THE STATE OF NEW HAMPSHIRE

SUPREME COURT

No. 2017-0362

Appeal of Northern New England Telephone Operations LLC and FairPoint Logistics, Inc.

APPEAL PURSUANT TO RULE 10 FROM A DECISION OF THE NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY

BRIEF FOR THE STATE OF NEW HAMPSHIRE DEPARTMENT OF EMPLOYMENT SECURITY

THE STATE OF NEW HAMPSHIRE

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STATEMENT OF THE CASE AND FACTS

This case involves the consolidated unemployment claims of unionized FairPoint[1] employees who went on strike for approximately four months from October 17, 2014, to February 25, 2015. The claimants filed for unemployment compensation benefits, and the claims were initially denied at the certifying officer level based on a finding that the employees were "voluntarily involved in a labor dispute" and therefore did not meet the eligibility requirements of RSA 282-A:36, I. CR[2] Vol. VI at 66, 147, 234, 324. The claimants appealed the disqualification decision to the appeal tribunal pursuant to RSA 282-A:53. CR Vol. VI at 69, 150, 238, 326.

Following a *de novo* hearing held on February 3 and March 12, 2015, the appeal tribunal (*Croce*, Chairman) issued a decision denying unemployment benefits to the claimants. Pet. Add. at 1-9. The appeal tribunal based its decision on a conclusion that "the claimants were unemployed because of a stoppage of work due to a labor dispute, per RSA 282-A:36." Pet. Add. at 6. In reaching this conclusion, the appeal tribunal "define[d] stoppage of work as the claimant's election to stop working because of a labor dispute." *Id.* The appeal tribunal noted that a majority of states define "stoppage of work" as a "substantial curtailment of the employer's business," but rejected that definition because "there is no clear consensus with respect to what constitutes a 'substantial curtailment.'" *Id.* Despite "declin[ing] to create such a definition in the

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[1] "Fairpoint" refers to Appellants Northern New England Telephone Operations LLC and FairPoint Logistics, Inc. collectively.

[2] Citations to the record are as follows: "CR Vol. __ at __" refers to the Certified Record; "Pet. Br." refers to the Brief of the Petitioners'/Appellants; "Pet. Add." refers to the Addendum attached to the Brief of Petitioners/Appellants.

absence of guidance from the law, rule, or case law," the appeal tribunal nevertheless made an alternative finding that "if . . . [it] were to define stoppage of work as a substantial curtailment of the employer's business, [it] would have concluded that Fairpoint suffered a substantial curtailment of its business because of the strike." *Id.* In making this finding, the appeal tribunal applied a "negative impact" test. *Id.* at 6-8. The appeal tribunal further concluded that the strike pay received by some of the claimants constituted deductible wages under RSA 282-A:14. *Id.* at 8.

The claimants appealed to the commissioner pursuant to RSA 282-A:60 seeking to reopen the case. CR Vol. IV at 5-87. The commissioner granted the request in a decision dated July 1, 2015, based on a finding that the appeal tribunal decision was "affected by a mistake of law." Pet. Add. at 16. Specifically, the commissioner found it was mistake to define "stoppage of work" under RSA 282-A:36 as the cessation of work by employees, rather than the curtailment of an employer's operations. *Id.* at 16-17. The commissioner also found that mistake affected the appeal tribunal's alternative finding of substantial curtailment. *Id.* at 17. Because the appeal tribunal had expressly declined to adopt a definition for "substantial curtailment," *see* Pet. Add. at 6, the commissioner found it was mistake for the appeal tribunal to make a finding of substantial curtailment in the absence of any standard to guide such a finding, *id.* at 17; *see also id.* at 29-30 (subsequent decision by commissioner further explaining that the first appeal tribunal applied an improper "negative impact" analysis in reaching the substantial curtailment finding). The commissioner provided guidance on the legal standard for "substantial

curtailment" that should be applied on reopening, and directed the appeal tribunal to hold a *de novo* hearing before a new appeal tribunal chairman. *Id.* at 18-19; *see also* CR Vol. III at 425-30 (Attachment A to commissioner's July 1, 2015 reopening decision).

FairPoint filed an objection to the commissioner's reopening decision, arguing that the commissioner exceeded his authority under RSA 282-A:60 to reopen a case based on "fraud, mistake or newly discovered evidence," and claiming that any future *de novo* hearing would be *ultra vires*. CR Vol. III at 417-423. The commissioner affirmed its reopening decision, concluding that the reference in RSA 282-A:60 to "mistake" encompasses mistakes of law. Pet. App. 21.

A *de novo* hearing was held on September 29, 2015, before a new appeal tribunal (*Mooney*, Chairman). Pet. Add. at 26. Based on all of the evidence presented, the appeal tribunal found that "there was no stoppage of work as defined by a substantial curtailment of business." *Id.* at 25. On the issue of strike pay, the appeal tribunal found that the strike pay constituted deductible income because the claimants had to perform strike duty to be eligible for the strike pay. *Id.* at 26. As a result, the appeal tribunal reversed in part and affirmed in part the certifying officer's benefits determination. *Id.* Specifically, benefits were allowed to the claimants, but reduced or denied due to the receipt of strike pay. *Id.*

FairPoint appealed to the commissioner pursuant to RSA 282-A:60, seeking to vacate the appeal tribunal's decision and reinstate the earlier appeal tribunal's decision. CR Vol. I at 241-312. The claimants affected by the strike pay ruling also filed a partial appeal seeking a reopening of the case on the limited question of whether strike pay

constitutes deductible income. *Id.* at 229-39. In a decision dated December 15, 2016, the commissioner denied both requests to reopen, finding no basis in either request to reopen the case on the basis of fraud, mistake or newly discovered evidence. Pet. Add. 28-42. With regard to FairPoint's request to vacate the appeal tribunal's decision and reinstate the earlier appeal tribunal decision, the commissioner further found that he did not have the authority to grant such relief. *Id.* at 28, 42.

FairPoint appealed to the appellate board pursuant to RSA 282-A:64. CR Vol. I at 152-53. Claimants affected by the strike pay ruling also filed a limited appeal seeking reversal of that ruling only. *Id.* at 155-67. Following review of the extensive record, pleadings submitted by the parties, and oral arguments presented at a hearing held on March 31, 2017, the appellate board issued a decision affirming in part and reversing in part the appeal tribunal's decision. Pet. Add. 42-50. On the issue of qualification for benefits, the appellate board affirmed the appeal tribunal's decision awarding benefits to the claimants, finding that the appeal tribunal "properly and clearly applied the applicable law to the facts before [it] and that [its] decision on the issue of Work Stoppage is amply supported by the record." *Id.* at 49.[3] On the issue of strike pay, the appellate board reversed the decision of the appeal tribunal, finding that strike pay is not deductible income because the source of the payment is a strike benefit fund funded by the employees' own pay rather than the employer. *Id.* at 49-50.

[3] In contrast, the appellate board found that the earlier appeal tribunal decision, issued prior to the commissioner's July 1, 2015 reopening decision, "applied the wrong legal standard." Pet. Add. at 48. Therefore, even if the commissioner had exceeded his authority in granting the reopening, the ultimate result would have been the same given that the appellate board "would have adopted the same legal analysis" as the commissioner. Pet. Add. 46.

FairPoint filed a motion for reconsideration, CR Vol. I at 27-37, which the appellate board denied, Pet. Add. 52-53. This appeal followed.

SUMMARY OF THE ARGUMENT

The commissioner of the Department of Employment Security ("Department") is vested with broad authority to administer the unemployment laws of the State of New Hampshire. That authority includes interpreting the laws relating to the qualification for unemployment compensation benefits and overseeing the administrative process available to individuals seeking such benefits. RSA chapter 282-A provides an extensive appeal process, which involves three levels of appeal—a *de novo* appeal from a certifying officer's determination to an appeal tribunal, a second level appeal to the commissioner to correct for any "fraud, mistake, or newly discovery evidence," and finally a record review by the appellate board—before judicial review of the Department's determination may be sought. These procedures are "designed to minimize inaccuracies and to assure quality and fairness in adjudication." *Appeal of Mullen*, 169 N.H. 392, 401 (2016) (quoting *Petition of Kilton*, 156 N.H. 632, 645 (2007)). This court has observed that the commissioner's role in the second level of the appeal process, "streamlines review and enables correction of errors earlier in the process." *Id.* at 404 (quotation marks omitted). Interpreting RSA 282-A:60 as authorizing the commissioner to correct any mistake, including mistakes of law, is consistent with the principle that administrative agencies should have a chance to correct their own mistakes before time is spent appealing from them, as well as the Department's longstanding practice of interpreting the statute to permit reopening for a mistake of law. Here, the commissioner did not exceed his authority in reopening the case based on a finding that the first appeal tribunal's decision was affected by a mistake of law.

ARGUMENT

I. STANDARD OF REVIEW

Appeals to the New Hampshire Supreme Court from the Department are governed by RSA 282-A:67. This court's "review is confined to the record and [it] cannot substitute [its] judgment as to the weight of the evidence on questions of fact for that of the tribunal." *Appeal of Mullen*, 169 N.H. at 396 (citing RSA 282-A:67, IV and V). This court may reverse or modify the appeal tribunal's decision only in the following limited circumstances:

> The court shall reverse or modify the decision of the appeal tribunal, or remand the case for further proceedings, as determined by the court, only if the substantial rights of the appellant had been prejudiced because the administrative findings, inferences, or conclusions are:
>
> (a) In violation of constitutional or statutory provisions;
>
> (b) In excess of statutory authority;
>
> (c) Made upon unlawful procedures;
>
> (d) Clearly erroneous in view of the substantial evidence on the whole record; or
>
> (e) Affected by other error of law.

RSA 282-A:67, V. In all other circumstances, this court is required to "affirm the appeal tribunal's decision." *Id.*

II. THE COMMISSIONER'S AUTHORITY UNDER RSA 282-A:60 TO REOPEN ON THE BASIS OF "MISTAKE" INCLUDES MISTAKES OF LAW.

The first issue FairPoint raises on appeal is a challenge to the commissioner's July 1, 2015 reopening decision. Pet. Br. 17-22. FairPoint argues that the commissioner exceeded the scope of his authority under RSA 282-A:60 to reopen a case on the basis of "fraud, mistake, or newly discovered evidence" by reopening the case on the basis of a "mistake of law." Pet. Br. 17-22. In so doing, FairPoint challenges the Department's longstanding interpretation of a statute it is charged with administering and the appellate procedure it has followed for decades.

The commissioner of the Department of Employment Security is vested with the broad authority to administer the unemployment compensation laws of the state. RSA 282-A:112. This authority necessarily includes interpreting the statutes he administers, and his interpretations are entitled to deference. *See Appeal of Town of Seabrook*, 163 N.H. 635, 644 (2012) ("[I]t is well established in our case law that an interpretation of a statute by the agency charged with its administration is entitled to deference."); *Appeal of Salem Regional Med. Ctr.*, 134 N.H. 207, 219 (1991) ("[T]he construction of a statute by those charged with its administration is entitled to substantial deference." (quotation omitted)); *cf. State Farm Mut. Auto. Ins. Co. v. Whaland*, 121 N.H. 400, 404 (1981) ("[O]ne of the functions of the commissioner of a State agency is 'to fill in details to effectuate the purpose of the statute.'") (citation omitted).

Appeals from a certifying officer's determination on a claim for unemployment benefits are "to an impartial tribunal appointed by the commissioner." RSA 282-A:53. The decision of an appeal tribunal must, among other things, "set forth all the material findings *and specific provisions of law necessary to support the conclusions* . . . . ." RSA 282-A:58 (emphasis added). Consistent with the commissioner's broad authority to administer and interpret the unemployment compensation laws, the Department's longstanding interpretation of RSA 282-A:60 has been that the commissioner can reopen a case on the basis of a mistake in law. Where the appeal tribunal decision represents the final decision of the Department, such oversight by the commissioner is entirely appropriate. *See Asmussen v. Commissioner, N.H. Dep't of Safety*, 145 N.H. 578, 592 (2000) ("On issues of policy *and legal interpretation*, hearings examiners are subject to the direction of the agency by which they are employed, and their independence is accordingly qualified." (emphasis added)).

RSA 282-A:60 authorizes the commissioner to reopen a case "on the basis of fraud, mistake, or newly discovered evidence." Whether the term "mistake" includes mistakes of law is a question of statutory interpretation which this court reviews *de novo*. *See Appeal of Local Gov't Ctr.*, 165 N.H. 790, 804 (2014) ("Statutory interpretation is a question of law, which [this court] review[s] *de novo*."). In matters of statutory interpretation, this court is the final arbiter of the intent of the legislature as expressed in the words of the statute considered as a whole. *Id.* The court first looks to the language of the statute itself, and, if possible, construes that language according to its plain and ordinary meaning. *Id.* The court interprets legislative intent from the statute as written

and will not consider what the legislature might have said or add language that the legislature did not see fit to include. *Id.* It construes all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result. *Id.* Moreover, the court does not consider words and phrases in isolation, but rather within the context of the statute as a whole. *Id.* This enables the court to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme. *Id.*

FairPoint argues that if the legislature had intended to grant the commissioner the authority to correct a mistake of law, it would have included those words in RSA 282-A:60 the way it did in RSA 282-A:65, III (authorizing the appellate board to reverse or modify the decision of the appeal tribunal if it is "[a]ffected by reversible error of law") and RSA 282-A:67, V(e) (authorizing this court to reverse or modify the decision of the appeal tribunal if it is "[a]ffected by . . . error of law"). While this argument is somewhat appealing on its face, it is inconsistent with the overall purpose of the appeal process established in RSA chapter 282-A, and would lead to the absurd result of prohibiting the Department from correcting its own mistakes of law before the case is appealed to the appellate board.

As this court noted in *Appeal of Mullen*, "[t]he appeal procedures under RSA chapter 282-A 'as a whole would appear designed to minimize inaccuracies and to assure quality and fairness in adjudication.'" 169 N.H. at 401 (quoting *Petition of Kilton*, 156 N.H. 632, 645 (2007)). The first step of the appeal process—appeal to the appeal tribunal—"serves at least two functions: It affords the claimant a hearing and it affords

the department an opportunity to correct any mistake by the certifying officer." *Pregent v. New Hampshire Dep't of Employment Sec.*, 116 N.H. 149, 151 (1976). As mentioned above, the decision of the appeal tribunal must set forth the specific provisions of law necessary to support the conclusions. *See* RSA 282-A:58. When an appeal tribunal decision is affected by a mistake of law, that mistake should be corrected as soon as possible in the appellate process. *See Appeal of White Mountains Educ. Ass'n*, 125 N.H. 771, 774 (1984) ("[A]dministrative agencies should have a chance to correct their own alleged mistakes before time is spent appealing from them."). This court has said that "appeals in unemployment cases should be 'simple, prompt and nonlegalistic.'" *Appeal of Gallant*, 125 N.H. 832, 836 (1984) (quoting *Pomponio v. State*, 106 N.H. 273, 275 (1965)). The procedures set up by the Unemployment Compensation Act are "designed to facilitate a simple and speedy determination of benefits claims." *Pomponio*, 106 N.H. at 275.

Interpreting RSA 282-A:60 as authorizing the commissioner to correct any mistake, including mistakes of law, is consistent with the overall purpose of the Act and avoids the absurd result of prohibiting the Department from correcting its own mistakes of law before the case is appealed to the appellate board. *See Appeal of Mullen*, 169 N.H. at 404 ("[T]he commissioner's 'adjudicatory role, as expressly permitted by [RSA 282-A:60] . . . streamlines review and enables correction of errors earlier in the process."). Requiring a party to wait until the third level of appeal before challenging a ruling of law unnecessarily lengthens an appeal process which is meant to be "simple and speedy." Moreover, it logically follows that the commissioner, who is vested with the broad

authority to administer the unemployment compensation laws of the state, be authorized to interpret such laws and correct mistakes made by an appeal tribunal appointed by the commissioner. *See* RSA 282-A:112. Had the legislature intended to limit the type of "mistake" the commissioner can correct, it would have so stated in the statute. *See Appeal of Local Gov't Ctr.*, 165 N.H. at 804 (This court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

The doctrine of administrative gloss further supports interpreting "mistake" in RSA 282-A:60 as including mistakes of law. "Administrative gloss is placed upon an ambiguous clause when those responsible for its implementation interpret the clause in a consistent manner and apply it to similarly situated applicants over a period of years without legislative interference." *Petition of Kalar*, 162 N.H. 314, 321 (2011); *see also New Hampshire Retirement Sys. v. Sununu*, 126 N.H. 104, 109 (1985) ("[W]hen the meaning of a statute is in doubt, 'the long-standing practical and plausible interpretation applied by the agency responsible for its implementation, without any interference by the legislature, is evidence that the administrative construction conforms to the legislative intent.'") (citation omitted).

Here, the Department has long interpreted RSA 282-A:60 as permitting the commissioner to reopen a case if the appeal tribunal decision is tainted by a mistake of law. This interpretation is consistent with guidance the Department received from the New Hampshire Attorney General in 1982 regarding the scope of the commissioner's reopening authority. CR Vol. I at 216-17 (Opinion of the Attorney General, No. 82-15-

F). In that Opinion, the Attorney General observed that while the commissioner "cannot on his own modify, amend, or reverse any Appeal Tribunal decision," he may find "that a mistake has been made, either through misapprehension of fact *or misapplication of law*, and order reopening." *Id.* at 217 (emphasis added). The Opinion further notes that the purpose of review by the commissioner "is to enable the Appeal Tribunal to correct errors or deficiencies in the process in which it has engaged, before its decision is transmitted to the Appellate Division." *Id.* at 216. If the legislature had disagreed with this longstanding interpretation of the commissioner's reopening authority, it could have altered the language of the statute accordingly. The fact that it has not done so supports the Department's longstanding interpretation of RSA 282-A:60.

This court should interpret RSA 282-A:60 as authorizing the commissioner to reopen a case on the basis of mistake of law, since such an interpretation "streamlines review and enables corrections of errors earlier in the process." *See Mullen*, 169 N.H. at 404.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests five (5) minutes of oral argument to be presented by Senior Assistant Attorney General Laura Lombardi.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
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February 9, 2018

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing were mailed this 9th day of February 2018, postage prepaid, to Daniel Will, Esq., Arthur Telegren, Esq., Peter Perroni, Esq., and James A.W. Shaw, Esq., counsel of record.

Laura E. B. Lombardi