigpen appealed the determination.

Mr. Thigpen's appeal was heard at two separate hearings: one on September 8, 2022, and a second on September 30, 2022. (Tr. 2, 63). There are four separate DEED "Issue ID" numbers associated with this case. Issue ID 48681520-5 is the finding that Mr. Thigpen was overpaid standard unemployment benefits as well as Pandemic Emergency Unemployment Compensation (PEUC).³ (Add. 1). Issue ID 48894042-5 is the finding that Mr. Thigpen committed unemployment mis-

¹ Tr. refers to the amended transcript.

² I.L. refers to the itemized list.

³ PEUC extended the period of time an applicant could receive benefits. 15 U.S.C. § 9025.

representation with respect to his standard and PEUC unemployment benefits. (Add. 9). Issue ID 49097671-4 is the finding that Mr. Thigpen was overpaid the first round of \$600 weekly Federal Pandemic Unemployment Assistance Benefits (FPUC) and that he committed unemployment misrepresentation. (Add. 21). Issue ID 49097672-4 is the finding that Mr. Thigpen was overpaid the second round of \$300 weekly FPUC and committed unemployment misrepresentation. (Add. 33).

The Unemployment Law Judge (ULJ) issued decisions on November 8, 9, and 10, 2022, concluding both that Mr. Thigpen had been overpaid and that he had committed unemployment misrepresentation. (I.L. 2A). Mr. Thigpen properly requested reconsideration of this decision on December 19, 2022. (I.L. 2A). In his request for reconsideration, Mr. Thigpen requested that DEED waive the FPUC overpayments as permitted by the Cares Act, since collecting them would be against equity and good conscience. 15 U.S.C § 9025(e)(2).

On February 13, 2023, the ULJ granted reconsideration and ordered a new evidentiary hearing. (I.L. 2A). The hearing was held on March 20, 2023. (Tr. 34) The ULJ then issued a new decision on March

24, 2023, again finding that Mr. Thigpen had been overpaid and he had committed unemployment misrepresentation. (I.L. 3). Mr. Thigpen again requested reconsideration. (I.L. 4). The ULJ issued amended and final orders on September 21 and 22, 2023, again finding that Mr. Thigpen committed unemployment misrepresentation. (Add. 1–44) The ULJ also determined that Mr. Thigpen’s FPUC overpayments could not be waived because Mr. Thigpen had committed fraud. (Add. 16, 28, 40). Mr. Thigpen timely appealed these determinations via a writ of certiorari.

FACTS

In March of 2020, Christopher Thigpen was 21 years old and working two jobs. (Tr. 96). He lived with his mother and four other siblings, three of whom were under the age of 18. (Tr. 94). His main employment was working retail at Target, but he also worked as a personal care assistant (PCA) for his disabled mother. (Tr. 82–85). As it did for many people, the COVID-19 pandemic turned Mr. Thigpen’s life upside down. Mr. Thigpen separated from his job at Target because of the pandemic, last working there on March 12, 2020. (Add. 54, Tr. 83).

Hoping to make up for his lost income, especially since it helped support his family, Mr. Thigpen applied for unemployment insurance benefits. (Tr. 94-5). He had never previously applied for unemployment benefits and was unsure if he would be eligible. (Tr. 97-8) Mr. Thigpen's benefit account was established with an effective date of March 22, 2020. (Add. 10).

When Mr. Thigpen filled out his initial application, he not only noted that he was no longer working at Target because of the COVID-19 pandemic, but he also reported that he was still employed as his mother's PCA, through Best Home Care LLC. (Add. 58). With this information in hand, DEED determined that Mr. Thigpen was eligible for UI benefits. (I.L. 1A). Accordingly, Mr. Thigpen requested weekly unemployment benefits approximately through the week of March 13, 2022. (I.L. 1A).

Mr. Thigpen and his mother, Kimberly Thigpen,⁴ both testified that Mr. Thigpen had difficulties reading paperwork and bills. (Tr. 56, 105). Ms. Thigpen testified that she typically helped her son understand

⁴ The decisions made no findings about the credibility of Ms. Thigpen's testimony.

these kinds of documents because he was still getting used to them. (Tr. 105). Ms. Thigpen testified that she was unable to help Mr. Thigpen with his unemployment benefit application in March 2020 because she was having significant issues with her health at the time. (Tr. 105).

DEED is supposed to send out a handbook spelling out the program rules for unemployment benefits when a new unemployment benefit account is established. (Tr. 14). However, there is no evidence that a handbook was mailed to Mr. Thigpen or that Mr. Thigpen ever received such a handbook. He does not remember ever receiving or seeing a handbook. (Tr. 89).

When requesting unemployment benefits each week, recipients must answer four separate yes/no questions about the previous week so that DEED may determine their eligibility for benefits during that particular week. (I.L. 1A) Question 2 reads:

For the time period above, did you/will you receive income from any other source **that you have not already reported to us?**

(emphasis in original). (I.L. 1A). Mr. Thigpen was under the impression that because he had reported that he was working at Best Care in his application, this job was already in DEED's system, and he did not need

to report it again. (Tr. 88). Because he had not received any *new* sources of income, Mr. Thigpen answered this question “no.” (Tr. 88). DEED never contacted Mr. Thigpen to inquire why he was not reporting income from a job he had reported as ongoing in his application for benefits.

DEED uses individuals’ weekly earnings to determine first if they are eligible for unemployment benefits, and second what the proper amount of their unemployment benefits is. Since Mr. Thigpen mistakenly did not report his PCA income, he was overpaid every month he requested benefits. (Add. 12)

Applicants who are working are eligible for unemployment benefits if they earn less in a week than their weekly benefit amount. Minn. Stat. § 268.085, subd. 5(b). Mr. Thigpen’s weekly benefit amount was \$370 from March 22, 2020, through September 4, 2021. (Add. 11) His weekly benefit amount was \$333 from September 5, 2021, through March 19, 2022. (Add. 11) When he earned more than his weekly benefit amount, he was totally ineligible for unemployment benefits; when he earned less, he was eligible for a prorated amount of unemployment benefits. Minn. Stat. § 268.085. Mr. Thigpen received

104 weeks of unemployment benefits. He was eligible for at least some benefits in 61 of those weeks. (Add. 12)

On April 20, 2022, more than two years after his initial application for benefits, DEED sent Mr. Thigpen an “Unemployment Insurance Request for Information.” (Add. 63) The form notified Mr. Thigpen that his unemployment account was being audited. It listed all of the income Mr. Thigpen had received from Best Home Care, LLC while he was receiving unemployment and asked him if he had any corrections to make. (Add. 63–67). Mr. Thigpen checked the boxes on the form indicating that he had no corrections. He then returned the form to DEED. (Add. 63–67).

If applicants receive unemployment benefits to which they are not entitled, they are required to repay them. Minn. Stat. §268.18, subd. 1. When applicants are overpaid but there is no finding of fraud, there is no additional financial penalty, and the overpayment balance does not accrue any interest. In such cases, applicants can be eligible for unemployment benefits prospectively, but DEED withholds 50% of their benefits to be applied to the overpayment. *Id.* at subd. 3a (a). A non-

fraud overpayment balance never accrues interest while it is outstanding.

But a determination that an applicant has committed unemployment misrepresentation dramatically alters the terms of an overpayment. When DEED determines that a misrepresentation overpayment has occurred, it assesses a 40 percent penalty on top of the total amount of benefits that are overpaid. *Id.* at subd. 2(a). In addition, DEED assesses a 1 percent monthly interest rate on the entire unpaid balance, including the penalty. *Id.* at 2b. Finally, DEED makes an applicant ineligible for unemployment benefits while any unpaid balance related to the misrepresentation overpayment remains. Minn. Stat. § 268.085, subd. 2(2).

Because of the misrepresentation decision in Mr. Thigpen's case, he incurred significant penalties. He was assessed a \$24,005 overpayment of standard unemployment insurance and PEUC, and a \$9,000 and \$6,600 overpayment of FPUC. (Add. 5, 29, & 41). The 40% penalty amounts to \$15,842, resulting in a total outstanding amount of \$55,447. Additionally, 1% monthly interest is assessed on the

overpayment and penalty amount of the standard overpayment,⁵ which means that the standard unemployment insurance overpayment and penalty have been accumulating monthly interest since 30 days after the date of the final decision.

STANDARD OF REVIEW

When reviewing a ULJ's decision on reconsideration, the Court may affirm, remand for further proceedings, or reverse the ULJ's decision. Reversal is warranted if the Court determines that the ULJ's "findings, inferences, conclusion, or decision are ... in violation of constitutional provisions ... made upon unlawful procedure ... [or] unsupported by substantial evidence in view of the hearing record as submitted." Minn. Stat. § 268.105, subd. 7(d).

"[Appellate courts] review the ULJ's findings of fact in the light most favorable to the decision and will not disturb those findings as long as there is evidence in the record that reasonably tends to sustain them." *Wilson v. Mortg. Res. Ctr., Inc.*, 888 N.W.2d 452, 460 (Minn. 2016) (quotations omitted). "The Minnesota Unemployment Insurance

⁵ The interest penalty does not apply to PEUC and FPUC.

Law is ‘remedial in nature and must be applied in favor of awarding unemployment benefits.’” *White v. Univ. of Minn. Physicians Corp.*, 875 N.W.2d 351, 354 (Minn. App. 2016). “Statutory interpretation of the Minnesota Unemployment Insurance Law is a question of law that appellate courts review *de novo*.” *Yusuf v. Masterson Pers., Inc.*, 880 N.W.2d 600, 603 (Minn. App. 2016) Constitutional challenges to statutes are also reviewed *de novo*. *State v. Rey*, 905 N.W.2d 490, 493 (Minn. 2018).

LEGAL ARGUMENT

An agency’s conclusions are reviewed under the substantial evidence test. *Dep’t of Human Services v. Muriel Humphrey Residences*, 436 N.W.2d 110, 114 (Minn. App. 1989), *review denied* (Minn. Apr. 26, 1999). The reviewing court will affirm if the Commissioner engaged in “reasoned decision-making.” *White v. Minn. Dep’t of Natural Res.*, 567 N.W.2d 724, 730 (Minn. App. 1997). “An agency’s decision is not supported by substantial evidence if there is a combination of danger signals which suggest that the agency has not taken a hard look at the salient problems and the decision lacks articulated standards and

reflective findings.” *In re Claim for Benefits by Meuleners*, 725 N.W.2d 121, 123 (Minn. App. 2006) (internal quotations omitted).

The substantial evidence standard requires such evidence “that a reasonable person would accept as adequate to support a conclusion.” *In re A.D.*, 883 N.W.2d 251, 259 (Minn. 2016). When an “agency’s findings are insufficient, the case can be either remanded for additional findings or reversed for lacking substantial evidence supporting the decision.” *Id.*

The agency’s decision cannot be arbitrary and capricious. An agency’s decision is arbitrary and capricious if the agency “(a) relied on factors not intended by the legislature; (b) entirely failed to consider an important aspect of the problem; (c) offered an explanation that runs counter to the evidence; or (d) the decision is so implausible that it could not be explained as a difference in view of the result of the agency’s expertise.” *In re Review of the 2005 Annual Automatic Adjustment of Charges for all Elec. And Gas Utils.*, 768 N.W.2d 112, 118 (Minn. 2009). An agency acts arbitrarily if it fails to articulate a rational connection between the facts found and the decision made. *In re Excess Surplus*

Status of Blue Cross & Blue Shield of Minn., 624 N.W.2d 264, 277
(Minn. 2001).

I. DEED’s decision is not supported by substantial evidence when viewing the record as a whole.

When courts review an agency decision, they are required to evaluate the decision based on the entire record. “The substantial evidence test requires a reviewing court to evaluate the evidence relied upon by the agency in view of the entire record as submitted.” *Cable Commc'ns Bd. v. Nor-W. Cable Commc'ns P'ship*, 356 N.W.2d 658, 668 (Minn. 1984).

For DEED to find that Mr. Thigpen committed unemployment representation, the evidence must show that he made “false statement or representation without a good faith belief as to the correctness of the statement or representation.” The evidence in this case simply does not support such a finding. DEED’s determination that Mr. Thigpen engaged in misrepresentation is not supported by substantial evidence.

A. The decision must be reversed because a heightened standard is warranted when the agency is determining that a person has committed unemployment misrepresentation.

DEED's decision failed to apply the proper legal standard for determining Mr. Thigpen's intent. An individual commits unemployment misrepresentation when an "applicant is overpaid unemployment benefits by making a false statement or representation without a good faith belief as to the correctness of the statement or representation." Minn. Stat. § 268.18, subd. 2(a). This means that the standard is whether the applicant had a good faith belief that his actions were correct. Accordingly, to find misrepresentation in Mr. Thigpen's case, there must be substantial evidence in the record that he did not have a good faith belief about the correctness of his statements.

In Minnesota, good faith is judged as a subjective standard, while a "reasonable belief" is judged objectively. *See Bahr v. Capella Univ.*, 788 N.W.2d 76, 82 (Minn. 2010) ("Capella is not contesting that Bahr's opposition was in good faith; this dispute does not concern the subjective element"); *Choa Yang Xiong v. Su Xiong*, 800 N.W.2d 187, 191 (Minn. Ct. App. 2011) ("in Minnesota, 'good faith' is judged subjectively, while 'reasonable belief' is judged objectively"). A good faith belief does not have to be objectively reasonable. *See Cheek v. United States*, 498 U.S. 192, 203 (1991) (holding that a good faith belief

does not need to be objectively reasonable); *Bahr*, 788 N.W.2d 76 (holding that the statute required both a good faith belief and a reasonable belief, which are separate inquiries).

The decision in the present case failed to state clearly how DEED attempted to determine whether Mr. Thigpen had a good faith belief in his statements. Instead, the decision focused almost exclusively on Mr. Thigpen's objective reasonableness in construing the question DEED asked. This is precisely the wrong inquiry, and it leads DEED to the wrong result.

The decision does not appear to have approached the problem from the perspective of Mr. Thigpen. Instead, it chose to focus on what DEED believed to be obvious about unemployment benefits. The decision stated that Mr. Thigpen could not possibly have thought that DEED would know that he was still working at Best Home Care, LLC, even though he had reported that he was still working at Best Home Care when he applied for benefits. (Add. 14).⁶ Why? Because the form

⁶ The "Findings of Fact" and "Reason for the Decision" sections of the final orders in the three Issue IDs involving misrepresentation – Issue ID: 48894042-5, Issue ID: 49097671-4, and Issue ID: 49097671-4 – appear to be essentially identical. All citations to these sections are to Issue ID: 48894042-5 for the sake of clarity and simplicity.

explains that still working includes “part time, on-call employment, or reduced hours.” (Add. 14). It is not clear why that distinction would matter to Mr. Thigpen, or any applicant. After all, he told them he was working in his initial application. DEED further faulted Mr. Thigpen’s testimony as not making sense because “the Department would have no way to know how many hours or earnings he had in a given week.” (Add. 14). Workers cannot be expected to understand how DEED collects hours and earnings data. Most workers expect that agencies such as the IRS and Minnesota Department of Revenue cross-reference earnings with DEED. Mr. Thigpen’s lack of knowledge about bureaucratic information exchanges in no way minimizes his good faith belief that he was reporting what DEED asked for.

The DEED decision also stated that “for two years, Mr. Thigpen continued with his assumption that he did not have to report his wages from Best Care without taking steps to verify whether his assumption was correct.” (Add. 14.) This statement begs the question. For two years, Mr. Thigpen reported his unemployment benefits exactly the same way. For two years, DEED raised no issues whatsoever, and Mr. Thigpen had no reason to believe he was doing anything wrong. His

ongoing error caused the consequences to balloon; but if Mr. Thigpen made this mistake once, without any indication that he had made a mistake, it is almost assured that he would make it again. There was no signal to Mr. Thigpen that he was doing anything wrong.

DEED's expectation was that Mr. Thigpen should have taken additional steps to ensure that original assumptions about how the program worked were correct; otherwise, it said, he could not have had a good faith belief in the correctness of his submission. This position flips the burden, requiring applicants to prove they were acting in good faith. Instead, the burden should have been on DEED to establish that Mr. Thigpen *intended* to deceive the agency, that he lacked a good faith belief in the correctness of his actions.

Perhaps most tellingly is that DEED's decision essentially conceded that Mr. Thigpen made a good faith error in reporting. It stated that "the only plausible explanation [for his failure to report] is that he made assumptions about how the unemployment program worked and answered the questions based on his assumptions." (Add. 13). That is precisely what Mr. Thigpen did and what a good faith error is: an incorrect assumption about how the program worked.

Mr. Thigpen's belief in how to answer question 2 when requesting benefits was mistaken. People make mistakes, even unreasonable mistakes. But the fact that he incorrectly answered a question does not mean that he committed unemployment fraud. As stated, he initially reported to DEED that he was still working as a PCA. While an unemployment expert might know better, a lay person could assume he was putting the agency on notice to look for earnings from the job at which he reported working. And that is exactly what Mr. Thigpen testified he believed. And when DEED inquired directly about the PCA earnings, Mr. Thigpen immediately confirmed that they were correct.

Mr. Thigpen does not have any innate ability to understand how unemployment benefits are calculated, or what information DEED needs in order to correctly process unemployment benefits. At the time these issues arose, Mr. Thigpen was a 21-year-old applying for benefits for the first time in his life. He had just left his job and was trying to care for his disabled mother during a historic, unprecedented pandemic. Whether or not Mr. Thigpen had a good faith belief in the correctness of his actions must be judged from his perspective, his subjective belief

which he held at the time, even if this belief is viewed as objectively unreasonable.

When applying the proper standard of good faith, DEED's determination that Mr. Thigpen intentionally misrepresented his earnings is not supported by substantial evidence and must be reversed.

B. DEED's decision is not supported by substantial evidence because it makes unsupported assumptions while ignoring exculpatory evidence.

The agency reached its decision by ignoring the significant evidence contained in the record of Mr. Thigpen's lack of subjective intent to commit fraud. Mr. Thigpen failed to report income from a job caring for his mother, which job he reported to DEED, when requesting weekly benefits. But the evidence surrounding this failure supports Mr. Thigpen's testimony that he simply made an honest mistake. Mr. Thigpen had reported the PCA job in his initial application. He responded to DEED's audit request honestly and accurately. His behavior is totally inconsistent with that of someone attempting to commit unemployment fraud.

DEED also failed to take Mr. Thigpen's youth, his difficulty navigating complex paperwork, his mother's inability to help him with

the application due to her health, his inexperience with the Unemployment Insurance system, and the fact that this all occurred during the beginning of a historic pandemic, when it attempted to determine if he had acted without good faith in failing to report his earnings from his PCA job. It is not reasonable for DEED to assume that applicants have the same level of familiarity with the Unemployment Insurance program that an Unemployment Law Judge has.

DEED's decision attempts to sidestep these concerns by asserting that the agency mailed Mr. Thigpen an unemployment insurance handbook "shortly after he established his unemployment account." (Add. 12) There is no evidence in the record that this event occurred. This finding is merely unsupported speculation; it is not a reasonable assumption under the circumstances. March 2020 was not a normal time for DEED. It was, in fact, an unprecedented time, especially for the administration of unemployment benefits. It is not reasonable to assume that DEED was able to mail handbooks as it typically had done, nor that it mailed one to Mr. Thigpen in particular, absent evidence.

When viewing the record as a whole, the weight of the evidence belies the ULJ's findings. Because DEED's determination is not, and cannot be, supported by substantial evidence, it must be reversed.

C. Courts should look for a “logical bridge” when determining if there is substantial evidence; because DEED’s logical bridge is unsound, the misrepresentation determination must be reversed.

An alternative or complementary way of conducting a substantial evidence inquiry is the “logical bridge” test popularized by the Seventh Circuit Court of Appeals. The logical bridge test requires that a reviewing court reverse or remand the decision of an administrative agency “if, while there is enough evidence in the record to support the decision, the reasons given by the trier of fact do not build an accurate and logical bridge between the evidence and the result.” *Chao v. Gunitite Corp.*, 442 F.3d 550, 558 (7th Cir. 2006); *Sarchet v. Chater*, 78 F.3d 305, 307 (7th Cir. 1996).

While the Eighth Circuit has not adopted this test yet, the logical bridge test has been favorably cited by courts in the Minnesota federal district. *See, e.g., Tereather T. v. Kijakazi*, 22-CV-3216 (DJF), 2023 WL

8355944, at *5 (D. Minn. Dec. 1, 2023); *Jacobs v. Astrue*, No. 08-cv431, 2009 WL 943859 at, *3 (D. Minn. April 6, 2009).

The logical bridge test also fits in well with Minnesota precedent, through Minnesota’s “arbitrary and capricious” case law. The logical bridge test is complementary to that standard in *2005 Annual Automatic Adjustment*. 768 N.W.2d at 118. In the rate adjustment case, an agency acted arbitrarily and capriciously when it “. . .(b) entirely failed to consider an important aspect of the problem; [and] (c) offered an explanation that runs counter to the evidence. . . .” *Id.* The test is also noted in *Blue Cross*, which held, “An agency acts arbitrarily if it fails to articulate a rational connection between the facts found and the decision made.” 624 N.W.2d at 277.

The logical bridge test is another formulation that makes it clear it is not sufficient for a reviewing court to simply weigh the evidence in the record; rather, the court needs to look at the evidence and the reasoning in the agency’s decision to determine how the agency got to its conclusion and if its reasoning is sound.

For example, In *J.C. Penney Co.*, the Seventh Circuit overturned a National Labor Relations Board decision which had found that the

employer committed an unfair labor practice when “Smith (the supervisor) noticed that Jaccard (the employee) was wearing a union button and stated, ‘Oh, you're for the Union.’ When Jaccard did not respond, Smith said, ‘I'm glad you got a husband.’” *J.C. Penney Co., Inc. v. N.L.R.B.*, 123 F.3d 988, 992 (7th Cir. 1997). The ALJ interpreted Smith’s comment as meaning he was threatening to fire Jaccard for her union support. *Id.* at 996. The Seventh Circuit disagreed, stating that “Apparently, the ALJ found that because Smith's testimony was not credible, he must have threatened Jaccard with discharge. The fact that the ALJ found that Jaccard was telling the truth does not mean that Smith's remarks were in fact a threat. There is a long jump between the credibility determination and the ultimate finding that Smith's remarks were a threat of discharge; too long a jump to withstand scrutiny.” *Id.*

Applying the logical bridge test to our current facts, DEED failed to build a logical bridge between the evidence in the record and the determination that Mr. Thigpen committed unemployment fraud. DEED assumed that Mr. Thigpen has a great deal of knowledge about how the unemployment system operates, even finding, with no basis, that he was mailed an unemployment handbook, without being able to

point to any evidence in the record that it did so. As in the *J.C. Penney* case, DEED heavily relied on credibility determinations to create mal-intent that simply is not supported by the record. DEED's decision even conceded that "[Mr. Thigpen] chose to answer [Question 2] the way that he thought unemployment should work during the pandemic." (Add. 13) Being wrong about how unemployment works is not the same thing as intending to deceive the agency.

At the same time as casting Mr. Thigpen as an unemployment-law expert, DEED failed to reckon with why a would-be-fraudster would initially report the very job he subsequently failed to report. The DEED decision asserts that Mr. Thigpen intended to deceive DEED from the start, which makes this contradiction a glaring flaw in the decision's reasoning. (Add. 14).

DEED made a long jump from Mr. Thigpen's credibility to the ultimate finding that he committed unemployment fraud. That is too far a leap. DEED made this finding without reckoning with any of the contradictory evidence in the record. Because the decision failed to build a logical bridge from the evidence to its conclusion, the decision must be reversed. Alternatively, because the decision failed to make a rational

connection between the facts found and its conclusion, it must be reversed.

II. DEED’S stated policy that decisions are to be made “without regard to a burden of proof” is unconstitutional as applied to misrepresentation overpayments.

Minnesota Unemployment Insurance Law provides that when determining eligibility for unemployment benefits, “An applicant's entitlement to unemployment benefits must be determined based upon that information available without regard to a burden of proof.” Minn. Stat. § 268.09, subd. 2.⁷ The statute, however, is silent as to the burden of proof required to establish a *misrepresentation* overpayment.

While it is not clear from the decision on reconsideration, it is presumed the decision in Mr. Thigpen’s case was made without regard to any burden of proof. While the no-burdens rule might be reasonable in the context of typical UI proceedings, it is unconstitutionally inadequate for situations when DEED is making a finding that an applicant defrauded the agency. Due process requires, at minimum,

⁷ DEED has also promulgated rules mandating that hearings “must be conducted by an unemployment law judge as an evidence-gathering inquiry, without regard to a burden of proof.” Minn. R. 3310.2921.

that an agency bear the burden of proving that an applicant committed a misrepresentation against it.

To determine the specific dictates of due process an agency must follow, the court must consider three factors, as laid out in *Mathews v.*

Eldridge:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest, through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 335 (1976).

The private interest in this matter is substantial. DEED has assessed an enormous penalty beyond the overpayment it is seeking to have Mr. Thigpen repay, and DEED has disqualified him from receiving any unemployment benefits so long as any balance remains. Mr. Thigpen bears the stigma of being labeled as a fraudster. An additional 40 percent owed beyond overpaid funds is a significant amount for anyone found to have committed unemployment misrepresentation.

Requiring DEED to bear the burden of proof significantly decreases the risk of erroneous deprivation, because it requires the agency to produce evidence of what it believes to be true. The current paradigm essentially allows DEED to find misrepresentation where there is a paucity of evidence, simply because a ULJ deems it to be the more probable outcome or because the applicant has failed to produce enough evidence to convince the ULJ otherwise. If a misrepresentation is alleged to have occurred, the burden must be on the agency asserting it.

Burdening the agency with establishing the truth of the allegations it seeks to assert is the heart of due process. The *Mathews* factors strongly favor placing the burden on DEED to prove that a misrepresentation occurred.

III. Due process requires that DEED make misrepresentation overpayment determinations only when there is clear and convincing evidence of an intent to misrepresent.

Currently, DEED makes fraud determinations under a preponderance of the evidence standard of proof. Presumably, this is how Mr. Thigpen's decision was made, although the decision itself does not actually state what standard of proof was applied. The appropriate

standard for determining misrepresentation overpayments is the clear and convincing standard. In contrast to the preponderance of the evidence standard, clear and convincing evidence is satisfied “where the truth of the facts asserted is highly probable.” *Weber v. Anderson*, 269 N.W.2d 892, 895 (Minn. 1978).

Clear and convincing evidence is the appropriate standard for two separate reasons. First, it is the standard utilized in both civil fraud and quasi-criminal proceedings. Since a misrepresentation overpayment is a quasi-criminal fraud proceeding, the appropriate standard of proof is clear and convincing evidence as a matter of law. Secondly, given the interests at stake in this matter, due process requires that misrepresentation overpayments be evaluated under a clear and convincing evidence standard.

Since clear and convincing evidence that Mr. Thigpen committed unemployment misrepresentation does not exist, the Court should reverse the misrepresentation determination once the proper standard of proof is applied.

- A. Because misrepresentation proceedings are both fraud and quasi-criminal in nature, they should be**

held under the intermediate standard of proof as a matter of law.

The typical standard for civil cases is the preponderance of the evidence, “because society has a ‘minimal concern’ with the outcome of private suits.” *Carrillo v. Fabian*, 701 N.W.2d 763, 774 (Minn. 2005). “But a higher standard, clear and convincing evidence, is required in some civil matters, *such as disputes involving allegations of fraud or other quasi-criminal wrongdoing* ... because the defendant's interests at stake in those cases are more substantial than those present in a typical civil case.” *Christie v. Estate of Christie*, 911 N.W.2d 833, 839 (Minn. 2018) (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)) (emphasis added). “Quasi-criminal” statutes are “[l]aws that provide for punishment but are civil rather than criminal in form[.]” *Dunham v. Roer*, 708 N.W.2d 552, 568 (Minn. Ct. App. 2006) (quoting *Savina Home Indus., Inc. v. Sec’y of Labor*, 594 F.2d 1358, 1362 n. 6 (10th Cir.1979)). When a statute is quasi-criminal, a clear and convincing standard of proof must be used. *State by Humphrey v. Alpine Air Prod., Inc.*, 500 N.W.2d 788, 792 (Minn. 1993).

A misrepresentation determination is “quasi-criminal” in nature. A forfeiture proceeding is, for instance, quasi-criminal because “[i]ts

object, like a criminal proceeding, is to penalize for the commission of an offense against the law.” *Garcia-Mendoza v. 2003 Chevy Tahoe*, VIN No. 1GNEC13V23R143453, Plate No. 235JBM, 852 N.W.2d 659, 666 (Minn. 2014) (citing *One 1958 Plymouth Sedan v. Com. of Pa.*, 380 U.S. 693, 697 (1965)). In *State by Humphry v. Alpine Air Products*, the Minnesota Supreme Court cited the U.S. Supreme Court on determining whether a civil penalty was punitive or regulatory:

Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only upon a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned are all relevant to the inquiry, and may often point in differing directions.

500 N.W.2d 788, 792 (Minn. 1993) (quoting *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963)).

The purpose of DEED’s misrepresentation or fraud determination is, straightforwardly, to punish the person making the misrepresentation. A misrepresentation overpayment requires the finding of *scienter*. The sole effect of a misrepresentation overpayment, in contrast to a typical overpayment, is the imposition of penalties.

In typical overpayment cases, those who were paid more unemployment benefits than they were entitled to receive are required to repay the overpaid amount. Minn. Stat. § 268.105, subd. 3a (b). In misrepresentation cases, recipients are punished beyond repayment of the overpayment itself.

There are three main consequences of a misrepresentation determination. First, DEED “must issue a determination of overpayment penalty assessing a penalty equal to 40 percent of the amount overpaid.” Minn. Stat. § 268.18, subd. 2(a). Next, DEED must assess an interest rate of 1 percent a month on the benefits obtained by misrepresentation and any penalty amounts beginning 30 days after the determination of the “overpayment penalty.” Minn. Stat. § 268.18 subd. 2b. This interest rate applies only to misrepresentation overpayments. Finally, applicants are not eligible for unemployment benefits so long as they have any misrepresentation overpayment balance, including penalties and interest. Minn. Stat. § 268.085, subd. 2(2).

These penalties establish that the purpose of the misrepresentation scheme is to punish individuals who make false

statements to DEED without a good-faith belief in their correctness.

The statutory language firmly places misrepresentation overpayments within the realm of quasi-criminal determinations to which the intermediate, clear and convincing evidence standard should be applied.

The Minnesota Supreme Court recently found that clear and convincing evidence was the appropriate standard in a non-quasi criminal context. In *Christie*, the Minnesota Supreme Court found that the clear and convincing evidence standard was required for oral contracts for the sale of land because “an underlying concern is that a fraudulent claim regarding the contract could be enforced if the standard of proof is not high enough to ensure certainty.” 911 N.W.2d at 840. The Court analogized the matter to other contexts where “the need for certainty surrounding the contract is heightened.” *Id.* A misrepresentation determination is the type of case in which the need for certainty is also heightened when an ambiguous action by an applicant can be interpreted either as a mistake or as fraud.

Even beyond the standard rule for quasi-criminal or fraud proceedings, proceedings analogous to the misrepresentation overpayment proceeding already require clear and convincing evidence.

When a recipient of public benefits is accused of “wrongfully obtaining assistance or intentional program violations,” and criminal charges are not pursued, the Department of Human Services or local agency can initiate an administrative fraud disqualification hearing.⁸ This is an administrative proceeding heard by a DHS Human Services Judge; it is subject to the requirements in Code of Federal Regulations, title 7, section 273.16. 7 CFR(e)(6). *Id.* (also referencing Minn. Stat. §§ 256.045 and 0451). The CFR says that "The hearing authority shall base the determination of intentional Program violation on clear and convincing evidence which demonstrates that the household member(s) committed, and intended to commit, intentional Program violation as defined in paragraph (c) of this section." 7 CFR(e)(6). If individuals are found to commit an intentional Program violation, they are then disqualified

⁸ The welfare fraud statute covers essentially every Minnesota public benefits program: “Minnesota family investment program and any affiliated program to include the work participation cash benefit program, child care assistance programs, general assistance, family general assistance program formerly codified in section 256D.05, subdivision 1, clause (15). Minnesota supplemental aid, the Supplemental Nutrition Assistance Program (SNAP), MinnesotaCare for adults without children, and upon federal approval, all categories of medical assistance and remaining categories of MinnesotaCare except for children through age 18.” Minn. Stat. § 256.046 subd. 1.

from receiving benefits for one year, three years, or permanently, depending on whether it is the first, second, or third offense. Minn. Stat. § 256.98, subd. 8.

While the Unemployment Insurance Program is not a public-benefits program *per se*, the misrepresentation or fraud determination bears a striking similarity to the administrative disqualification process. A finding of misrepresentation renders an individual ineligible for unemployment benefits pending full repayment of benefits and adds on an extremely significant 40% additional penalty. Because the misrepresentation overpayment is a quasi-criminal action, and similar proceedings are already determined under a clear and convincing standard, DEED must find misrepresentation only when the evidence meets the clear and convincing standard. And because DEED cannot meet that burden in this case, Mr. Thigpen's misrepresentation determination must be reversed.

B. Due process requires that misrepresentation proceedings proceed under the intermediate standard of proof.

Even if DEED is not required to evaluate misrepresentation under a clear and convincing standard as a matter of law, due process requires

DEED to evaluate them under that standard. To determine the specific dictates of due process an agency must follow, the court must consider the three *Mathews v. Eldridge* factors, *Supra*.

The private interest in this matter is substantial. *Supra*. DEED is attempting to assess a penalty of around \$10,000 beyond the overpayment it is seeking to have Mr. Thigpen repay, and also to disqualify him from receiving any unemployment benefits so long as any balance remains. Minnesota has recognized that allegations of fraud or other quasi-criminal wrongdoing necessarily create a situation where more is at stake than in a typical civil proceeding. *Christie*, 911 N.W.2d at 839.

The procedural safeguard of requiring clear and convincing evidence significantly reduces the risk of erroneous deprivation. There is a reason it is the classic standard for fraud: intent is a slippery thing to grasp, and being branded with having committed fraud is a significant infirmity. And as discussed above, similar proceedings are already held to this standard.

The extra burden on the government is minimal. The agency must simply adjust the standard it uses to make its determination. This is

the standard requirement for civil fraud as well as administrative fraud claims. Requiring DEED to adopt a clear and convincing standard might result in DEED submitting more evidence in cases where it believes fraud has occurred. It also might result in DEED being satisfied that some overpayments are just overpayments.

In this case, because DEED cannot show that Mr. Thigpen committed unemployment misrepresentation by clear and convincing evidence, the determination that he committed unemployment misrepresentation must be reversed.

IV. The penalties for misrepresentation overpayments in Minnesota violate State and Federal constitutional guarantees against excessive fines.

DEED's finding that Mr. Thigpen committed misrepresentation creates significant liability for him. Minnesota penalties for unemployment misrepresentation are particularly draconian. The mandatory penalty alone far exceeds Minnesota's financial fine limits in criminal law for misdemeanor and gross misdemeanor offenses. Minn. Stat. § 609.02.

Unemployment benefit applicants found to have committed misrepresentation face not only a requirement that they repay the

balance of the overpayment, they must also pay the penalty (assessed at a 1% interest rate every month). On top of that, they are completely ineligible for unemployment benefits until the entire amount of the overpayment and penalty balance is repaid.

These penalties and punishments violate the prohibitions against excessive fines found in Article 1, Section 5 of the Minnesota Constitution. They also violate the 8th amendment to the Constitution of the United States of America. U.S. Const. amend. VIII (“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”); Minn. Const. art. I, § 5. The Excessive Fines Clause “applies to civil penalties that are punitive in nature.” *United States v. Aleff*, 772 F.3d 508, 512 (8th Cir. 2014).

Minnesota typically has evaluated excessive fines claims using the three factors announced by the U.S. Supreme Court in *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001 (1983). These factors are “1) the gravity of the offense and the harshness of the penalty; 2) a comparison of the contested fine with fines imposed for the commission of the other crimes in the same jurisdiction; and 3) comparison of the contested fine with fines imposed for commission of the same crime in other jurisdictions.”

Miller v. One 2001 Pontiac Aztek, 669 N.W.2d 893, 895 (Minn. 2003).

Minnesota also applies the Bajakajian gross disproportionality test “specifically, the where Supreme Court held that a fine is unconstitutional if it is grossly disproportional to the gravity of the offense.” *Miller v. One 2001 Pontiac Aztek*, 669 N.W.2d 893, 895 (Minn. 2003) citing *United States v. Bajakajian*, 524 U.S. 321, 344 (1998).

DEED’s misrepresentation penalties fail both tests.

The *Miller* decision left open the possibility that the ability of an individual to pay should be included in the excessive fines analysis. The “first factor [in *Solem*] does not expressly preclude consideration of a defendant's financial condition in determining harshness. Without specifically deciding the extent that harshness can be measured by a defendant's unique financial situation, we conclude on the record before us that the district court abused its discretion in finding that a forfeiture of more than \$1,000 was a violation of the United States or Minnesota Constitutions.” *Miller v. One 2001 Pontiac Aztek*, 669 N.W.2d 893, 897 (Minn. 2003).

While the Minnesota Supreme Court has not yet embraced including an analysis of an individual’s ability to pay as part of the

excessive fines analysis, the Eighth Circuit has, specifically when evaluating the proportionality of the offense. “Proportionality is determined by a variety of factors, including the reprehensibility of the defendant's conduct; the relationship between the penalty and the harm to the victim; and the sanctions in other cases for comparable misconduct. Legislative intent is also relevant, as is the defendant's ability to pay.” *Aleff*, 772 at 512 (internal citations omitted). This Court should follow the Eighth Circuit in *Aleff* in assessing a person’s ability to pay when determining the proportionality of the offense.

The harshness of the penalty in DEED misrepresentation cases far outweighs the gravity of the offense. Mr. Thigpen has not been tried or convicted of any crime. Rather, DEED made an administrative determination that he did not have a good faith belief that it was correct to not report his income from an employment source that he had already reported. The penalty DEED assessed is disproportionate to the actual harm caused by his incorrectly receiving unemployment benefits.

While repayment of the overpaid unemployment benefits and some penalty for those who commit fraud is permissible, DEED has assessed Mr. Thigpen a fine of \$15,842 for misrepresentation. Such a

large fine in this administrative proceeding far exceeds an individual's potential liability even for committing a criminal gross misdemeanor offense. Moreover, the 40% penalty imposed on top of the overpayment is mandatory under the statute and leaves DEED with no discretion to impose a lesser fine depending on the circumstances of a particular case.

It is also significant when evaluating the extent of the harm here that Mr. Thigpen actually informed DEED of his ongoing employment when he applied for unemployment benefits. This fact, along with the fact that DEED took no action on this information for more than two years, is undisputed. Thus, although the amount of the overpayment here was admittedly substantial, DEED bears at least some of the responsibility for its size given that it failed to follow up or make any further inquiry for several years on the information that Mr. Thigpen truthfully and voluntarily provided.

Administrative penalties imposed in other government benefits fraud determinations also demonstrate how excessive DEED's misrepresentation penalties are. DEED's penalties are significantly harsher than those in other government benefits programs. For

example, people found by a clear and convincing standard of proof to have committed an intentional program violation in the SNAP or MFIP program must merely repay the overpaid benefits and be rendered ineligible from the program for a set period of time, depending on the number of offenses. Minn. Stat. § 256.98, subs. 4 and 8. Like people who receive public assistance benefits, those who are receiving unemployment benefits are typically already facing a period of financial hardship.

Moreover, it is significant that Minnesota's penalty stands out as disproportionate among other states' unemployment fraud penalties. Minnesota's 40% penalty is one of the highest in the nation.⁹ Most states require a 15% penalty, which is the federal rule. Further, almost every other state allows an individual to maintain eligibility for unemployment insurance following a misrepresentation determination, during which the agency may recoup the unemployment benefits at up to 100% against the overpayment. *Id.*

⁹ Department of Labor, Office of Unemployment Insurance Division of Legislation, Comparison of State Unemployment Insurance Laws (2023) available at <https://oui.doleta.gov/unemploy/statelaws.asp> Ch. 6. Overpayments, 6-10.

All three of the *Solem* factors support a finding that Minnesota's misrepresentation payments are excessive fines. The *Bajakajian* test does as well, especially when considering the ability of an individual to pay the fine. *United States v. Bajakajian*, 524 U.S. 321, 344 (1998). Minnesota's misrepresentation system appears to be designed to make it impossible for former recipients to repay the agency. The combination of the 40% penalty, 1% monthly interest, and complete bar on prospective eligibility makes any attempt to pay the penalty insurmountable. Minnesota statutes even allow for court fees to be added to the overpayment, should a misrepresentation debtor try and fail to discharge the debt through bankruptcy, over a department objection. Minn. Stat. § 268.18 subd. 4a(b). In effect, the penalty serves as a 10-year bar on unemployment eligibility, as that is when Minnesota will write off the debt. Minn. Stat. § 268.18, subd. 4(b).

Because Minnesota's unemployment misrepresentation penalties are excessive, the misrepresentation overpayment statute is unconstitutional.

CONCLUSION

DEED's determination that Mr. Thigpen committed misrepresentation is flawed in a myriad of ways. The decision is not supported by substantial evidence, unconstitutionally uses the wrong burden and standard of proof, and violates the State and Federal constitutional guarantees against excessive fines. Because DEED's determination that Mr. Thigpen committed unemployment misrepresentation cannot be supported, the decision must be reversed.

Additionally, because DEED denied Mr. Thigpen's request to waive his FPUC overpayments as the agency incorrectly determined he committed fraud, the issue of waiving his FPUC overpayments should be remanded to the agency so it can reconsider its waiver decision.

Dated: January 25, 2024

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CERTIFICATION OF LENGTH OF DOCUMENT

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