IN THE COURT OF APPEALS OF THE STATE OF NEVADA

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

No. 86335-COA

ORDER OF AFFIRMANCE

David Willmert appeals from a district court order denying a petition for judicial review in an unemployment benefits matter. Eighth Judicial District Court, Clark County; Crystal Eller, Judge.

From April 2016 to April 2019, Willmert lived in Indiana and worked at a Carrabba's Italian Restaurant. At the end of April 2019, Willmert voluntarily quit his job at Carrabba's and moved to Las Vegas, where he began work as a volunteer poker dealer for the Nevada Poker League (NPL). NPL is an LLC that contracts with local Las Vegas bars to provide poker games for the bars' patrons. NPL works solely with bars and does not offer its poker game services in other venues. Between April 2019 and mid-March 2020, Willmert worked as a volunteer poker dealer for NPL approximately five nights per week and made around $150 per night in tips. The record is unclear regarding the origin of NPL and Willmert's working relationship or NPL's internal operations. There is no information regarding how NPL determined which dealers it would send to what bars. NPL's

internal communications with its dealers, or NPL's scheduling system. The record reveals that Willmert worked voluntarily for NPL without a contract, and that Willmert's income was solely tip-based, as NPL did not pay Willmert a salary or commission.

In March 2020, Governor Sisolak issued a Stay-at-Home order in response to the COVID-19 pandemic that forced most bars and restaurants to close. With the bars shuttered, both NPL and Willmert were unable to continue offering their poker game and dealing services. Despite intermittent orders that permitted bars to reopen at reduced-capacity, NPL and Willmert were unable to work until late August 2021, when the bars were permitted to fully reopen.

In July 2020, Willmert filed a claim with the Employment Security Division (ESD) for Pandemic Unemployment Assistance (PUA) benefits effective from March 15, 2020. In his application, Willmert reported his work history and self-certified that he was a "self employed" "gig worker" for NPL. Willmert appeared to meet the financial eligibility criteria for PUA benefits and received four preliminary response letters from ESD establishing what he would likely receive as his weekly benefit allowance. These letters, however, explicitly stated that Willmert's ability to receive PUA benefits was contingent on Willmert meeting the other eligibility requirements, and Willmert never actually received any benefits.

Based on the nonfinancial components of Willmert's PUA benefits application, ESD issued a final disqualifying determination letter in November 2020, stating that Willmert did "not meet the qualifications required by the [CARES] Act of 2020" and failed to "demonstrate[ ] that [his] unemployment in Nevada was COVID-19 related pursuant to the CARES Act." Willmert appealed this decision to the ESD Administrative Tribunal, and a referee hearing was scheduled for April 2022. Prior to the hearing,

ESD issued a Notice of Telephone Hearing in which it stated the following issues would be considered: "[PUA] benefits pursuant to Section 2102 of the CARES Act of 2020 and the applicable federal regulations at 20 CFR. Part 625." as well as "2102(c): PUA - Eligibility."

Willmert was represented by counsel at the telephone hearing. Prior to questioning Willmert, the referee laid out the hearing's agenda and overviewed the hearing procedures. In doing so, the referee referenced the "Issue Summary" for Willmert's PUA claim and admitted the summary as an exhibit. The Issue Summary described the basis for denial as "[claimant has] not demonstrated that your unemployment in Nevada was COVID-19 related pursuant to the CARES Act." The referee stated that in order to be eligible under the CARES Act, Willmert must meet three elements. Namely, that he was (1) not eligible for any regular unemployment benefits in either Nevada or any other state, (2) out of employment "or out of self-employment" due to the COVID-19 pandemic, and (3) able and available to work within the meaning of state law. After explaining the purpose of the hearing and a roadmap for the criteria at issue, the referee asked if there were "any questions," to which Willmert's counsel replied, "No. We are ready to go." Willmert moved to admit evidence as exhibits, including his 2019 and 2020 tax returns; a "monthly income tracker" showcasing his January, February, and March 2020 tip-based earnings; and attestation letters meant to support Willmert's gig working status.

The referee then questioned Willmert. With the CARES Act PUA eligibility criteria in mind, the majority of the questions focused on Willmert's role at NPL and appeared to probe the veracity of Willmert's self-employed (as opposed to volunteer) status. Additionally, the referee asked Willmert about his 2019 and 2020 tax returns, and the circumstances surrounding the late submissions and unclear wage designations on both,

Regarding the attestation letters, the referee confirmed that Willmert prepared six of the seven letters himself. These six letters were identical and signed by other dealers at NPL. Willmert began these letters with, "To Whom it May Concern: I am writing to attest that David Willmert was a poker dealer/gig worker for the Nevada Poker League at the time of the COVID-19 pandemic closures." The dealers simply had to sign their names on the letters if they agreed. In contrast to Willmert's self-prepared letters, one of NPL's co-owners, Patricia Murphy, wrote the seventh attestation letter and, in this letter, she referred to Willmert's nonemployed "volunteer" status twice. Specifically, Murphy stated that Willmert was "a volunteer gig worker for Nevada Poker League" and "volunteered to deal poker for tips 5 days a week."

Willmert's counsel questioned Willmert at the conclusion of the referee's questions. During this questioning, Willmert affirmed that the tips he earned as a poker dealer for NPL were his "sole source of income," and pronounced that he did not immediately file a claim with ESD for PUA benefits in March 2020 because he was unaware that such benefits were potentially available to him. To that end, Willmert expressed that he was inspired to apply for PUA benefits after seeing other NPL dealers apply for and receive them. At this point, the referee interjected and stated for the record that his determination on Willmert's benefits would be based on the facts of Willmert's case alone and without regard to whether similarly situated dealers received benefits. Willmert gave a closing statement in which he reiterated the continuous nature of his work as a dealer for NPL and emphasized that the CARES Act was enacted to protect people in his position.

The referee issued a decision in June 2022 that affirmed ESD's disqualifying determination on the basis that Willmert had not met the

CARES Act eligibility requirements to qualify for PUA benefits. The referee supported his conclusion on three main and independent grounds. Namely, that (1) Willmert had neither a state business license in Nevada nor an exemption pursuant to NRS 76.100 (thus making him "unavailable for self-employment work," as required by the CARES Act); (2) Willmert was potentially eligible to receive regular unemployment compensation benefits (UC benefits) in Indiana; and (3) Willmert offered his poker dealing services as a volunteer with NPL and was therefore not employed within the meaning of the CARES Act.

Willmert appealed the referee's decision to ESD's Board of Review (the Board) and, in June 2022, the Board summarily declined further review pursuant to NRS 612.515. In October 2022, Willmert filed a petition for judicial review with the district court. In his petition, Willmert argued that the referee exceeded the scope of the telephone hearing and violated NAC 612.225(3) when he considered Willmert's lack of a state business license, potential benefits in Indiana, and arguable volunteer status in making his determination. Willmert asserted that the sole issue mentioned in the Notice of Telephone Hearing was "[Section] 2102(c): PUA - Eligibility," and that this was therefore the only issue appropriate for the referee to consider. Moreover, Willmert contended that he was not given an opportunity to request a continuance to prepare for the referee's newly presented issues. In response, ESD argued that all three grounds the referee relied on to inform his decision were part of the PUA eligibility criteria pursuant to the CARES Act, and the referee's findings and conclusions were supported by substantial evidence. The district court agreed with ESD and denied Willmert's petition for judicial review. This appeal followed.

On appeal, Willmert raises three issues that mirror those presented in his appeal to the Board and in his petition for judicial review.

Specifically Willmert argues that the district court's order denying his petition was improper because (1) ESD violated NAC 612.225(3) by failing to restrict the tribunal hearing's scope to the issues presented in the hearing's notice; (2) the three independent bases the referee relied on to affirm ESD's denial of PUA benefits were inappropriate as a matter of law and not supported by substantial evidence; and (3), as an extension of the preceding two issues, ESD's ultimate determination that Willmert was ineligible for PUA benefits was not supported by substantial evidence. We conclude that the district court properly denied Willmert's petition for judicial review because ESD's denial of PUA benefits was appropriate. ESD did not violate NAC 612.225(3) and exceed the hearing's scope because notice was proper, the issues the referee considered were within the CARES Act eligibility criteria, Willmert bore the burden to prove his eligibility, and the referee's conclusions on several issues were clearly supported by substantial evidence. We therefore affirm the district court's order and ESD's disqualifying determination.

ESD did not violate NAC 612.225(3)

Willmert argues that ESD violated NAC 612.225(3) because the issues the referee considered during the telephone hearing exceeded the scope of the hearing's notice. Specifically, Willmert contends that the referee was permitted to consider only whether Willmert's unemployment was "caused by COVID-19" and not whether Willmert had a state business license, was potentially eligible for regular UC benefits in Indiana, or was a volunteer. ESD responds that the Notice of Telephone Hearing was broad enough to encapsulate the three contested issues, and that the referee properly previewed his line of inquiry and otherwise followed all of NAC 612.225(3)'s procedural requirements. Because Willmert received proper notice, and because the issues the referee considered therefore did not exceed

the scope of the hearing, we conclude that ESD did not violate NAC 612.225(3).

Notice of the telephone hearing was proper

Willmert argues that, pursuant to the Notice of Telephone Hearing, the sole issue the referee could properly consider was whether Willmert's unemployment was "caused by COVID-19." To that end, Willmert argues that when the referee considered issues beyond that narrow inquiry, the notice became inadequate. ESD responds that the notice was proper because section 2102 of the CARES Act, which it referenced in the Notice of Telephone Hearing, was broad enough to include all of the issues the referee covered during the hearing. In reviewing agency decisions, this court reviews questions of law de novo. *See Clark Cty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1445, 148 P.3d 750, 754 (2006).

NAC 612.225 outlines the requirements for proper notice of administrative hearings. NAC 612.225(3), specifically, states the following:

> At the start of the hearing, the examiner will present a concise explanation of the issues to be covered and the procedures to be followed. The scope of the hearing must be restricted to issues identified in the notice of hearing, unless the parties are provided with proper notice and the opportunity to request a continuance with respect to other issues.

Pursuant to NAC 612.225(1), the "notice" referenced in subsection 3 must also comply with NRS 233B.121(2). NRS 233B.121(2)(a)-(d) requires the notice to include "[a] statement of the time, place, and nature of the hearing"; "[a] statement of the legal authority and jurisdiction"; "[a] reference to the

particular sections of the statutes and regulations involved"; and "[a] short and plain statement of the matters asserted."[1]

The Nevada Supreme Court has concluded that NRS 233B.121 requires notice to be "reasonable," and "that the due process requirements of notice are satisfied where the parties are sufficiently apprised of the nature of the proceedings so that there is no unfair surprise. The crucial element is adequate opportunity to prepare." *Nev. State Apprenticeship Council v. Joint Apprenticeship & Training Comm. for the Elec. Indus.*, 94 Nev. 763, 765, 587 P.2d 1315, 1316-17 (1978). With the supreme court's principles in mind, we reasoned that NRS 233B.121(2)(c)'s statutory "reference" requirement does not mean that the notice "must cite the sections of the statute with particularity." *Reno Dodge Sales, Inc. v. State, Dep't of Motor Vehicles*, No. 67903-COA, 2016 WL 3213593, at *1, *3 (Nev. Ct. App. June 1, 2016) (Order of Affirmance).[2]

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[1]"[T]he initial notice may be limited to a statement of the issues involved" "[i]f the agency or other party is unable to state the matters in detail at the time the notice is served." NRS 233B.121(2)(d). This limited statement remains sufficient unless either the agency or other party subsequently requests "a more definite and detailed statement." *Id.*

[2]In *Reno Dodge*, the Nevada DMV served Reno Dodge with a Notice of Violation, alleging that one of Reno Dodge's advertisements violated NRS 482.554, which prohibits deceptive trade practices. 2016 WL 3213593, at *1. Reno Dodge filed a motion to dismiss the violation, arguing that because the DMV did not cite to NRS 482.554's specific subsections, it did not have jurisdiction to issue violations. *Id.* The administrative law judge denied the motion and Reno Dodge filed a petition for judicial review, which the district court denied. *Id.* On appeal, we affirmed the district court's decision, concluding that, because Reno Dodge "was reasonably on notice that the advertisement was an alleged violation of NRS 482.554 *as a whole*," notice was proper. *Id.* at *3 (emphasis added).

Here, ESD did not violate NAC 612.225(3) because the Notice of Telephone Hearing included references to the applicable section of the CARES Act, and the referee provided a concise explanation of the hearing procedures and issues at the hearing's outset. Specifically, in addition to listing the hearing date and time, the Notice of Telephone Hearing stated, "**THE FOLLOWING ISSUES WILL BE CONSIDERED:** Pandemic Unemployment Assistance (PUA) benefits pursuant to Section 2102 of the CARES Act of 2020 and the applicable federal regulations at 20 CFR, Part 625." Directly underneath the reference to Section 2102, the Notice lists "2102(c): PUA - Eligibility." It is unclear why ESD listed subsection "(c)" separately from its reference to Section 2102, but gleaning ESD's rationale is beside the point. ESD cited to 2102(c) *in addition to* its broad reference to Section 2102, which governs the entire PUA program writ large. *See* 15 U.S.C. § 9021 (Supp. II 2018). Thus, Willmert was on notice that Section 2102, in its entirety, was fair game for the hearing.

The referee did not exceed the hearing's scope

Related to improper notice, Willmert argues that the three grounds the referee relied on in issuing his decision exceeded the scope of the hearing. ESD responds that all three contested issues were properly within the scope of Section 2102 of the CARES Act. In reviewing agency decisions, we review purely legal issues de novo, including matters of statutory interpretation. *See Sierra Pac. Power Co. v. State, Dep't of Taxation*, 130 Nev. 940, 944, 338 P.3d 1244, 1246-47 (2014).

PUA benefits were part of a temporary federal unemployment assistance program offered to claimants who were ineligible for traditional unemployment compensation but nevertheless unemployed as a result of the COVID-19 pandemic. *See* 15 U.S.C § 9021. Pursuant to Section 2102 of the CARES Act, to qualify for PUA benefits, an applicant must meet three

requirements and show that they (1) do not qualify for regular unemployment compensation or extended benefits under state or federal law; (2) are available for work within the meaning of applicable state law, except that they are unemployed, partially unemployed, or unable to work due to one of the COVID-19 related reasons identified in Section 2102(a)(3)(A)(ii)(I); and (3) are either self-employed or seeking part-time employment.[3] *See* 15 U.S.C. § 9021(a)(3)(A).

Here, Willmert contends that the referee exceeded the hearing's scope by considering whether he (1) had a state business license, (2) was potentially eligible for regular UC benefits in Indiana, and (3) was a volunteer as opposed to a self-employed gig worker. Considering only whether these issues were within the broad scope of the hearing's notice—and not whether the referee's answers to these questions were proper (which will be discussed in greater depth below)—all three of these issues are relevant to Section 2102 of the CARES Act and within the hearing's scope. Specifically, whether Willmert was eligible for regular UC benefits in Indiana was relevant to whether he qualified for "regular unemployment or extended benefits under State or Federal law," 15 U.S.C. § 9021(a)(3)(A)(i), and Willmert's potential volunteer status was relevant to whether Willmert was "self-employed [or] seeking part-time employment." 15 U.S.C. § 9021(a)(3)(A)(ii)(II).

Whether Willmert had a state business license was also relevant to Section 2102 of the CARES Act. We have found that state business

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[3]The CARES Act also requires an applicant to substantiate their employment or self-employment through documentation. *See Moore v. Emp't Sec. Div.*, No. 84185-COA, 2022 WL 2901129 at *2 (Nev. Ct. App. July 21, 2022) (Order of Affirmance); *see also* 15 U.S.C. § 9021(a)(3)(A)(iii).

licenses can be used for "[p]roof of self-employment." *Moore v. Emp't Sec. Div.*, No. 84185-COA, 2022 WL 2901129 at *3 (Nev. Ct. App. July 21, 2022) (Order of Affirmance) (alteration in original) (internal quotation marks omitted). Thus, we need not decide whether the state business license criterion was relevant to Willmert's "availab[ility] for work within the meaning of applicable state law," 15 U.S.C. § 9021(a)(3)(A)(ii)(I), because it was relevant to the question of whether Willmert was self-employed or a volunteer, *see* 15 U.S.C. § 9021(a)(3)(A)(ii)(II). Consequently, all three issues the referee covered during the telephone hearing—and on which he based his decision—were precisely within Section 2102's purview and, consequently, the hearing's scope.[4]

Accordingly, because the Notice of Telephone Hearing included a broad reference to the section of the CARES Act that would form the hearing's basis, and because Willmert had an opportunity to be heard, was adequately prepared, and did not request a continuance, we conclude that the Notice of Telephone Hearing was proper, and that ESD did not violate NAC 612.225(3) by exceeding the hearing's scope.

The referee's conclusions were supported by substantial evidence

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[4]Willmert also argues that, based on the issues the referee considered, he was inadequately prepared for the hearing. While not determinative to our ultimate decision of whether the referee exceeded the hearing's scope, the record negates this facet of Willmert's argument. Specifically, Willmert neither objected nor asked for a continuance after the referee announced the issues; instead, Willmert stated that he was "ready to go." Further, Willmert came to the hearing prepared to offer evidence that went directly to the issues he now claims exceeded the hearing's scope. Namely, he was prepared with attestation letters, tax returns, and a self-prepared monthly income tracker that he used to support his ineligibility for Indiana benefits, as well as his self-employed status.

Willmert argues that, even if the issues considered during the telephone hearing were properly within the hearing's scope, the referee's findings were not supported by substantial evidence. ESD responds that the referee's decisions were all sufficiently backed by evidence in the record. At the outset, we note that Willmert bore the burden to prove that he satisfied the PUA eligibility criteria. *See* 15 U.S.C. § 9021 (3)(A)(i)-(ii). When reviewing an administrative unemployment compensation decision, we review the Board's and referee's decisions for an abuse of discretion and will uphold those decisions as long as they are supported by substantial evidence, which is evidence that a reasonable mind could find adequately upholds a conclusion. *Bundley*, 122 Nev. at 1444-45, 148 P.3d at 754. To obtain a reversal in this case, Willmert must show on appeal that all of the referee's findings were incorrect. We conclude that a reversal is not warranted because at least one independent basis the referee relied on to affirm ESD's disqualifying determination was supported by substantial evidence.[5]

Willmert was potentially eligible for regular UC benefits in Indiana

Willmert argues that the referee's determination that he was potentially eligible for regular UC benefits in Indiana was not supported by substantial evidence because he voluntarily quit his job before moving to Las Vegas. Additionally, Willmert contends that even if he was not categorically

[5]The first basis—that Willmert was not available to work in Nevada because he did not have a state business license—need not be resolved in light of our overall decision. Nevertheless, as noted in the previous section, Willmert's lack of a state business license was probative of his volunteer status, as it tended to show that he was not self-employed. *See Moore*, No. 84185-COA at *3.

disqualified from receiving regular UC benefits, he had not earned sufficient wages during Indiana's "base period" to qualify for them. ESD responds that Willmert reported $8,195 in W-2 wages on his 2019 Indiana state tax return during the applicable base period, which was enough to make him financially eligible for regular UC benefits as long as he met the other eligibility criteria. We conclude that the referee's decision was supported by substantial evidence because, in Indiana, individuals who voluntarily quit may still be eligible to receive reduced benefits and because Willmert reported income during the applicable base period sufficient to potentially qualify for them.

Chapter 15 of the Indiana Code covers disqualification for benefits. *See* Ind. Code Ann. § 22-4-15-1 (LexisNexis 2019). Ind. Code Ann. § 22-4-15-1(a) specifically mandates that "individual[s] who voluntarily [leave their] employment without good cause in connection with [their] work . . . [are] ineligible for waiting period or benefit rights." The Indiana Code does not define "good cause"; rather, the question of whether an employee quit for good cause is left to the Unemployment Insurance Review Board. *See Davis v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 900 N.E.2d 488, 492 (Ind. Ct. App. 2009). That said, to quit without good cause typically means that the employee's reason for terminating was "purely subjective or personal." *Whiteside v. Ind. Dep't of Workforce Dev.*, 873 N.E.2d 673, 675 (Ind. Ct. App. 2007). Notably, even individuals who left their employment *without* good cause may still be eligible for reduced benefits under Ind. Code Ann. § 22-4-15-1.[6]

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[6]*See, e.g.*, Ind. Code Ann. § 22-4-15-1(b)(1)(A)-(B) ("For the first separation from employment under disqualifying conditions, the maximum benefit amount of the individual's current claim is equal to the result of . . . the maximum benefit amount of the individual's current claim, as

Employees who are not categorically exempt from applying for benefits must still be financially eligible in order to qualify. *See* Ind. Code Ann. § 22-4-2-25. To determine financial eligibility, states typically review the employee's wages earned during a specified segment of time called a "base period." *See, e.g., Anderson*, 130 Nev. at 299, 324 P.3d at 365 (determining the appropriate base period after a claimant applied for benefits). In Indiana, the base period is defined as "the first four (4) of the last five (5) completed calendar quarters immediately preceding the first day of an individual's benefit period." Ind. Code Ann. § 22-4-2-12. A "calendar quarter" is "the period of three (3) consecutive calendar months ending on March 31, June 30, September 30, or December 31." Ind. Code Ann. § 22-4-2-13.

Here, Willmert voluntarily quit his job at Carrabba's in April 2019 to move to Las Vegas and has never attempted to receive benefits in Indiana. Although Willmert voluntarily quit, this "disqualifying condition" did not render him categorically exempt from all benefits—he may still have been eligible to receive reduced benefits, had he applied for them. *See* Ind. Code Ann. § 22-4-15-1(b)(1)(A)-(B). Therefore, Willmert's argument that his voluntary departure from Carrabba's was determinative as to his potential eligibility for Indiana benefits fails.

As to whether Willmert was financially eligible based on his earnings during the base period, the question for the referee was one of potentiality. The CARES Act specifies that a covered individual is one who "*is not* eligible for regular compensation or extended benefits under State or Federal law." 15 U.S.C. § 9021(a)(3)(A)(i) (emphasis added). Thus, the

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initially determined: multiplied by . . . seventy-five percent (75%); rounded . . . .").

finding of ineligibility must be conclusive in order to satisfy that component of the CARES Act and Willmert bore the burden to prove that he had "exhausted all rights to regular unemployment or extended benefits under State or Federal law." *Id.* In Willmert's case, the referee determined that Willmert may have earned sufficient wages during the putative base period (October 1, 2018, to September 30, 2019) to be monetarily eligible for regular UC benefits in Indiana. At minimum, based on Willmert's 2019 Indiana State Tax Return, the referee could not say that Willmert was conclusively ineligible. Thus, there remained a possibility for Willmert to receive regular UC benefits in Indiana.

Accordingly, because Willmert was not categorically exempt from receiving regular UC benefits in Indiana, and because Willmert may have been financially eligible for benefits based on his 2019 tax return and Indiana's specified base period, we conclude that the referee's determination that Willmert may have been eligible for regular UC benefits in Indiana was supported by substantial evidence.

Evidence supports Willmert's volunteer status

Willmert argues that the referee abused his discretion by finding that Willmert was a volunteer. Specifically, Willmert argues that because he worked five nights per week and made an average of $150 in tips per night as a dealer for NPL before the COVID-19 pandemic, he was a self-employed gig worker and not a volunteer. ESD responds that the referee's decision was supported by substantial evidence because Willmert offered his services on a voluntary basis, worked without a contract, and had no guarantee or expectation of payment. We conclude that the referee's determination that Willmert was a volunteer was not an abuse of discretion, as it was supported by evidence in the record and was neither arbitrary nor capricious. *See Clark Cty. Liquor & Gaming Licensing Bd. v. Simon & Tucker, Inc.*, 106 Nev. 96,

97, 787 P.2d 782, 783 (1990) (noting that, when reviewing agency decisions, we are "limited to a determination of whether the decision was arbitrary, capricious, or an abuse of discretion").

Under NRS 612.065, "'employment' means "service . . . performed for wages or under any contract of hire, written or oral, express or implied." The United States Department of Labor has clarified that work performed for employment must be "bona fide 'work'", which does not "include unremunerative work performed as a volunteer." U.S. Dep't of Labor, Employment & Training Administration, Opinion Letter on Definition of "Work" for Purposes of Section 3304(a)(7) of the Federal Unemployment Tax Act (March 4, 1992). There is no clear delineation between a "volunteer" and a "self-employed gig worker." However, the Nevada Supreme Court suggests that, even in the absence of statutory, regulatory, or common law definitions, it would be difficult to call an individual "self-employed" if that individual did not work for wages and was under no contract. *See Whitney v. State, Dep't of Emp't Sec.*, 105 Nev. 810, 813, 783 P.2d 459, 461 (1989). Although not controlling, the Code of Federal Regulations' definition of "volunteer" is also helpful. The Code defines "volunteer" as "[a]n individual who performs hours of service . . . without promise, expectation or receipt of compensation." 29 C.F.R. § 553.101(a) (2012). "For purposes of PUA eligibility," this court has found that "[p]roof of self-employment includes . . . state or Federal employer identification numbers, business licenses, tax returns, business receipts, and signed affidavits from persons verifying the individual's self-employment." *Moore v. Emp't Sec. Div.*, No. 84185-COA, 2022 WL 2901129, at *3 (Nev. Ct. App. July 21, 2022) (Order of Affirmance) (alteration in original) (internal quotation marks omitted).

Here, the referee determined that Willmert was a volunteer with NPL because he had no contract and performed his poker dealing services without expectation of payment. This finding was not an abuse of the referee's discretion, particularly because the record does not demonstrate either how Willmert came to work with NPL, how NPL delegated work to its dealers, or whether NPL set specific requirements for its dealers. *See Clark Cty. Sch. Dist. v. Buchanan*, 112 Nev. 1146, 1149, 924 P.2d 716, 718 (1996) (noting that work done for employment is "required" work, while volunteer work is done with no requirements attached); *see Clark Cty. Liquor & Gaming Licensing Bd.*, 106 Nev. at 97, 787 P.2d at 783. Willmert stated that between April 2019 and March 2020 he consistently worked five nights per week and made $150 in tips per night. However, these facts do not change the reality that, while Willmert may have had an expectation of payment, there was no guarantee. Although it may be customary for players to tip their poker dealers, it is not required, and nothing in the record indicates that tips were required in Willmert's case.

Moreover, to be an "employed" poker dealer in Nevada requires significant licensing and documentation submissions, as well as background checks, pursuant to the Gaming Control Board's discretion. *See, e.g.*, Nev. Gaming Control Bd., Investigations Division, Nonrestricted License as an Officer, Director, Key Employee, or Like Position Instructions, https://gaming.nv.gov/modules/showdocument.aspx?documentid=13405 (last visited Dec. 12, 2023). The record does not indicate that Willmert held either a restricted or nonrestricted employee license, which further supports

Willmert's "volunteer" status.[7] Finally, the attestation letters that Willmert offered as evidence to support his self-employed status were unpersuasive for two reasons. First, of the seven attestation statements, Willmert prepared six of them himself—the letters were identical and potentially self-serving.[8] Second, in the only attestation letter that Willmert did not prepare himself, Patricia Murphy, one of NPL's co-owners, referred to Willmert as "a volunteer gig worker for Nevada Poker League" who "volunteered to deal poker for tips."

Accordingly, because the referee's determination that Willmert was a volunteer with NPL was supported by substantial evidence and appears neither arbitrary nor capricious, we conclude that the referee did not abuse his discretion in deciding this arguable issue.

ESD's determination that Willmert was ineligible for PUA benefits is supported by substantial evidence

As an extension of his previous arguments, Willmert's final argument is that ESD's disqualifying determination was not supported by substantial evidence because his unemployment was caused by the COVID-19 pandemic, and PUA benefits were specifically created to help individuals in Willmert's position. ESD counters that, in order to be eligible for PUA benefits, Willmert had to satisfy all of the criteria set forth in Section 2102 of the CARES Act, which he failed to do. We conclude that, based on the foregoing analysis, ESD's disqualifying determination was supported by substantial evidence. With respect to the referee's decision, the telephone

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[7]Further, as noted throughout, Willmert did not have a state business license, which further supports his volunteer status. *See Moore*, No. 84185-COA at *3.

[8]Willmert stated that he prepared the letters to "have proof of [his] gig working status."

hearing was properly noticed and the issues the referee considered were within the hearing's scope. Additionally, because one or more of the three independent grounds the referee relied on to affirm ESD's initial disqualifying determination was supported by substantial evidence in the record and in accordance with the applicable statutes, regulations, and caselaw, Willmert has not demonstrated reversible error. Consequently, we conclude that ESD's determination that Willmert was ineligible for PUA benefits was not an abuse of discretion, and the district court therefore properly denied Willmert's petition for judicial review.

Accordingly, we

ORDER the judgment of the district court AFFIRMED.[9]

_____, C.J.
Gibbons

_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Crystal Eller, District Judge
Jonathan Andrews, Settlement Judge
The Siegel Group
State of Nevada/DETR - Las Vegas
State of Nevada/DETR - Carson City
Eighth District Court Clerk

[9]Insofar as Willmert has raised arguments that are not specifically addressed in this order, we have considered the same and conclude that they do not present a basis for relief.