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

Decided and Entered: November 5, 2026 CV-25-1344

In the Matter of the Claim of
FRANCIS FACCIOLO,
Appellant. MEMORANDUM AND ORDER

COMMISSIONER OF LABOR,
Respondent.

Calendar Date: October 19, 2026

Before: Pritzker, J.P., Ceresia, Fisher, Powers and Corcoran, JJ.

Francis Facciolo, Brooklyn, 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 April 29, 2025, which ruled that claimant was ineligible to receive unemployment insurance benefits because he was unable to file a valid original claim.

Claimant's employment ended on August 31, 2022 and, pursuant to a confidential separation agreement, he received a severance package that was paid in two lump sum payments on September 30, 2022 and January 13, 2023. Claimant thereafter filed a claim for unemployment insurance benefits on September 18, 2023. On September 20, 2023, the Department of Labor issued a preliminary Monetary Benefit Determination, setting claimant's basic base period as running from the second quarter of 2022 through the first quarter of 2023 (April 1, 2022 through March 31, 2023) and his alternate base period as

running from the third quarter of 2022 through the second quarter of 2023 (July 1, 2022 through June 30, 2023). The determination further informed claimant that he had earned remuneration in two quarters of his basic base period. On October 13, 2023, the Department of Labor issued a Notice of Determination of Dismissal/Severance Payments, finding claimant ineligible for benefits under Labor Law § 591 (6) due to the receipt of the dismissal payments, with the ineligibility period beginning on September 18, 2023 and ending on February 11, 2024. The notice advised claimant that, if he was still unemployed after February 11, 2024, he could file a new claim for unemployment insurance benefits. Claimant did not request a hearing to challenge the Department's determination.

On February 17, 2024, claimant filed a claim for unemployment insurance benefits, effective February 12, 2024. The Department thereafter issued a new Monetary Benefit Determination, setting claimant's new basic base period as running from the fourth quarter of 2022 through the third quarter of 2023 (October 1, 2022 through September 30, 2023) and his new alternate base period as running from the first quarter of 2023 through the fourth quarter of 2023 (January 1, 2023 through December 31, 2023). Based upon these time periods, the Department determined that claimant did not meet the earnings requirement for either his basic or alternate base periods in order to file a valid original claim for benefits under Labor Law § 527. Claimant objected and, following a hearing, the determination was sustained by an Administrative Law Judge. Upon administrative appeal, the Unemployment Insurance Appeal Board upheld the determination, and this appeal ensued.

Initially, claimant's challenges on appeal to the Department's October 2023 Notice of Determination of Dismissal/Severance Payments determination, including a challenge to the length of the time period of his ineligibility, are not properly before this Court as he failed to request a hearing on that determination (*see* Labor Law § 620 [1] [a]; *Matter of Bernardone [Commissioner of Labor]*, 224 AD3d 1049, 1051 [3d Dept 2024]; *Matter of Moskovits [Commissioner of Labor]*, 219 AD3d 1652, 1654 [3d Dept 2023]). Further, we reject claimant's contention that his dismissal payments should have been considered weekly remuneration payments qualifying him for benefits, as Labor Law § 517 (2) (h) expressly excludes dismissal payments from the definition of remuneration.

Claimant also contends that his September 18, 2023 claim constituted a valid original claim pursuant to Labor Law § 527. As such, he argues that, once the ineligibility period due to the dismissal payments expired in February 2024, benefit payments should have commenced under the basic and alternate base periods initially calculated for the

September 2023 claim, as referenced in the Department's September 2023 Monetary Benefit Determination. Claimant raised this issue before the Administrative Law Judge, who found that claimant's February 2024 claim "superseded" the original September 2023 claim. On administrative appeal, the Board dismissed the challenge on the grounds that the issue was not properly before it and therefore made no explicit findings as to whether the Department's refusal to utilize the initial base periods was proper. Inasmuch as this argument challenges the denial of benefits in the Department's February 2024 determination, and was properly raised by claimant, the issue of whether claimant's September 2023 claim is to be considered his "valid original claim" must be addressed by the Board. "Our review of Board decisions is limited and we are not permitted to surmise, speculate or substitute our judgment for that of the Board," therefore we withhold decision and remit the matter back to the Board for consideration of this issue (*Matter of Mercedes [Commissioner of Labor]*, 235 AD3d 1079, 1081 [3d Dept 2025] [internal quotation marks and citations omitted]; *see Matter of Panday [RLRG & Assoc. LLC-Commissioner of Labor]*, 244 AD3d 1543, 1544 [3d Dept 2025]).

Pritzker, J.P., Ceresia, Powers and Corcoran, JJ., concur.

ORDERED that the decision is withheld, and matter remitted to the Unemployment Insurance Appeal Board for the issuance of a new decision within 60 days, in accordance with this Court's decision.

ENTER:



Robert D. Mayberger
Clerk of the Court