

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: June 27, 2024

CV-23-1035

In the Matter of the Claim of CRAIG
HERSKOWITZ,

Appellant.

MEMORANDUM AND ORDER

COMMISSIONER OF LABOR,

Respondent.

Calendar Date: May 28, 2024

Before: Garry, P.J., Egan Jr., Lynch, Fisher and Powers, JJ.

Craig Herskowitz, New York City, appellant pro se.

Letitia James, Attorney General, New York City (*Dennis A. Rambaud* of counsel),
for respondent.

Fisher, J.

Appeal from a decision of the Unemployment Insurance Appeal Board, filed December 7, 2022, which ruled that claimant was ineligible to receive unemployment insurance benefits because he was employed in a major nontenured policymaking or advisory position within the meaning of Labor Law § 565 (2) (e).

At all times relevant, claimant was one of approximately 10 individuals employed as an Assistant Counsel and Legislative Coordinator in the Executive Chamber. He was appointed to this nontenured position by the Counsel to the Governor in December 2019 and served in that capacity until August 2021. The Department of Labor denied claimant's subsequent application for unemployment insurance benefits upon the ground that claimant was employed in a major nontenured policymaking or advisory position

with a governmental agency and, therefore, his employment was excluded from covered employment pursuant to Labor Law § 565 (2) (e). Following a hearing, an Administrative Law Judge sustained the initial determination. Upon administrative review, the Unemployment Insurance Appeal Board affirmed, prompting this appeal.

We affirm. Initially, any argument regarding the admission into evidence of Hearing Exhibits 6 and 7 is unpreserved for our review as claimant raised no objection in this regard at the administrative hearing (*see e.g. Matter of Lamo [Commissioner of Labor]*, 205 AD3d 1297, 1298 [3d Dept 2022]; *Matter of DeCarlo [Commissioner of Labor]*, 6 AD3d 1003, 1003 [3d Dept 2004]). Turning to the merits, "[f]or purposes of determining a claimant's eligibility for unemployment insurance benefits, Labor Law § 565 (2) (e) excludes from employment services rendered for a governmental entity by a person in a major nontenured policymaking or advisory position" (*Matter of Birnbaum [Commissioner of Labor]*, 122 AD3d 1039, 1040 [3d Dept 2014] [internal quotation marks and ellipsis omitted]; *see Matter of Briggs [Commissioner of Labor]*, 90 AD3d 1349, 1350 [3d Dept 2011]). Whether this exclusion applies "presents a mixed question of law and fact, [and] the Board's determination must be upheld if it has a rational basis" (*Matter of Franconeri [New York City Dept. of Personnel-Hudacs]*, 190 AD2d 970, 971 [3d Dept 1993]; *see Matter of Birnbaum [Commissioner of Labor]*, 122 AD3d at 1040; *Matter of Le Porte [New York City Dept. of Personnel-Hartnett]*, 142 AD2d 866, 866 [3d Dept 1988], *lv denied* 73 NY2d 705 [1989]). In this regard, whether a claimant's recommendations or advice is heeded – or the fact that his or her decisions are subject to approval by a higher authority – is irrelevant (*see Matter of Newell [County of Nassau-Commissioner of Labor]*, 9 AD3d 559, 560 [3d Dept 2004], *lv denied* 3 NY3d 610 [2004]). Finally, "it is within the exclusive province of the Board to evaluate evidence and the inferences to be drawn therefrom, and the Board is the final arbiter of witness credibility" (*Matter of Fraternal Order of Eagles [Commissioner of Labor]*, 209 AD3d 1067, 1068 [3d Dept 2022] [internal quotation marks and citations omitted]; *see Matter of Kramer [RT Temps, LLC-Commissioner of Labor]*, 202 AD3d 1230, 1231-1232 [3d Dept 2022]).

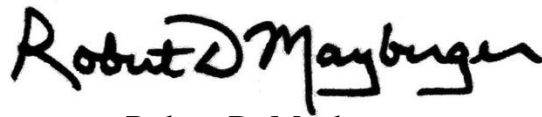
There is no dispute that claimant held a nontenured position in the Executive Chamber, and the record as a whole provides a rational basis for the Board's finding that claimant served in a major policymaking or advisory role (*see Matter of Birnbaum [Commissioner of Labor]*, 122 AD3d at 1040-1041; *Matter of Townes [Commissioner of Labor]*, 114 AD3d 989, 990-991 [3d Dept 2014]; *Matter of Richman [Commissioner of Labor]*, 254 AD2d 673, 673-674 [3d Dept 1998]). The testimony offered by the Executive Chamber's then-Chief Administrative Officer and the information contained in

Hearing Exhibit 1, which outlined claimant's job duties and was received into evidence without objection, established that claimant served as the "chief legal advisor" on issues affecting the three state agencies contained within his designated portfolio. In that capacity, claimant, among other things, "approved the development of the legislative agenda of each agency" and "was the only attorney advising the [Counsel] on major matters," including litigation strategies, involving those agencies. Notably, claimant conceded that he advised the Counsel regarding legal issues involving the relevant state agencies, negotiated with the Legislature with respect to the "content, breadth, and scope of proposed legislation" and would "fill in" for the Counsel in meetings related thereto. Although claimant denied that he played a major policymaking or advisory role in the Executive Chamber, insisting that he was more akin to a "mid-level employee," any conflict in the hearing testimony presented a credibility issue for the Board to resolve (*see Matter of Lamo [Commissioner of Labor]*, 205 AD3d at 1298; *Matter of Richman [Commissioner of Labor]*, 254 AD2d at 674), and – as noted previously – the fact that claimant's decisions were subject to review and/or approval by the Counsel or the relevant deputies is not determinative (*see Matter of Newell [County of Nassau-Commissioner of Labor]*, 9 AD3d at 560). Accordingly, claimant's application for unemployment insurance benefits was properly denied (*see Matter of Franconeri [New York City Dept. of Personnel-Hudacs]*, 190 AD2d at 971-972). Claimant's remaining arguments, to the extent not specifically addressed, have been examined and found to be lacking in merit.

Garry, P.J., Egan Jr., Lynch and Powers, JJ., concur.

ORDERED that the decision is affirmed, without costs.

ENTER:

A handwritten signature in black ink that reads "Robert D. Mayberger". The signature is written in a cursive, slightly slanted style.

Robert D. Mayberger
Clerk of the Court