APPENDIX TO THE PETITION FOR A WRIT

OF CERTIORARI

TABLE OF CONTENTS

APPENDIX D

APPENDIX E

CERTIFICATE OF SERVICE

I, John M. Custin hereby certify that 1 unbound copy of the foregoing Petition for Writ of Certiorari in Custin v. Wirths et al., were sent via USPS Delivery confirmation to the U.S. Supreme Court, and 1 bound copy was sent via USPS Priority Mail and email to the following party listed below, this [July 28th, 2021] in accordance with the November 13th 2020 COVID 19 modifications to the deadline for filing and paper filing requirements.

(tracking # (_____)

and email to the following party listed below, this [July 28th, 2021]:

Name of Respondent: Rimma Razhba D.A.G.
Title: Deputy Attorney General
Address: Office of the Attorney General NJ
Department of Law & Public Safety
Division of Law
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 112
City, State Zip Trenton, N.J. 08625

Executed on July 28, 2021.

John M Custin

Name of Petitioner: John M. Custin
Title: Pro Se
Address: P.O. Box 5631
City, State, Zip: Christiansted, VI 00823

e mail: jocust100@yahoo.com

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

SUMMARY ORDER

FOR THE COURT:
s/ Patricia S. Dodszuweit
Patricia S. Dodszuweit,
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1837

JOHN M. CUSTIN,

Appellant

v.

HAROLD J. WIRTHS, STATE OF NEW JERSEY COMMISSIONER OF LABOR;
JOSEPH SIEBER, N.J. BOARD OF REVIEW;
GERALD YARBROUGH, N.J. BOARD OF REVIEW;
JERALD L. MADDOW, N.J. BOARD OF REVIEW;
HILDA S. SOLIS, U.S. SECRETARY OF LABOR;
JANE OATS, SECRETARY OF EMPLOYMENT & TRAINING;
SETH D. HARRIS, ACTING U.S. SECRETARY OF LABOR

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-12-cv-00910)
District Judge: Honorable Kevin McNulty

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 2021

Before: AMBRO, PORTER and SCIRICA, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted pursuant to Third Circuit LAR 34.1(a) on February 12, 2021. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered March 26, 2020, be and the same is hereby affirmed. Costs taxed against the appellant. All of the above in accordance with the opinion of this Court.

ATTEST:

s/ Patricia S. Dodszuweit
Clerk

Dated: March 4, 2021

APPENDIX

APPENDIX B

Case # 20-1837

UNITED STATES COURTS OF APPEALS

FOR THE THIRD CIRCUIT

John M. Custin,

Plaintiff-Appellant,

v.

Harold J. Wirths,et al.

Defendants/Appellees.

On Appeal from the United States District Court

For New Jersey

Opinion of the Third Circuit

John M. Custin

P.O. Box 5631

Christiansted, VI 00823

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 20-1837

JOHN M. CUSTIN,

Appellant

v.

HAROLD J. WIRTHS, STATE OF NEW JERSEY COMMISSIONER OF LABOR;
JOSEPH SIEBER, N.J. BOARD OF REVIEW;
GERALD YARBROUGH, N.J. BOARD OF REVIEW;
JERALD L. MADDOW, N.J. BOARD OF REVIEW;
HILDA S. SOLIS, U.S. SECRETARY OF LABOR;
JANE OATS, SECRETARY OF EMPLOYMENT & TRAINING;
SETH D. HARRIS, ACTING U.S. SECRETARY OF LABOR

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil Action No. 2-12-cv-00910)
District Judge: Honorable Kevin McNulty

Submitted Pursuant to Third Circuit LAR 34.1(a)
February 12, 2021

Before: AMBRO, PORTER and SCIRICA, Circuit Judges

(Opinion filed: March 4, 2021)

OPINION*

PER CURIAM

Appellant John Custin, proceeding pro se, appeals from the District Court's orders dismissing his complaint in part and granting summary judgment on the remaining claims in an action he brought pursuant to 42 U.S.C. § 1983. For the following reasons, we will affirm.

In April 2010, Custin was discharged by Walmart Stores, Inc., after two years of employment. Over the next two years, he filed four separate claims for benefits under the New Jersey Unemployment Compensation Law, N.J.S.A. § 43:21-1, et seq., each of which was ultimately denied. In February 2012, Custin filed this action. The operative third amended complaint sought relief against the Commissioner of the State of New Jersey Department of Labor and Workforce Development (NJDOL) and three members of the Department of Labor's Board of Review (collectively the state defendants), and the former and acting U.S. Secretary of Labor and the U.S. Secretary of Employment and Training Administration (collectively the federal defendants). Custin alleged that, in their administration of the unemployment compensation program, the state defendants violated the Social Security Act (SSA), as well as his Fourteenth Amendment due process rights and Eighth Amendment right to be free of excessive fines. Custin also challenged the constitutionality of 20 C.F.R. § 615.8(c)(2) and N.J.S.A. § 43:21-5(b). Finally, he

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

sought to enjoin the federal defendants from continuing to certify or provide federal funding for New Jersey's unemployment compensation program.

In January 2014, the District Court dismissed the claims against the federal defendants. See ECF No. 82 & 83. It subsequently dismissed, under Fed. R. Civ. P. 12(b)(6), all of the claims against the state defendants except the due process claims.[1] See ECF No. 130 & 131. In an order entered March 26, 2020, the District Court granted the state defendants' motion for summary judgment on the due process claims, and this appeal ensued. See ECF No. 253 & 254.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over the District Court's dismissal of the claims for failure to state a claim for relief, see Gelman v. State Farm Mut. Auto. Ins. Co., 583 F.3d 187, 190 (3d Cir. 2009), and over its grant of summary judgment, see Groman v. Twp. of Manalapan, 47 F.3d 628, 633 (3d Cir. 1995). Summary judgment is proper where, viewing the evidence in the light most favorable to the nonmoving party and drawing all inferences in favor of that party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); Kaucher v. County of Bucks, 455 F.3d 418, 422-23 (3d Cir. 2006).

We first affirm the dismissal of the claims against the federal defendants. Pursuant to the Social Security Act of 1935, 42 U.S.C. § 501 et seq., unemployment

[1] In the same order, the District Court dismissed all claims against the NJDOL; however, because the agency was not named as a defendant in the third amended complaint, we do not address Custin's argument on appeal that the claims against NJDOL were dismissed in error.

compensation is provided through a cooperative federal-state program. See California Dep't. of Human Resources Development v. Java, 402 U.S. 121, 125 (1971). Although the United States partially funds the programs, the states are responsible for establishing eligibility requirements and making individual eligibility determinations. See 26 U.S.C. § 3304(a); 42 U.S.C. § 503. The Secretary of Labor annually certifies state programs after confirming that they conform to federal requirements. Java, 402 U.S. at 125. Custin claimed that the federal defendants violated his constitutional rights by continuing to certify New Jersey's unemployment compensation program as compliant with federal law "when it was not." In particular, Custin claimed that the state failed to comply with the federal requirements that its program provide "full payment of unemployment compensation when due," and the "[o]pportunity for a fair hearing, before an impartial tribunal," when benefits are denied. 42 U.S.C. § 503(a)(1), (3).

The District Court properly concluded that Custin lacked standing to pursue this claim because there was no causal connection between the certification of New Jersey's unemployment compensation benefits program and the injury alleged in the complaint, which, contrary to Custin's contention on appeal, was the alleged improper denial of his benefits claims and an ensuing financial fallout. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992) (noting the well-recognized elements of Article III standing, including a "causal connection between the injury and the conduct complained of"). In his complaint, Custin did not allege any facts suggesting that the state's unemployment compensation program was non-compliant with federal law; instead, he alleged only defects in the process by which the state denied *his* claims for benefits. Neither the

Secretary of Labor nor the Secretary of Employment and Training Administration is a proper defendant under the facts as alleged. Id. (noting that the alleged injury must be "fairly . . . trace[able]" to the defendant's actions) (citation omitted); cf. Java, 402 U.S. at 135 (enjoining enforcement of California unemployment law as inconsistent with federal "when due" requirement where defendants were California Department of Human Resources Development and other state defendants).

Turning to the claims against the state defendants, Custin argues that the District Court used the wrong standard in evaluating his due process claims. We disagree. A claimant has a property interest in unemployment compensation benefits which is protected by the Fourteenth Amendment's Due Process Clause. See Wilkinson v. Abrams, 627 F.2d 650, 664 (3d Cir. 1980). The District Court cited and properly applied Supreme Court decisions outlining "the essential requirements of due process," including the right to "notice and opportunity to respond," "the opportunity to be heard at a meaningful time and in a meaningful manner," and the right to "an impartial and disinterested tribunal." See ECF No. 253 at 13 (citing and quoting Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985), Mathews v. Eldridge, 424 U.S. 319, 332 (1976), and Marshal v. Jericho, 446 U.S. 238, 242 (1980)). The District Court also looked to analogous administrative cases to guide it in applying these principles to the unemployment compensation context.[2] See, e.g., DeBlasio v. Zoning Bd. of Adjustment

[2] Contrary to Custin's argument on appeal, this case is not analogous to Shaw v. Valdez, 819 F.2d 965, 968 (10th Cir. 1987). Shaw challenged the state's procedures as violative of the "fair hearing" requirement of the SSA, 42 U.S.C. § 503(a)(3). Id. at 966. Although Custin purported to do the same, as discussed *supra*, the factual allegations in

for Twp. of West Amwell, 53 F.3d 592 (3d Cir. 1995). Custin appears to argue that the District Court should have separately analyzed whether he was denied a "fair hearing" under 42 U.S.C. § 503(a)(3); but a separate analysis was not necessary as the requirements of due process and § 503(a)(3) are co-extensive. See Cosby v. Ward, 843 F.2d 967, 982 (7th Cir. 1988) ("Whether the statutory 'fair hearing' requirement has been met is tested by the same standards as constitutional procedural due process.") (citation omitted); Ross v. Horn, 598 F.2d 1312, 1318 n.4 (3d Cir. 1979) (assuming the same).[3]

In his brief, Custin focuses on his due process claims stemming from the denial of his first claim for unemployment benefits made in April 2010. Initially, the Deputy Director of the Division of Unemployment and Disability Insurance determined that Custin was eligible for benefits. Walmart appealed and, during a telephonic hearing before the Appeals Tribunal on June 28, 2010, argued that Custin was ineligible for benefits because he was dismissed for misconduct. See N.J.S.A. § 43:21-5(b) (2007) (disqualifying individuals for unemployment compensation benefits "for the week in which the individual has been suspended or discharged for misconduct connected with the work, and for the five weeks which immediately follow that week"). A personnel manager from Walmart testified that Custin was discharged from employment because he

---

his complaint support only a claim that *he* was denied a fair hearing.

[3] To the extent that Custin challenges the District Court's discovery rulings as erroneous and adversely affecting his due process claims, we find no abuse of discretion. See Anderson v. Wachovia Mortg. Corp., 621 F.3d 261, 281 (3d Cir. 2010) ("We review a district court's discovery orders for abuse of discretion, and will not disturb such an order absent a showing of actual and substantial prejudice.").

violated the company's callout policy by failing to notify Walmart of his absences for five consecutive days that he was scheduled to work in April 2010. Under the policy, employees were required to call a 1-800 number prior to their shift to advise that they would be absent; employees then received a verification number as proof of their call and were directed to their local Walmart store to speak to a manager. Custin testified that he was aware of the callout policy and that, on each of the days in question, he tried to call the hotline but he was disconnected because "there [wa]s something wrong with it," and he tried to call the local store but no one picked up. The manager testified that there were no problems reported with the phone system and other employees properly called out on those days. During her testimony, the manager referred to two documents which were provided to the hearing examiner in advance of the hearing, an "exit interview" indicating that Custin was "rehirable," and an "attendance report" indicating the dates of Custin's absences from work.

The hearing examiner determined that Custin was discharged for misconduct based on his failure to properly notify Walmart of his absences and that, as a result, he was ineligible for benefits under § 43:21-5(b) for the period from April 18, 2010 to May 29, 2010. See N.J.S.A. § 43:21-5(b) (defining "[m] isconduct" to include "conduct which is improper, intentional, connected with the individual's work, within the individual's control, not a good faith error of judgment or discretion," including the "deliberate refusal, without good cause, to comply with the employer's lawful and reasonable rules made known to the employee"). Custin appealed, first to the NJDOL Board of Review,

which affirmed the Tribunal, and then to the Appellate Division of the Superior Court of New Jersey, which affirmed the Board's decision.

In his complaint, Custin claimed that his due process rights were violated because he did not receive notice of his right to appeal the Appellate Tribunal's decision, he was not provided copies of the "exit interview" and "attendance report" referenced in the hearing, and the Board of Review upheld the decision without copies of those documents. Custin also alleged that the hearing examiner was required to find malicious intent to sustain a misconduct charge.[4]

We agree with the District Court that Custin received all of the process that he was due in these initial proceedings. Custin was given notice, both of the hearing before the Appellate Tribunal, and of Walmart's claims, and he was afforded an opportunity to rebut those claims. See FTC v. National Lead Co., 352 U.S. 419, 427 (1957) (noting that "the requirements of a fair hearing include notice of the claims of the opposing party and an opportunity to meet them"). As the Superior Court indicated in affirming the denial of benefits, "Custin was well aware of Walmart's position that he had been separated from work for misconduct." ECF No. 233-13 at 13. The Court noted that when Custin first

[4] In its opinion, the District Court outlined numerous other procedural defects stemming from these proceedings which Custin raised for the first time in his Statement of Material Facts. See ECF No. at 14-16. These claims were not properly before the District Court. See Shanahan v. City of Chicago, 82 F.3d 776, 781 (7th Cir. 1996) ("A plaintiff may not amend his complaint through arguments in his brief in opposition to a motion for summary judgment."); Trishan Air, Inc. v. Federal Ins. Co., 635 F.3d 422, 435 (9th Cir. 2011) (noting that "summary judgment is not a procedural second chance to flesh out inadequate pleadings") (citation omitted). In any event, for the reasons provided by the District Court, these alleged procedural defects do not amount to due process violations.

applied for unemployment benefits, the notice scheduling an appointment with a claims examiner indicated "in bold letters" that "the reason for his appointment was that he may have been separated for misconduct in connection with his work." Id. at 13-14. It further noted that, when Walmart appealed, Custin received a copy of the notice of the Appeal Tribunal hearing, "which explicitly stated that the issues involved were 'voluntary leaving' and 'discharge for misconduct.'" Id. at 14. Finally, at the start of that hearing, the examiner indicated that "[t]he issues to be resolved were the issue of discharge for misconduct and the issue of voluntary leaving." Id. Custin gave no indication that he was unprepared to meet those charges.

At the Appeal Tribunal hearing, Custin was also provided an opportunity to present evidence and testify on his own behalf, and to cross-examine Walmart's personnel manager. See ECF No. 233-11. Neither the failure to provide Custin with copies of the exit interview or attendance record, nor the failure to make those documents part of the record on appeal, rendered the proceedings fundamentally unfair. Custin readily admitted in his testimony that he was absent on the days in question. And Walmart's personnel manager testified that, according to the exit interview, Walmart was willing to rehire Custin; that testimony was part of the record on appeal. The mere fact that Walmart was willing to rehire Custin did not negate the hearing examiner's finding that Custin was discharged for misconduct. Furthermore, the hearing examiner was not required to find malicious intent to disqualify Custin for misconduct. Cf. N.J.S.A. § 43:21-5(b) (2015) (providing malicious behavior as an example of "severe

misconduct").[5] As the Superior Court observed, the determination that Custin failed to properly notify Walmart of his absences constituted misconduct at the time under N.J.A.C. § 12:17-10.3. See ECF No. 233-13. Finally, Custin exercised his right to appeal to the Board of Review and, from there, to the Superior Court, which addressed his due process claims. Because Custin was afforded all of the procedural safeguards required for a fair hearing and received meaningful review through the appellate process, summary judgment was warranted on these due process claims.

The District Court also properly denied Custin's due process claims arising from the denial of his second, third, and fourth claims for unemployment compensation benefits because he failed to avail himself of all the processes available to him. See Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000) ("In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are

[5] Custin sought to challenge N.J.S.A. § 43:21-5(b), arguing that it "enables an employer to disqualify a claimant for benefits for being a malicious employee while in the same breath stating in testimony that he is rehirable." ECF No. 38 at 6. But as the District Court concluded, Custin failed to allege how the statute violates 42 U.S.C. § 503(a)(1), the provision of the SSA requiring state unemployment compensation programs to provide for payment of benefits "when due." We likewise agree that there is no merit to Custin's challenge to the validity of N.J.S.A § 21-24(19), which deems claimants ineligible for extended unemployment benefits if they failed to accept any offer of, or to apply for, suitable work, or if they failed to actively seek suitable work. Custin argued that the statute "disqualifies claimants twice on the same charge on the original claim even before that original disqualification has been heard on appeal." We see no basis for finding this statute violative of the SSA or the due process clause, neither of which requires the payment of benefits while an appeal from the *denial* of benefits is pending. Cf. Java, 402 U.S. at 133 (finding section of state unemployment insurance code providing for suspension of allowed benefits pending the employer's appeal violative of the SSA's "when due" clause). For the same reasons, Custin's challenge to 20 C.F.R. § 615.8(c)(2), which was based on similar arguments, fails.

available to him or her, unless those processes are unavailable or patently inadequate."). In particular, for each of these benefits claims he failed to appeal the final decisions of the Appeals Tribunal to the Board of Review. See N.J.S.A. § 43:21-6 (setting forth the appeal procedures in unemployment compensation proceedings). Custin did not explicitly allege that the state processes were unavailable or inadequate. The District Court, construing the pro se pleadings liberally, identified a dozen allegations of procedural defects in the appellate process. See ECF No. 253 at 10-11. But as the District Court explained, most of the alleged defects could have been raised on appeal to the Board of Review, and none of them would amount to interference with the appellate process or render it a sham. See Alvin, 227 F.3d at 118 ("When access to procedure is absolutely blocked or there is evidence that the procedures are a sham, the plaintiff need not pursue them to state a due process claims.").

Finally, we agree with the District Court that Custin alleged no basis for relief under the Eighth Amendment. See Browning-Ferris Indus. v. Kelco Disposal, 492 U.S. 257, 262 (1989) (holding that the Eighth Amendment applies "primarily, and perhaps exclusively, to criminal prosecutions and punishments" and does not apply to punitive damages in a civil suit).

For the foregoing reasons, we will affirm the District Court's judgment.

APPENDIX

APPENDIX C

Case # 12cv910

UNITED STATES DISTRICT COURT

FOR NEW JERSEY

John M. Custin,

Plaintiff-Appellant,

v.

Harold J. Wirths,et al.

Defendants/Appellees.

The United States District Court

For New Jersey

Opinions of the District Court of New Jersey

John M. Custin

P.O. Box 5631

Christiansted, VI 00823

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN M. CUSTIN, **Plaintiff,** **v.** **HAROLD J. WIRTHS, JOSEPH SIEBER, GERALD YARBROUGH, JERALD L. MADDOW, et al.,** **Defendants.**	Civ. No. 2:12-cv-910-KM-MAH **OPINION**

MCNULTY, U.S.D.J.:

The plaintiff, John M. Custin, alleges that various New Jersey state officials deprived him of his constitutional right to due process in the course of denying his claims for unemployment benefits. Defendant Harold J. Wirths was the Commissioner of the New Jersey Department of Labor, and Defendants Joseph Sieber, Gerald Yarbrough, and Jerald Maddow were members of the Board of Review for unemployment claims. These defendants, represented by the New Jersey Attorney General's office, collectively move for summary judgment as to the remaining claims against them.

In two previous opinions on this matter, I dismissed several claims against these defendants as well as against other parties. (DE 82, 130). Familiarity with those prior opinions is assumed. This motion for summary judgment addresses all remaining due process claims. The accompanying order invites the parties to identify any issue which they believe remains open and undecided.

Defendants contend that Custin has not raised a triable issue of fact that would demonstrate his due process rights were violated in the course of any of his claims for unemployment benefits. For the reasons herein, Defendants' motion will be granted.

I. Background[1]

Plaintiff John M. Custin filed a lawsuit alleging a variety of harms relating to denial of his multiple claims for unemployment benefits. (DSMF ¶ 1). The remaining Defendants are Harold Wirths, Joseph Sieber, Gerald Yarbrough, and Jerald Maddow (the "State Defendants"). (DSMF ¶ 6). The suit was filed against a number of federal and state officials, but the only remaining claim is one under 42 U.S.C. § 1983 against the State Defendants in their individual capacities. (DSMF ¶¶ 2, 6)). Defendant Wirths was the Commissioner of the New Jersey Department of Labor, and Defendants Sieber, Yarbrough, and Maddow were members of the Board of Review for unemployment claims. (DSMF ¶ 8).

Custin was discharged from employment at Wal-Mart on April 26, 2010. (DSMF ¶ 12). Thereafter, he filed a claim for unemployment benefits with the New Jersey Department of Labor, Division of Unemployment Insurance. (*Id.*). Initially, a Deputy Director of the Division of Unemployment Insurance deemed Custin eligible for unemployment benefits. (DSMF ¶ 13). However, Wal-Mart appealed this determination to the Appeal Tribunal. (DSMF ¶ 14). The Appeal Tribunal is the first appellate level within the New Jersey Department of Labor

---

[1] For purposes of this motion, I consider the State Defendants' statement of material facts ("DSMF") (DE 233), Plaintiff SSC's responsive statement of material facts ("PRSMF") (DE 245), Plaintiff's separately numbered counter statement of facts ("CSMF") (DE 245), as well as documentary evidence. Facts not contested are assumed to be true.

Record items cited repeatedly will be abbreviated as follows:

AT Transcript= Transcript from Appeal Tribunal hearing on June 28, 2010 (DE 233-11)

AG Cert. = Certification of Rimma Razhba (counsel for State Defendants) (DE 233-5)

Pl. Opp. = Plaintiff John M. Custin's brief in opposition to State Defendants' motion (DE 244)

for deciding unemployment and temporary disability benefit disputes. (DSMF ¶ 8).

Custin received a notice scheduling the appeal for a telephone hearing on June 28, 2010. (DSMF ¶ 15). This notice specified two charges: "voluntary leaving" and "discharge for misconduct."[2] (*Id.*). During that hearing on June 28, 2010, a hearing officer heard testimony from Custin and a personnel manager from Wal-Mart, Beverly Shuck.[3] Custin was given an opportunity to cross-examine Shuck during the hearing. (DSMF ¶ 17). The hearing officer explained that the issues to be resolved were "voluntary leaving" and "discharge for misconduct." (DSMF ¶ 18). Shuck testified that Custin was terminated for being a "no call no show" for five consecutive days on which he was scheduled

---

[2] The applicable statute, effective as of the time of Custin's application for benefits, reads in relevant part as follows:

> An individual shall be disqualified for benefits:
>
> (a) For the week in which the individual has left work voluntarily without good cause attributable to such work, and for each week thereafter until the individual becomes reemployed and works four weeks in employment, which may include employment for the federal government, and has earned in employment at least six times the individual's weekly benefit rate, as determined in each case. This subsection shall apply to any individual seeking unemployment benefits on the basis of employment in the production and harvesting of agricultural crops, including any individual who was employed in the production and harvesting of agricultural crops on a contract basis and who has refused an offer of continuing work with that employer following the completion of the minimum period of work required to fulfill the contract.
>
> (b) For the week in which the individual has been suspended or discharged for misconduct connected with the work, and for the five weeks which immediately follow that week, as determined in each case. In the event the discharge should be rescinded by the employer voluntarily or as a result of mediation or arbitration, this subsection (b) shall not apply, provided, however, an individual who is restored to employment with back pay shall return any benefits received under this chapter for any week of unemployment for which the individual is subsequently compensated by the employer.

N.J. Stat. Ann. § 43:21-5 (eff. December 9, 2007 to June 30, 2010).

[3] Custin refers to this individual as "Shupp" or "Schupp," but her name is listed in the Appeal Tribunal transcript and Defendants' briefing as "Shuck."

to work: April 17, 19, 21, 22, and 23, 2010.[4] (DSMF ¶ 19). She explained that Wal-Mart's policy required employees to call a designated number prior to the start of their scheduled shift if they anticipated being absent. (DSMF ¶ 20). Custin testified that he was aware of this call-out procedure. (DSMF ¶ 23). In his testimony, Custin admitted that that he did not report to work on April 17, 19, 21, 22, and 23, 2010. (DSMF ¶ 22). Further, he testified that he had used these call-out procedures successfully in the past without issue. (DSMF ¶ 28).

His defense of his actions was that he attempted to call the designated number on each of the five days but was unable to connect. (DSMF ¶ 24). He also attempted to call the store at which he worked, he said, but no one picked up there, either. (DSMF ¶ 25). He could not provide any telephone records or other verification of his attempts to call the store or the designated number. (DSMF ¶ 26). When asked about his failure to successfully call out, Custin replied that he thought he did as much as he had to do. (DSMF ¶ 29). In response to his contention that the phone system was not working, Shuck responded that no other employee had reported issues with the system "that day."[5] (AT Transcript at 20). The examiner also referred to two documents sent to her by Wal-Mart: an exit interview with Plaintiff and his attendance record. (DSMF ¶ 31). While Custin did not, evidently, receive copies of these

---

[4] Custin states that he is in no position to verify Shuck's testimony. I take him to be referring to the truth, or not, of her statements. A transcript of the testimony itself was attached as Exhibit F to the Defendants' motion for summary judgment. It does not seem to be disputed that Shuck testified.

[5] There is a potential ambiguity as to "that day." State Defendants claim that Shuck testified that there were no other issues reported "on each of those days." (DSMF ¶ 30). That is inaccurate; Shuck testified that the phone was working on one day in particular, later stating that she "just printed out the list from that day and there are nine people called out and would be tardy." (AT Transcript at 27). It is not clear which day she is referring to, and Plaintiff claims "that day" is in fact April 26, 2010—the day he was terminated. (PRSMF ¶ 42). However, Shuck also testified that "[w]e had no other problems and we did have other absences that day," which in context is referring to April 23, 2010, the day she allegedly called Custin to ask why he had not called out. (AT Transcript at 19-20).

documents prior to the hearing, he did not raise any issues regarding them at the time. (DSMF ¶ 31; PRSMF ¶ 32).

On July 6, 2010, the Appeal Tribunal issued a decision disqualifying Custin from unemployment benefits. (DSMF ¶ 33). The Tribunal found that Custin did not properly notify his employer of his absence for five consecutive work days, despite his awareness of the notification requirement. (DSMF ¶ 34). Custin appealed the decision to the Board of Review, which is the highest appellate level within the New Jersey Department of Labor for deciding unemployment and temporary disability benefit disputes. (DSMF ¶¶ 8, 35). The Board of Review consisted of Defendants Sieber, Yarbrough, and Maddow (the "Board of Review Defendants"). (DSMF ¶ 35). In a decision dated February 4, 2011, the Board of Review affirmed the decision of the Appeal Tribunal.[6] (*Id.*)

Custin then appealed the Board of Review's decision to the Superior Court of New Jersey, Appellate Division. (DSMF ¶ 36). The Appellate Division affirmed the Board of Review's decision. (*Id.*).

Second Claim

On or about December 4, 2011, Custin filed a claim for extended benefits. (DSMF ¶ 61). This claim was denied, and he appealed the decision to the Appeal Tribunal on December 21, 2011. (DSMF ¶ 62). On February 23, 2012, Custin participated in a telephone hearing with an examiner from the Appeal Tribunal. (*Id.*). The next day, the Appeal Tribunal affirmed the decision and deemed Plaintiff ineligible for extended benefits because he had not earned any wages after the effective date of his disqualification for regular benefits.[7] (DSMF ¶ 63).

---

6 Custin claims to dispute this fact, but not in the sense that he denies that the Board of Review affirmed the Appeal Tribunal's decision. Rather, he makes the point that "[t]he Board of Review had no authority to find on an incomplete and insufficient record." (PRSMF ¶ 35).

7 Custin admits this, but notes that the decision of the Appeal Tribunal rested on "monetary grounds" while the denial by the examiner on the second claim cited what he describes as "separation grounds." (PRSMF ¶ 63).

Custin appealed this decision to the Board of Review, which remanded the case to the Appeal Tribunal for additional testimony regarding monies Custin received in 2011 (*i.e.,* wage income that could provide a basis for extended benefits). (DSMF ¶ 64). The Appeal Tribunal held another hearing on September 12, 2012, during which Custin noted that he received a payment of $13,000 from Wal-Mart for the settlement of a discrimination lawsuit he filed at some point after his discharge. (DSMF ¶ 65).

The Appeal Tribunal again deemed Custin ineligible for extended benefits. The $13,000 settlement payment, it held, did not constitute wages, and Plaintiff did not perform any services for Wal-Mart after his April 26, 2010 discharge. (DSMF ¶ 66). He did not appeal this decision to the Board of Review.[8] (DSMF ¶ 67).

Third Claim

Custin filed another unemployment claim on March 11, 2012. (DSMF ¶ 72). Custin disputes many of the circumstances regarding this claim and whether he properly received notice of it, but ultimately the Appeal Tribunal held a hearing on August 29, 2012. (DSMF ¶ 75). In a decision dated August 30, 2012, the Appeal Tribunal affirmed Custin's ineligibility for benefits. (DSMF ¶ 78). He did not appeal this decision to the Board of Review. (DSMF ¶79).

Fourth Claim

Custin filed another unemployment claim on December 30, 2012. (DSMF ¶ 82). He was deemed ineligible for benefits "on the ground that he lacked sufficient base weeks or sufficient base year wages to establish a valid claim." (DSMF ¶ 83). He appealed this determination to the Appeal Tribunal, which held a hearing on March 15, 2013. (DSMF ¶ 84). The Appeal Tribunal affirmed the denial of benefits. (DSMF ¶ 85). Custin did not appeal this decision to the Board of Review. (DSMF ¶ 90).

---

8 Custin disputes this fact without an explanation. He does not appear to be asserting that he did in fact appeal the decision. (PRSMF ¶ 67). Rather, he seems to object to the Defendants' characterizations of, e.g., his reasons for not appealing. (PRSMF ¶¶79, 90).

I. Legal Standard

Federal Rule of Civil Procedure 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Kreschollek v. S. Stevedoring Co.*, 223 F.3d 202, 204 (3d Cir. 2000). In deciding a motion for summary judgment, a court must construe all facts and inferences in the light most favorable to the nonmoving party. *See Boyle v. Cty. of Allegheny Pa.*, 139 F.3d 386, 393 (3d Cir. 1998). The moving party bears the burden of establishing that no genuine issue of material fact remains. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). "[W]ith respect to an issue on which the nonmoving party bears the burden of proof ... the burden on the moving party may be discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325.

Once the moving party has met the threshold burden, the non-moving party "must do more than simply show that there is some metaphysical doubt as to material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party must present actual evidence that creates a genuine issue as to a material fact for trial. *Anderson*, 477 U.S. at 248; *see also* Fed. R. Civ. P. 56(c) (setting forth types of evidence on which the nonmoving party must rely to support its assertion that genuine issues of material fact exist). In deciding a motion for summary judgment, the court's role is not to evaluate and decide the truth of the matter, but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. Credibility determinations are the province of the fact finder. *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992). The summary judgment standard, however, does not operate in a vacuum. "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented

through the prism of the substantive evidentiary burden." *Anderson*, 477 U.S. at 254.

II. Discussion

Custin raises due process issues with respect to his first, second, third, and fourth claims for unemployment benefits. The first claim for unemployment benefits arose from Custin's dismissal on April 26, 2010. As to that claim, the main issue was whether he had essentially been absent without leave for five days. The second, third, and fourth claims sought extended benefits. As to those, the main issue was whether, in the relevant period, Custin had earned wages, a prerequisite for an award of benefits.

In Section A, I consider Custin's due process claim with respect to the second, third, and fourth claims for unemployment benefits. In Section B, I consider his due process claim with respect to the original, first claim for benefits. Sections C and D dispose of miscellaneous issues.

A. Due Process Violations: Second, Third, and Fourth Claims

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Unemployment benefits are considered to be property interests. *See Wilkinson v. Abrams*, 627 F. 2d 650, 664 (3d Cir. 1980) ("State statutes providing for the payment of unemployment compensation benefits create in the claimants for those benefits property interests protected by due process.").

"In order to state a claim for failure to provide due process, a plaintiff must have taken advantage of the processes that are available to him or her, unless those processes are unavailable or patently inadequate." *Alvin v. Suzuki*, 227 F. 3d 107, 116 (3d Cir. 2000). Available processes need not be followed when they are futile. *See id.* at 118 ("When access to procedure is absolutely blocked or there is evidence that the procedures are a sham, the plaintiff need not pursue them to state a due process claim."). A plaintiff "cannot forego

attempting to use those processes simply because he thinks that they will be followed in a biased manner." *Id.* at 119. "This is true even when the plaintiff contends that one part of the process afforded him was biased, so long as there were avenues of review available to him." *Persico v. City of Jersey City*, 67 F. App'x 669, 675 (3d Cir. 2003).

For example, in *Alvin*, the plaintiff alleged that a public university failed to provide him due process in depriving him work-related privileges. The plaintiff argued that, based on his experience with the university, he believed the grievance process would be constitutionally inadequate. *Id.* at 118. Indeed, "[t]he record support[ed] his argument that the informal proceedings were painfully slow, and that several letters he wrote were not responded to, and even that several members of the [university] faculty and administration were disposed against his claim." *Id.* at 119. Still, the Third Circuit found that there was "simply insufficient evidence that the formal hearing would not be held in a fair and impartial manner." *Id.*

This court has previously outlined the applicable process for unemployment claims:

> New Jersey has a "process on the books that appears to provide due process of which Plaintiff simply failed to avail himself. Under the [New Jersey Unemployment Compensation Act, N.J.S.A. 43:21-19(c)(1)], a claimant who is dissatisfied with a determination of benefits eligibility is entitled to file an administrative appeal to an Appeal Tribunal, before which tribunal the claimant may be represented by counsel and may cross-examine witnesses. N.J.S.A. 43:21–6(b)(1), 43:21–17(b). The decision of the Appeal Tribunal is, in turn, appealable to the Board of Review, N.J.S.A. 43:21–6(e), and the final decision as to a claimant's entitlement to benefits is appealable to the Appellate Division under N.J. Ct. R. 2:2–3(a)(2).

Akuma v. New Jersey Comm'r of the Dep't of Labor and Workforce Dev., No. 07-1058, 2008 WL 4308229, at *2 (D.N.J. Sept. 17, 2008) (quotation omitted).

Plaintiff did not take proper advantage of this appeals process for his second, third, and fourth claims, however; in the words of *Alvin,* he has not "taken advantage of the processes that are available to him . . . ." 227 F. 3d at 116. As noted above, Custin did not pursue the third and fourth claims beyond

the Appeal Tribunal at all. Interestingly, as to the second claim, he did pursue further administrative appeals, obtained a remand and a new decision, but then went no farther than the Appeal Tribunal. *See* pp. 5–6, *supra*. So even assuming there was error at some stage of the process, his failure to pursue the available means of correction generally cuts off a due process claim.

Still, a plaintiff may retain a due process claim if the forgone processes "are unavailable or patently inadequate." *Id.* No claim of "unavailability" can be sustained here. In fact, Custin appealed his first claim all the way to the Appellate Division, and took his second claim up and down the administrative appeal ladder. There is no showing that, as to the second, third, and fourth claims, his access to the appeals process was "blocked." The claim, then, must be that the processes were "inadequate"— in effect, a "sham." *Id. at* 117–18.

I construe Plaintiff's materials liberally given his *pro se* status. In Custin's briefing and responsive statement of undisputed material facts, he makes the following claims regarding the efficacy of the appellate process for his second, third, and fourth claims:

1. He was not notified of the legal basis for his initial disqualification for the second claim in advance of his hearing with the Appeal Tribunal, and therefore could not prepare an adequate defense. (PRSMF ¶ 62).
2. The affirmation by the Appeal Tribunal for the second claim was based on different legal grounds than the grounds stated in the initial notice of ineligibility. (PRSMF ¶ 63).
3. After the second claim had been appealed to the Board of Review and remanded to the Appeal Tribunal for additional testimony, the decision of the Appeal Tribunal denying the claim stated no New Jersey law that the $13,000 he received should not qualify as wages. (PRSMF ¶ 66).
4. Denial of the second claim meant that he was being disqualified twice on the same charge. (PRSMF ¶ 68).

5. The damaging effect of the loss of benefits due to the denial of the second claim was disproportionate to the "purported offense" of not calling in to Wal-Mart. (PRSMF ¶ 68).
6. The result of denial of the second claim was an unfair application of law. (PRSMF ¶ 70).
7. He was not properly notified of the date and time of the initial hearing for his third claim. (PRSMF ¶ 74).
8. The decision by the Appeal Tribunal affirming denial of his third claim was arbitrary and did not state any New Jersey law that the $13,000 he received should not qualify as wages. (PRSMF ¶ 78).
9. He "was given every reason to believe from the experience with his claims that state agencies such as the [New Jersey Department of Labor] and its administrative proceedings and Boards were blind to offenses to constitutional due process of law." (PRSMF ¶ 79).
10. The "Notice to Claimant of Benefit Determination" regarding his fourth claim showed the wrong base year periods. (PRSMF ¶ 83).
11. During the Appeal Tribunal hearing for his fourth claim, the examiner failed to ask questions that would have confronted the issue of whether the $13,000 he received should qualify as wages. (PRSMF ¶ 84).
12. The decision by the Appeal Tribunal affirming denial of his fourth claim was arbitrary and did not state any basis under New Jersey law that the $13,000 he received should not qualify as wages. (PRSMF ¶ 78).

Legal or factual errors allegedly made by various Appeal Tribunals or other officials do not equate to a finding that the appeals process itself was faulty. For example, Custin has not shown that the Board of Review failed to give him the opportunity to appeal or present his case. Even less pertinent is Plaintiff's oft-expressed feeling that the Board of Review or the courts *would have* issued an incorrect decision if the matter were presented to them.

Even on their face, Plaintiff's claims tend to defeat themselves. The second claim, for example, relates that the Board of Review responded favorably to his proffer of additional evidence and remanded the case. After the Appeal Tribunal had initially affirmed denial of the claim, Custin sent a letter to the Board of Review requesting that they remand his case to the Appeal Tribunal. (CSMF ¶ 217). He attached to this letter a copy of a W2 form he had recently received from Wal-Mart, which, to him, showed that the Appeal Tribunal erred in concluding he had not received wages in the relevant period. (*Id.*). In response, the Board of Review remanded the case for further fact finding on this issue. (CSMF ¶ 221). An Appeal Tribunal hearing then in fact occurred on September 12, 2012. (CSMF ¶ 225). Plaintiff chose not to appeal this decision to the Board of Review, but there is no dispute that he was able to participate in the appeals process. This was anything but a sham.

Issue seven above is the only point that approaches a demonstration of a defect in the actual process of appeal. Custin claims that he was not properly given notice of a March 26, 2012 hearing on the "monetary" issue. (CSMF ¶¶ 242-246).[9] Plaintiff did receive a hearing before the Appeal Tribunal on August 29, 2012. (PRSMF ¶ 75). Custin's grievance, not always clearly expressed, seems to be that this appeal was irregular because it concerned the "monetary" hearing of which he had not received proper notice. (CSMF ¶ 257). If that was a procedural error, it should have been asserted as such. It was surely correctable within the procedures made available to Custin. There is no reason why he could not have raised this issue to the Board of Review, or, if necessary, the Appellate Division. Plaintiff knew that the Board, faced by claims of procedural error or additional evidence, had been willing to remand to the Appeal Tribunal previously.

---

[9] He states that he was only notified of a separate hearing on another issue, the "separation" issue, scheduled for March 29, 2012. The March 29, 2012 hearing apparently did not take place, for reasons that appear of record. Custin received a letter from an "ETA Region 1 Administrator" explaining that the determination that he did not receive wages, and was therefore monetarily ineligible, rendered the March 29, 2012 fact-finding interview on the separation issue unnecessary. (CSMF ¶ 245).

Plaintiff stated that he did not appeal his third claim to the Board of Review because "now it's headed for the U.S. Courts and not the State Courts, which apparently, don't do anything in regard to insuring due process of law at its proceedings." (DSMF ¶ 79; PRSMF ¶ 79). The choice to abandon state remedies in favor of a federal lawsuit was Custin's. Nothing in this statement, however, establishes that state remedies were unavailable or illusory, even if Custin was dissatisfied with the results he was getting.

Having reviewed Plaintiff's statement of facts and legal arguments, I see no evidence that the appeals process for his second, third, and fourth claims was unconstitutionally inadequate. That being the case, because he did not take advantage of the appeals process available to him, he cannot claim to have been denied due process.

B. Due Process Violations: First Claim

Regarding his first claim for unemployment benefits, Custin did pursue the available state procedures. That process culminated in an appeal to the New Jersey Superior Court, Appellate Division, which affirmed the denial of benefits. Thus as to the first claim, in contrast with the second, third, and fourth claims, it is possible to make a more meaningful assessment of his claim to have been denied due process.

"The essential requirements of due process . . . are notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546 (1985). Claimants are constitutionally obligated "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 332. Further, due process "entitles a person to an impartial and disinterested tribunal . . . ." *Marshall v. Jericho*, 446 U.S. 238, 242 (1980). Custin has not provided, nor can I discover, any authority in this circuit that defines the process constitutionally required in connection with a denial of unemployment benefits. However, the Third Circuit has provided guidance in somewhat analogous contexts.

One such context is review of local zoning board decisions. *See, e.g., Koynock v. Lloyd*, 405 F. App'x 679 (3d Cir. 2011); *DeBlasio v. Zoning Bd. of Adjustment for Twp. of West Amwell*, 53 F. 3d 592 (3d Cir. 1995); *Rogin v. Bensalem Twp.*, 616 F. 2d 680 (3d Cir. 1980). No process, of course, is free from error, and zoning board decisions are no exception. In *DeBlasio*, however, the Third Circuit held that "a state provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify a legal error by a local administrative body." 53 F. 3d at 597.

Another analogous context is review of public employee terminations. *See, e.g., Beckwith v. Pennsylvania State Univ.*, 672 F. App'x 194 (3d Cir. 2016); *Thomas v. Delaware State Univ.*, 626 F. App'x 384 (3d Cir. 2015); *Biliski v. Red Clay Consol. School Dist. Bd of Educ.*, 574 F. 3d 214 (3d Cir. 2009). In *Biliski*, the Third Circuit echoed the Supreme Court's holding that "[t]he tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." 574 F. 3d at 220 (quoting *Loudermill*, 470 U.S. at 546).

Finally, the Third Circuit has also addressed the question of when error by a state administrative body may be attacked as a due process violation. In a recent case, the plaintiff complained that the Director of the Division of Family Development overrode a favorable decision by an administrative law judge without evidentiary support. *Brown v. Camden Cnty. Bd. of Soc. Servs.*, 704 F. App'x 204, 206 (3d Cir. 2017)[10]. The court noted that the plaintiff (like Custin) had the option to seek review of the administrative decision by the New Jersey Appellate Division. The availability of that recourse for correction of error negated a due process claim, as "[t]he judicial remedy provided is no doubt adequate." *Id.* at 207.

Custin outlines a wide array of perceived procedural defects in the adjudication of his first claim, many of which are summarized below:

[10] The Third Circuit designated *Brown* as a nonprecedential decision. It is cited for its persuasive value.

1. The Appeal Tribunal wrongly allowed Wal-Mart to appeal the default judgment in his favor after Wal-Mart declined to respond to the claim examiner's questions. (CSMF ¶ 23).
2. The Appeal Tribunal allowed Wal-Mart to file an appeal despite its faxing in the request a day late. (CSMF ¶ 34).
3. He was never provided with the documents Wal-Mart intended to use as evidence against him during the Appeal Tribunal Hearing, some of which were faxed in advance to the Appeal Tribunals. (CSMF ¶ 1).
4. The notice for his initial claims hearing, while indicating that he "may have been discharged for misconduct connected to the work" did not indicate "what entity or individual was making this charge." (CSMF ¶¶ 14, 15).
5. He never received a copy of Wal-Mart's protest letter which led to the Appeal Tribunal hearing. (CSMF ¶ 29).
6. He did not receive notice that a witness would testify against him at the Appeal Tribunal hearing. (CSMF ¶ 29).
7. One of the two issues docketed to be determined at the Appeal Tribunal hearing was whether the claim could be denied for "misconduct connected to the work," despite default judgment having been entered on that issue. (CSMF ¶ 36).
8. The issues docketed for the Appeal Tribunal hearing were so broad in scope that he could not prepare an adequate defense. (CSMF ¶ 43).
9. The Appeal Tribunal did not give him information on how to seek to dismiss the issue of "voluntary leaving" on appeal. (CSMF ¶¶ 52-59).
10. Wal-Mart provided a different witness at the hearing than the person they indicated would be testifying in their protest letter to the Appeal Tribunal. (PRSMF ¶ 17).
11. The Appeal Tribunal should never have considered the "callout list" that Shuck printed out during the hearing. (CSMF ¶ 81).
12. His attendance record and exit interview were never entered into the record by the Appeal Tribunal. (CSMF ¶¶ 89-90).

13. The Board of Review submitted a review of his appeal to "an unknown deputy 'reviewer,'" thereby delegating a task reserved for Board of Review members to someone "not meeting the civil service requirements for a Board member." (CSMF ¶¶ 92-94).

14. The unknown reviewer for the Board of Review failed to detect the errors in the Appeal Tribunal record. (CSMF ¶ 95).

15. Shuck's testimony was insufficient for any reviewer to conclude that Wal-Mart's call-out system was functional, since it was ambiguous which day she was referring to when she stated others had no problems calling in. (CSMF ¶ 132).

Despite this lengthy list of putative procedural defects, Custin still has not shown that he was denied due process. Analyzing his case under general principles of due process and the analogous cases cited above, I find that he was given notice and an opportunity to respond prior to the denial of his benefits. He was given an explanation of the evidence against him and an opportunity to present his side of the story. He was afforded the opportunity to cross-examine Shuck, the witness who testified on behalf of his employer. He was also given, and took advantage of, the remedy of full judicial review to rectify possible errors by an administrative body.

Nowhere does Custin claim that he was denied participation in the administrative process or an opportunity to present his case. Following his appeal of the Board of Review's decision, the New Jersey Appellate Division analyzed his original claim as well as potential procedural defects in its adjudication. The Appellate Division's opinion considered the claim, reasserted here, that certain documents were not entered into the record or provided in advance of the hearing. It considered the claim that he was not on proper notice of the issues being determined. In a reasoned decision, that court rejected those claims. Notice, it found, had been given, the claim as to the documents had not been preserved, and in any event the documents were far from critical to his case. (AG Cert., Ex. H). However disappointing to the

plaintiff, this decision is not evidence of any procedural infirmity—quite the opposite, in fact.

Moreover, many of Custin's criticisms of the administrative process are simply incorrect. He argues that there never should have been an Appeal Tribunal appeal because Wal-Mart failed to respond to the initial request for information. But employers may provide new information, even after an initial determination. *See* N.J. Stat. Ann. § 43:21-6(b)(1).[11] He also claims Wal-Mart's appeal should have been dismissed as untimely. But Wal-Mart appealed within 10 days from the day after the determination was mailed. (AG Cert., Ex. E at 2). *See* N.J. Stat. Ann. § 43:21-6(b)(1) (appeal must be filed "within 10 calendar days after such notification was mailed . . . .").

To show that New Jersey's process was insufficient, Custin cites to a Tenth Circuit case concerning the Colorado unemployment benefits system. The plaintiff in that case was denied unemployment benefits after a hearing at which his employer testified. *Shaw v. Valdez*, 819 F. 2d 965, 968 (10th Cir. 1987). Prior to the hearing, the plaintiff had received only a simple notice indicating the time and place of the hearing, as well as the fact that it would discuss "[a]ll issues and factual matters affecting claimant's eligibility . . . ." *Id.* The Tenth Circuit concluded that this notice was insufficient, since the claimant was caught unaware at the hearing as to the reasons for his termination and the basis for denial of benefits. *Id.* at 969. This case is

---

[11] The relevant section provides:

> Whenever an initial determination is based upon information other than that supplied by an employer because such employer failed to respond to the deputy's request for information, such initial determination and any subsequent determination thereunder shall be incontestable by the noncomplying employer, as to any charges to his employer's account because of benefits paid prior to the close of the calendar week following the receipt of his reply. *Such initial determination shall be altered if necessary upon receipt of information from the employer*, and any benefits paid or payable with respect to weeks occurring subsequent to the close of the calendar week following the receipt of the employer's reply shall be paid in accordance with such altered initial determination.

N.J. Stat. Ann. § 43:21-6(b)(1) (emphasis added).

inapposite for several reasons. First, the plaintiff in *Shaw* argued that Colorado's statutory procedures were facially insufficient, not that individual state actors deprived him of due process. Second, that plaintiff was not claiming a due process violation, but the state's failure to provide him a "fair hearing" as required by the Social Security Act. Third, that plaintiff was presented for the first time during the hearing with certain reasons for his termination, having previously been given different reasons.

Here, although the record is not clear on what Custin was told by Wal-Mart upon termination, he was fully aware that the Appeal Tribunal hearing would encompass the issue of discharge related to misconduct.[12] This charge was sent to him in a letter and repeated at the beginning of the hearing. (PRSMF ¶ 15; AT Transcript at 4-6). Custin cannot claim the same lack of notice as the plaintiff in *Shaw*, despite his belief that the Appeal Tribunal improperly docketed the issue of workplace misconduct.

The Appeal Tribunal process was less than ideal in some respects. The documents faxed over by Wal-Mart prior to the hearing ought to have been entered into the record and provided to Custin prior to the hearing. *See* N.J.A.C. 1:12-14.6(d)[13]. But he has not shown that this error dragged the

---

[12] Custin argues that Wal-Mart did not in fact assert the "misconduct" charge, which somehow originated from the Appeal Tribunal itself. At any rate, that does not negate the fact that he was given notice of the charges, as the Appellate Division found. (AG Cert., Ex. H at 15).

[13] The subsection reads as follows:

> Any party that intends to offer documentary or physical evidence at the telephone hearing shall submit a copy of that evidence to the Board of Review or appeal tribunal and all other interested parties immediately upon receipt of notice of the scheduled telephone hearing. Also, the requesting party shall provide timely notice of this request to offer evidence to all other interested parties.
>
> 1. Any evidence not submitted as required in this subsection may be admitted at the discretion of the Board of Review or the appeal tribunal provided that such evidence is submitted to the Board of Review or appeal tribunal and all other parties within 24 hours of the telephone hearing.

proceedings below the federal constitutional floor of due process. And indeed, it is highly unlikely that these claimed errors even affected the outcome. The documents were not necessary to deny his claim. His attendance record was superfluous since he admitted he was absent for five consecutive work days. The exit interview document, even if submitted belatedly, could only be considered favorable to Custin's case, and Shuck testified that the exit interview reported him as re-hireable.[14] Even the "call-out list" was not evidence of his misconduct. It was merely additional evidence that Shuck used to bolster her sworn testimony that others had successfully used the call-out number, refuting Custin's testimony that he attempted to call in for five days, but the phone line malfunctioned.[15] These alleged errors did not amount to an overall unconstitutional deprivation of due process.

Ultimately, the critical evidence for and against Custin was amply explored. He was aware of the policy that he needed to call in prior to missing a scheduled shift. He failed to do so for five consecutive work days. Custin may believe that his proffered excuses and defenses should have prevailed, but a

---

2. The other parties shall have 24 hours from the time of receipt of the evidence to properly respond to its admission and use.

3. Upon review of the evidence, the Board of Review or the appeal tribunal shall determine if the telephone hearing shall be continued.

N.J.A.C. § 1:12-14.6(d).

14 Custin claims that the Appeal Tribunal examiner used the exit interview to corroborate Shuck's testimony regarding the precise dates of his absence. (Pl. Opp. at 20-21). Even so, he did not then dispute those dates, nor does he dispute them now.

15 Custin cites a case from the Commonwealth Court of Pennsylvania finding a lack of due process when the plaintiff was not able to examine documents that a witness referred to in the course of a telephone hearing. (Pl. Opp. at 18-19). This state court opinion is not binding precedent on this constitutional due process claim, nor is it entirely relevant. Custin has not shown any authority that the Appeal Tribunal hearing needed to comport with any particular rules of evidence. In fact, "the conduct of hearings and appeals shall be in accordance with rules prescribed by the board of review for determining the rights of parties, *whether or not such rules conform to common law or statutory rules of evidence* and other technical procedures." N.J. Stat. Ann. § 43:21-6(f) (emphasis added).

variety of tribunals (who are not alleged to be biased or conflicted) disagreed. That there may have been some procedural imperfections in the adjudication of his claim does not negate the overall adequacy of the process he was afforded. He had notice of and an opportunity to defend himself at an impartial hearing. To the extent he believed the procedure or substance of the hearing was flawed, he also had the ability to appeal the findings of that hearing multiple times, ultimately to an independent judicial forum. Because the State Defendants did not interfere with Custin's right to that process, he cannot succeed in claiming they deprived him of it. Even assuming *arguendo* that the outcome was erroneous, which I do not, the process was not so defective as to give rise to a constitutional claim.

Viewing all of the facts in the light most favorable to the non-movant, I hold that, as a matter of law, the State Defendants have not violated Custin's due process rights. I grant summary judgment in favor of the State Defendants on the § 1983 deprivation of due process claims.

C. Personal Liability and Qualified Immunity

Because Custin has failed to demonstrate a triable issue of fact with respect to his Due Process claim, I do not reach ancillary issues, such as the State Defendants' potential personal liability, or qualified immunity.

D. State Defendants' Requests to Strike Certain Arguments

In their reply brief, the State Defendants argue that (i) Custin's opposition brief should be disregarded due to its excessive length; (ii) his Rule 56.1 responsive statement of material facts should be disregarded because it is overlong, improperly advances legal arguments, and fails to cite properly to the record; and (iii) his argument regarding Shuck's call-out list, along with other new arguments, should be disregarded since it was raised for the first time in his opposition brief and was not present in the operative complaint.

Because Custin appears *pro se,* I accept his filings as-is. I have considered his documents and arguments fully in reaching my decision on the merits.

III. Conclusion

For the reasons set forth above, the State Defendants' motion for summary judgment (DE 233) is **GRANTED** in favor of Defendants on all claims based on alleged violations of the Due Process Clause of the Fourteenth Amendment.

An appropriate order follows. The order invites the parties, within ten days, to identify any issue which they believe remains open and undecided.

Dated: March 25, 2020

/s/ Kevin McNulty

HON. KEVIN MCNULTY, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN M. CUSTIN, **Plaintiff,** **v.** **HAROLD J. WIRTHS, JOSEPH SIEBER, GERALD YARBROUGH, JERALD L. MADDOW, et al.,** **Defendants.**	Civ. No. 2:12-cv-910-KM-MAH **ORDER**

THIS MATTER having come before the Court on the motion for summary judgment filed by the remaining Defendants, Harold J. Wirths, Joseph Sieber, Gerald Yarbrough, and Jerald Maddow (DE 233);

And the Court having considered the moving, opposition, and reply papers on the motion for summary judgment (DE 233-2, 246, 252);

For the reasons set forth in the accompanying Opinion, and for good cause shown:

IT IS this 25th day of March, 2020

ORDERED that the Defendants' motion for summary judgment is **GRANTED** and Plaintiff's third amended complaint (DE 38) is **DISMISSED WITH PREJUDICE** as to the remaining due process claims.

IT IS FURTHER ORDERED that to the extent any party believes that any issue remains open and undecided, that party shall notify the court in writing within ten days.

/s/ Kevin McNulty

HON. KEVIN MCNULTY, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN M. CUSTIN, **Plaintiff,** **v.** **HAROLD J. WIRTHS, et al.,** **Defendants.**	Civ. No. 12-910 (KM) **MEMORANDUM OPINION**

KEVIN MCNULTY, U.S.D.J.:

The plaintiff, John M. Custin ("Custin") brought this action alleging constitutional and statutory violations in connection with the process for applying for unemployment benefits. Following the termination of his employment with Walmart in April 2010, Custin sought eligibility for COBRA health benefits and biweekly unemployment benefits. Custin's five applications to the New Jersey Department of Labor ("NJDOL") were denied. He filed unsuccessful appeals of those determinations with the Appeals Tribunal and Board of Review. Custin also appealed one of those administrative actions to the New Jersey Superior Court, Appellate Division, which affirmed the denial of eligibility. Custin then filed suit in this Court against the Commissioner of the NJDOL, Harold Wirths, and three officials who sat on the Board of Review, Joseph Sieber, Gerald Yarbrough, and Jerald Maddow (collectively, "State Defendants"), as well as the current and former United States Secretary of Labor, and the Assistant Secretary of Employment and Training Administration (collectively, "Federal Defendants").

On January 31, 2014, I granted the Federal Defendants' motion to dismiss the Third Amended Complaint, but denied the State Defendants' motion that I abstain from exercising jurisdiction under the doctrine of *Younger*

v. Harris, 401 U.S. 37 (1971). (ECF no. 83) Although my dismissal was without prejudice, Custin has not filed another amended complaint, so the Third Amended Complaint remains the operative pleading. (ECF no. 38) (References herein to the Complaint ("Compl.") are to the Third Amended Complaint.)

Now before the Court is the State Defendants' motion to dismiss the complaint for lack of subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1) and for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). (ECF no. 94) Because I write for the parties, I write briefly and assume familiarity with the case. This Opinion should be read in conjunction with my earlier, more detailed Opinion in this matter (ECF no. 84). For the reasons set forth below, the motion is granted in part and denied in part.

LEGAL STANDARD

The State Defendants have moved to dismiss the complaint for lack of jurisdiction, citing the *Rooker-Feldman* doctrine. Rule 12(b)(1) governs jurisdictional challenges to a complaint. These may be either facial or factual attacks. *See* 2 Moore's Federal Practice § 12.30[4] (3d ed. 2007); *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). A facial challenge asserts that the complaint does not allege sufficient grounds to establish subject matter jurisdiction. *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 438 (D.N.J. 1999). A court considering such a facial challenge assumes that the allegations in the complaint are true, and may dismiss the complaint only if it nevertheless appears that the plaintiff will not be able to assert a colorable claim of subject matter jurisdiction. *Cardio–Med. Assoc., Ltd. v. Crozer–Chester Med. Ctr.*, 721 F.2d 68, 75 (3d Cir. 1983); *Iwanowa*, 67 F. Supp. 2d at 438.

The State Defendants have also moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim. Rule 12(b)(6) provides for the dismissal of a complaint, in whole or in part, if it fails to state a claim upon which relief can be granted. The defendant, as the moving party,

bears the burden of showing that no claim has been stated. *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005). In deciding a Rule 12(b)(6) motion, a court must take the allegations of the complaint as true and draw reasonable inferences in the light most favorable to the plaintiff. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008) (traditional "reasonable inferences" principle not undermined by *Twombly*, *see infra*).

Federal Rule of Civil Procedure 8(a) does not require that a complaint contain detailed factual allegations. Nevertheless, "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Thus, the complaint's factual allegations must be sufficient to raise a plaintiff's right to relief above a speculative level, so that a claim is "plausible on its face." *Id.* at 570; *see also Umland v. PLANCO Fin. Serv., Inc.*, 542 F.3d 59, 64 (3d Cir. 2008). That facial-plausibility standard is met "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Iqbal*, 556 U.S. at 678.

DISCUSSION

A. Application of the *Rooker-Feldman* Doctrine

I deal at the outset with the State Defendants' argument that this court lacks subject matter jurisdiction over the action because Custin's claims are barred by the *Rooker-Feldman* doctrine. Under that doctrine, lower federal courts may not adjudicate federal claims that were previously adjudicated in state court or are inextricably intertwined with a state court decision. *See District of Columbia Ct. of Appeals v. Feldman*, 460 U.S. 462, 482, 103 S.Ct. 1303 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416, 44 S.Ct. 149

(1923). A federal claim is inextricably intertwined with a prior state court decision if "granting the relief requested in the federal action requires determining that the state court's decision is wrong or would void the state court's ruling." *FOCUS v. Allegheny Cnty. Ct. of Common Pleas.*, 75 F.3d 834, 839-40 (3d Cir. 1996). The *Rooker-Feldman* doctrine precludes the exercise of subject matter jurisdiction "where a federal action would be the equivalent of an appellate review of a state court judgment." *Hogg's v. New Jersey*, 352 F. App'x 625, 629 (3d Cir. 2009). The doctrine is applied where "the losing party in state court filed suit in federal court after the state proceedings ended, complaining of an injury caused by the state-court judgment and seeking review and rejection of that judgment." *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284, 125 S.Ct. 1517 (2005). However, "when the source of the injury is the defendant's actions (and not the state court judgments), the federal suit is independent, even if it asks the federal court to deny a legal conclusion reached by the state court." *Great Western Mining & Mineral Co. v. Fox Rothschild LLP*, 615 F.3d 159, 167 (3d Cir. 2010).

Here, Custin does not complain of injuries caused by the state court judgment; rather, he complains of due process violations during the NJDOL administrative proceedings, which preceded the state court judgment, and asks for an injunction to avoid future abuses. It is true that the state court decision did analyze Custin's due process concerns and find them to be without merit. The state court judgment, however, is not itself the source of his claimed injury, and it does not seem that Custin seeks review and rejection of the state court judgment. Accordingly, I find the *Rooker-Feldman* doctrine inapplicable to the claims here.

B. Immunity

The State Defendants argue next that they are immune from suit: the N.J. Department of Labor because it is a state entity protected from suit by the Eleventh Amendment, and the individual defendants because they have qualified immunity for their actions as members of the Board of Review.

a. Department of Labor Immunity Under the Eleventh Amendment

It is axiomatic that under the Eleventh Amendment, "nonconsenting states may not be sued by private individuals in federal court unless Congress abrogates the state's immunity pursuant to a valid exercise of its power." *Hogg's*, 352 F. App'x at 628 (citing *Bd. of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 363-64, 121 S.Ct. 955 (2001)). Thus, even in actions where the state is not a named party, where the state is deemed to be the real party in interest, a suit will be barred by the Eleventh Amendment. *See Benn v. First Judicial Dist. of Pa.*, 426 F.3d 233, 239 (3d Cir. 2005) (citing *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 25, 429, 117 S.Ct. 900 (1997)). To determine whether a suit against a state entity is a suit against the state, courts are to consider the following factors: (1) whether the source of the money to pay a judgment would be the state treasury, (2) the status of the entity under state law, and (3) the entity's degree of autonomy. *Fitchik v. N.J. Transit Rail Ops., Inc.*, 873 F.2d 655, 659 (3d Cir. 1989).

As to the New Jersey Department of Labor, the outcome of the analysis is obvious. The DOL is a department of State government:

> We agree with the District Court's finding that any judgment against the State of New Jersey, the New Jersey Department of Labor and Workforce Development, or the Division of Workers' Compensation would be paid by New Jersey's state treasury. Dist. Ct. Op. at 13–15. Because the State of New Jersey was thus the real party at interest, the District Court properly held that these entities are immune from a suit seeking money damages

Hogg's, 352 F. App'x at 628. Personnel of the Department of Labor, sued in their official capacities, are likewise shielded from claims for damages by the Eleventh Amendment. *See Capogrosso v. The Supreme Court of New Jersey*, 588 F.3d 180, 185 (3d Cir. 2009).

The immunity does not, however, extend to individual state officers sued in their individual capacities. Nor does it prevent them from being sued for prospective injunctive or declaratory relief to end continuing or ongoing

violations of federal law. *Id.*; *See Ex Parte Young*, 209 U.S. 123, 28 S.Ct. 441 (1908).

Accordingly, the complaint will be dismissed against the NJDOL, as it is immune from suit under the Eleventh Amendment. As for the individual defendants, Custin has not specified whether he is suing them in their personal or official capacities. Affording this pro se complaint a liberal reading, however, I find that Custin has pled claims against the individual State Defendants in their individual capacities, and I decline to dismiss the suit against them on Eleventh Amendment grounds. I will, however, consider if they are subject to qualified immunity.

b. Individual Defendants' Qualified Immunity

The doctrine of qualified immunity "shields government officials from suit even if their actions were unconstitutional as long as those officials' actions did not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Burns v. PA Dep't of Corr.*, 642 F.3d 163, 176 (3d Cir. 2011) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727 (1982)). Courts employ a two-part inquiry to determine whether a state official is entitled to qualified immunity:

> Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right? If no constitutional right would have been violated were the allegations established, there is no necessity for further inquiries concerning qualified immunity. On the other hand, if a violation could be made out on a favorable view of the parties' submissions, the next, sequential step is to ask whether the right was clearly established.

Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151 (2001). Clearly established means that "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034 (1987).

Here, Custin alleges that his due process rights were violated in the administrative review process to determine his eligibility for medical benefits. The parties do not dispute that medical benefits are a property right, the denial

of which necessitates fulfilling the requirements of due process. *See Wilkinson v. Abrams*, 627 F.2d 650, 664 (3d Cir. 1980) ("State statutes providing for the payment of unemployment compensation benefits create in the claimants for those benefits property interests protected by due process."). Custin claims that he was denied due process because (1) he was not provided proper notice of a hearing, (2) he was not provided with copies of documents used against him at that hearing, and (3) the Board of Review failed to appropriately evaluate the evidence.

The question here centers on whether a reasonable official on the Appeals Tribunal and Board of Review would have understood that these failures violated due process. That raises factual issues that cannot be disposed of on a motion to dismiss. I therefore will deny the motion to dismiss the complaint based on qualified immunity, but without prejudice to reassertion of qualified immunity *via* a motion for summary judgment.

C. Failure to State a Claim

The State Defendants move to dismiss the complaint on the grounds that it is vague and conclusory as to the relief sought and because there are no allegations in the complaint relating to any act or omission by any of the individual state defendants. (Br. at 6, 19) Although it is true that the complaint fails to specifically name the individual state defendants when describing the allegedly unconstitutional actions, this pro se complaint requires a more liberal reading. "Where the plaintiff is a pro se litigant, the court has an obligation to construe the complaint liberally." *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir. 2009) (citing *Haines v. Kerner*, 404 U.S. 519, 520–21 (1972); *Gibbs v. Roman*, 116 F.3d 83, 86 n. 6 (3d Cir. 1997). In that spirit, the complaint should be construed such that Custin intends to refer to Commissioner Wirths when he alleges actions or omissions by NJDOL and to Sieber, Yarbrough and Maddow in the allegations relating to the Board of Review. Custin's claims seem to be that the NJDOL and the Board of Review violated (a) the "when due" clause of

the Social Security Act, 42 U.S.C. § 503(a)(1), (b) the Eighth Amendment, and (c) the Due Process Clause of the Fourteenth Amendment.

1. Social Security Act Claim

Custin appears to attack Section 43:21-5(b) of the New Jersey Unemployment Compensation Law, and Section 43:21-24.19 of the New Jersey Extended Benefit Law, as violative of the "when due" clause of the Social Security Act, 42 U.S.C. § 503(a)(1). (Compl. p. 6) As previously explained, the "when due" clause conditions payment to a state on that state's having laws which "include provision for [] such methods of administration...as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). (*See* ECF no. 92, Opinion at 12)

Custin challenges N.J.S.A. § 43:21-5(b), which provides that an individual suspended or discharged for misconduct is ineligible for unemployment benefits for a certain number of weeks thereafter.[1] Custin

---

[1] The full text provides:

For the week in which the individual has been suspended or discharged for misconduct connected with the work, and for the seven weeks which immediately follow that week, as determined in each case.

For the week in which the individual has been suspended or discharged for severe misconduct connected with the work, and for each week thereafter until the individual becomes reemployed and works four weeks in employment, which may include employment for the federal government, and has earned in employment at least six times the individual's weekly benefit rate, as determined in each case. Examples of severe misconduct include, but are not necessarily limited to, the following: repeated violations of an employer's rule or policy, repeated lateness or absences after a written warning by an employer, falsification of records, physical assault or threats that do not constitute gross misconduct as defined in this section, misuse of benefits, misuse of sick time, abuse of leave, theft of company property, excessive use of intoxicants or drugs on work premises, theft of time, or where the behavior is malicious and deliberate but is not considered gross misconduct as defined in this section.

In the event the discharge should be rescinded by the employer voluntarily or as a result of mediation or arbitration, this subsection (b) shall not apply, provided, however, an individual who is restored to employment with back pay shall return any benefits received under this chapter for any week of unemployment for which the individual is subsequently compensated by the employer.

If the discharge was for gross misconduct connected with the work because of the commission of an act punishable as a crime of the first, second, third or fourth

argues that this provision inconsistently allows the NJDOL to deny eligibility for unemployment benefits to people who were discharged for misconduct but whom the employer determined would be rehireable, as was the case with Custin himself. I fail to see any serious inconsistency, but that is not the point.

The relevant provision of the Social Security Act requires only that a state's administration methods reasonably provide for the payment of unemployment benefits when due. NJSA § 43:21-5(b) is directed to that end: it defines when unemployment benefits, in certain circumstances, are or are not due. Custin's real objection is that, in his circumstances, under the statute, benefits were not "due" him. That is a very different issue. I cannot discern from the complaint the basis for a complaint that the statute fails to conform to the Social Security Act's general mandate that State procedures be designed reasonably to insure full payment of benefits *when* due.

Custin also challenges N.J.S.A. § 43:21-24.19, although it is not clear which subsection he takes issue with.[2] Custin's claim appears to be that the

---

degree under the "New Jersey Code of Criminal Justice," N.J.S.2C:1-1 et seq., the individual shall be disqualified in accordance with the disqualification prescribed in subsection (a) of this section and no benefit rights shall accrue to any individual based upon wages from that employer for services rendered prior to the day upon which the individual was discharged.

The director shall insure that any appeal of a determination holding the individual disqualified for gross misconduct in connection with the work shall be expeditiously processed by the appeal tribunal.

N.J.S.A. § 43:21-5(b).

[2] The full text provides:

a. Notwithstanding the provisions of section 6 of P.L.1970, c. 324 (*C. 43:21-24.12*) an individual shall be ineligible for payment of extended benefits for any week of unemployment in his eligibility period if it is determined during such period:

(1) The individual failed to accept any offer of suitable work as defined in paragraph c. or failed to apply for any suitable work to which the individual was referred to by the employment service or the director; or

(2) The individual failed to actively engage in seeking work as prescribed under paragraph e.

b. Any individual who has been found ineligible for extended benefits by reason of the provisions in paragraph a. of this section shall also be denied benefits beginning with the first day of the week following the week in which the failure occurred and until the individual has been employed in each of 4 subsequent weeks (whether or not consecutive) and has earned remuneration equal to not less than 4 times the individual's weekly extended benefit rate.

c. For purposes of this section the term suitable work means, with respect to any individual, any work which is within such individual's capabilities; this work shall be held to be suitable only:

(1) If the gross average weekly remuneration payable for the work exceeds the sum of: the individual's weekly extended benefit rate as determined under section 8 of P.L.1970, c. 324 (*C. 43:21-24.14*), plus the amount, if any, of supplemental unemployment benefits (as defined in *Section 501(c)(17) of the Internal Revenue Code of 1954*) payable to the individual for the respective week;

(2) If the position pays wages not less than the higher of

(a) The minimum wage provided by Section 6(a)(1) of the Fair Labor Standards Act of 1938 *(29 U.S.C. 206)*, without regard to any exemption; or

(b) The applicable state or local minimum wage;

(3) Provided, however, that no individual shall be denied extended benefits for failure to accept an offer of or apply for any job which meets the definition of suitable work as described above if:

(a) The position was not offered to the individual in writing or was not listed with the employment service;

(b) The failure could not result in a denial of benefits under the definition of suitable work for regular benefits as provided under subsection (c) of *R.S. 43:21-5* to the extent that the criteria of suitability in that section are not inconsistent with the provisions of this paragraph c.;

(c) The individual furnishes satisfactory evidence to the division that his prospects for obtaining work in his customary occupation within a reasonably short period are good. If the evidence is deemed satisfactory for this purpose, the determination of whether any work is suitable with respect to the individual shall be made in accordance with the definition of suitable work for regular benefit claimants as provided under subsection (c) of *R.S. 43:21-5* without regard to the definition specified by this paragraph c.

d. Notwithstanding the provisions of section 6 of P.L.1970, c. 324 (*C. 43:21-24.12*) to the contrary, no work shall be deemed to be suitable work for an individual which does not accord with the labor standard provisions required by *Section 3304(a)(5) of the Internal Revenue Code of 1954* and subsection (c) of *R.S. 43:21-5*.

e. For the purposes of subparagraph (2) of paragraph a. of this section, an individual shall be treated as actively engaged in seeking work during any week if

(1) The individual has engaged in a systematic and sustained effort to obtain work during the week, and

(2) The individual furnishes tangible evidence that he has engaged in this effort during the week.

f. The employment service shall refer any claimant entitled to extended benefits under this act to any suitable work which meets the criteria prescribed in paragraph c.

g. An individual who has been disqualified for regular benefits under the provisions of subsection (b) or (c) of *R.S. 43:21-5* will not meet the eligibility requirements for the payment of extended benefits unless the individual has had employment subsequent to the effective date of disqualification for regular benefits and has earned in employment remuneration equal to not less than four times the individual's weekly benefit rate.

h. (1) An individual claiming extended benefits who is an exhaustee, as defined under paragraph j. of section 5 of P.L.1970, c. 324 (*C. 43:21-24.11*), and who is

statute permits a finding of ineligibility for a claimant who was previously found ineligible, even if that prior determination is under appeal. Custin alleges that he saw a message online that indicated "Benefits Exhausted," and that thereafter, he was disqualified for benefits because he was "determined to be disqualified or ineligible for benefits on a previous claim." (Compl. ¶¶ 8-9)

N.J.S.A. § 43:21-24.19 concerns ineligibility for extended benefits. The statute provides that an individual found to be disqualified for regular benefits under N.J.S.A. § 43:21-5 "will not meet the eligibility requirements for the payment of extended benefits" unless certain conditions are met. *See* N.J.S.A. § 43:21-24.19(g). The statute also provides that an individual who is an "exhaustee," defined as one who has received all of the regular benefits available to him, "shall be disqualified for extended benefits" unless certain conditions are met. *See id.* § 43:21-24.19(h).

Again, it is clear that Custin is aggrieved by being denied benefits under these substantive provisions. It is not clear from the complaint how these provisions violate the Social Security Act's procedural requirement that a

---

subsequently discharged or suspended for misconduct connected with his work as provided in subsection (b) of *R.S. 43:21-5*, shall be disqualified for extended benefits for the week in which the separation occurs and for each week thereafter until he has earned in employment remuneration equal to at least four times his weekly extended benefit rate, notwithstanding the disqualifying period for regular benefits for misconduct imposed under the provisions of subsection (b) of *R.S. 43:21-5*.

(2) An individual claiming extended benefits who is an exhaustee, as defined under paragraph j. of section 5 of P.L.1970, c. 324 (*C. 43:21-24.11*), but has satisfied the requirements of subparagraph c.(3)(c) of this section concerning prospects for employment, and who subsequently fails without good cause either to apply for available, suitable work when so directed by the employment office or the director or to accept suitable work as defined in subsection (c) of *R.S. 43:21-5* when offered to him, or to return to his customary self-employment when directed by the director, shall be disqualified for extended benefits. The disqualification shall be only for the week in which the refusal occurs and for each week thereafter, until he has earned in employment remuneration equal to at least four times his weekly extended benefit rate, notwithstanding the disqualifying period for regular benefits for the refusal normally imposed under the provisions of subsection (c) of *R.S. 43:21-5* or the disqualification imposed in paragraph b. of this section for individuals who have not satisfied the requirements of subparagraph c.(3)(c) of this section.

N.J.S.A. § 43:21-24.19.

state's administrative processes function reasonably to ensure payment of benefits *when* they are due.

In my prior Opinion, I found that Custin had failed to allege a cognizable claim under the "when due" clause of the Social Security Act. On reconsideration of the same contentions, I reach the same conclusion.

2. Eighth Amendment Claim

The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." As I explained in my prior opinion, the Eighth Amendment does not apply here because it is applies to bail, fines, criminal punishment, and closely allied penalties. (ECF no. 82, Opinion at 11) Here, Custin alleges that "disqualification from EB benefits is unusual and is unconstitutional under [the Eighth Amendment] because it disqualifies a claimant twice on the same charge." (Compl. ¶ 9) Custin objects to the fact that one of his applications for benefits was denied on the basis that he had previously been determined to be ineligible on a prior claim, although he was appealing that prior determination. Even given a liberal construction, these allegations cannot be said to relate to bail, fines criminal punishment, or anything closely analogous to them. Accordingly, Custin has failed to state a claim under the Eighth Amendment.

3. Due Process Claim

Finally, Custin appears to contend that the two state statutes cited above deprive persons of property without due process of law, and that the NJDOL and its Board of Review violated his due process rights. "Procedural due process imposes constraints on governmental decision which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause." *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S.Ct. 893 (1976). Unemployment benefits are considered to be property interests. *See Wilkinson*, 627 F.2d at 664 ("State statutes providing for the payment of unemployment compensation benefits create in the claimants for those benefits property interests protected by due process.").

It is not clear how the two statutes in themselves work a due process violation. (*See* ECF no. 82, Opinion at 12). Custin has alleged, however, that the NJDOL and the Board of Review committed various due process violations, including (1) failing to provide Custin with a copy of all documents used in his hearings (Compl. ¶¶ 2, 3, 11), (2) failing to notify Custin of his appellate rights (Compl. ¶¶ 5, 6, 7), (3) failing to provide proper notice of hearings (Compl. ¶ 10), and (4) failing to properly consider a settlement payment in determining eligibility for benefits (Compl. ¶¶11-14). At this stage of the proceedings, I find these allegations sufficient to state a claim. The State Defendants contend that Custin has received "all the process that is due," but I cannot determine whether that is the case without the benefit of discovery. I will therefore deny the motion to dismiss as to Custin's due process claim.

CONCLUSION

For the reasons set forth above, the State Defendants' motion to dismiss is granted to the extent that Defendant NJDOL is dismissed from this action, and that the claims based on the Eighth Amendment and the Social Security Act are dismissed with prejudice. The motion is otherwise denied. An appropriate Order follows.

Dated: March 22, 2016

HON. KEVIN MCNULTY, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN M. CUSTIN, **Plaintiff,** **v.** **HAROLD J. WIRTHS, et al.,** **Defendants.**	Civ. No. 12-910 (KM) **ORDER**

KEVIN MCNULTY, U.S.D.J.:

THIS MATTER having been opened to the Court by Defendants New Jersey Department of Labor, J. Wirths, Joseph Sieber, Gerald Yarbrough, and Jerald L. Maddow (collectively, "State Defendants"), on their motion to dismiss the Third Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(1) for lack of subject matter jurisdiction and Fed. R. Civ. P. 12(b)(6) for failure to state a claim (ECF no. 94); and Plaintiff John M. Custin having filed an opposition (ECF no. 97); and the Court having considered the submissions and decided the matter without oral argument, *see* Fed. R. Civ. P. 78; for the reasons expressed in the accompanying Memorandum Opinion, as well as the Court's prior opinion in this matter (ECF no. 82); and good cause appearing therefor:

IT IS this 22nd day of March, 2016,

ORDERED that the motion to dismiss the complaint (ECF no. 94) is **GRANTED in part** and **DENIED in part**, as follows:

1. All claims against Defendant New Jersey Department of Labor are **DISMISSED WITH PREJUDICE.**

2. As to the remaining defendants, all claims based on alleged violations of the Eighth Amendment and the Social Security Act are **DISMISSED WITH**

PREJUDICE, but the motion to dismiss is **DENIED** as to the claims based on alleged violations of the Due Process Clause of the Fourteenth Amendment.

HON. KEVIN MCNULTY, U.S.D.J.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN M. CUSTIN, **Plaintiff,** **v.** **HAROLD J. WIRTHS, State of New Jersey Commissioner of Labor; JOSEPH SIEBER, GERALD YARBROUGH, JERALD L. MADDOW, New Jersey Board of Review; HILDA S. SOLIS, U.S. Secretary of Labor; SETH D. HARRIS, Acting U.S. Secretary of Labor, and JANE OATES, U.S. Assistant Secretary of Employment and Training Administration** **Defendants.**	Civ. No. 12-910 (KM) **OPINION**

KEVIN MCNULTY, U.S.D.J.:

This action was filed by John M. Custin, pro se, against the Commissioner of the New Jersey Department of Labor ("NJDOL"); three NJDOL officials who sat on its Board of Review (collectively with the Commissioner, the "State Defendants"); and the current and former United States Secretary of Labor and the Assistant Secretary of Employment and Training Administration (collectively, the "Federal Defendants"). Mr. Custin filed this action, which alleges constitutional and statutory violations, after a series of unfavorable eligibility determinations by the NJDOL, in which he was denied certain unemployment benefits. The State Defendants ask this Court to abstain from exercising jurisdiction, citing *Younger v. Harris,* 401 U.S. 37 (1971). The Federal Defendants move to dismiss Mr. Custin's claims for lack of subject matter jurisdiction and failure to state a claim. As explained below, I will deny the State Defendants' motion. I will grant the motion of the Federal Defendants, and dismiss Mr. Custin's claims against them.

Facts and Administrative History

Mr. Custin worked at Wal-Mart from April 2008 through April 2010. His employment was terminated on April 26, 2010.

i. First Administrative Action

Following that termination, Mr. Custin filed a claim for unemployment benefits. On May 13, 2010, the NJDOL found him eligible.

Wal-Mart initiated an administrative action when it appealed Mr. Custin's eligibility determination to the Appeals Tribunal of the NJDOL. In a telephonic hearing, it claimed that Mr. Custin was a repeated no-show who did not call in his absences, pursuant to Wal-Mart's standard operating procedures. Mr. Custin claimed that there were problems with the call-in number and that Wal-Mart advised him he was "re-hirable" in his exit interview. The Appeals Tribunal found that Wal-Mart had discharged him for misconduct. It ruled that Mr. Custin was disqualified from receiving benefits, pursuant to N.J.S.A. 43:21-5(b), for the period from April 18, 2010 to May 29, 2010.

Mr. Custin appealed to the NJDOL's Board of Review, which affirmed the ruling of the Appeals Tribunal. He then appealed to the New Jersey Superior Court, Appellate Division, contending that he had been denied due process. The Appellate Division affirmed the Appeals Tribunal's disqualification finding, and declined to consider the due process issue because Mr. Custin did not raise it before the Appeals Tribunal.

ii. Second Administrative Action

Mr. Custin then initiated a short-lived second administrative action before the Appeals Tribunal. Based on the disqualification ruling in the first administrative action, NJDOL had requested that he refund $1,285 in benefits that he received in May 2010. Custin filed, but then withdrew, an appeal of NJDOL's refund request.

iii. Third Administrative Action

From May 29, 2010, through December 3, 2011, Mr. Custin received unemployment benefits up to the maximum amount of $6682, plus each allowable tier of "emergency unemployment compensation." Then, on December 4, 2011, he filed a claim for extended benefits. The NJDOL rejected this claim, pursuant to N.J.S.A. § 43:31-24.19(g), because Custin had not earned any wages since his initial claim in April 2010.[1] In December 2011, he appealed

[1] An individual who has been disqualified for regular benefits under the provisions of subsection (b) or (c) of R.S. 43:21-5 will not meet the eligibility requirements for the payment of extended benefits

this denial to the Appeals Tribunal, which affirmed that ineligibility finding in February 2012. He further appealed to the Board of Review, which remanded the matter for a new hearing. In September 2012, the Appeals Tribunal once again affirmed the ineligibility finding. Mr. Custin did not appeal this third administrative action to the Superior Court.

iv. Fourth Administrative Action

In March of 2012, Mr. Custin filed a 'transitional' claim, seeking benefits going forward, on the theory that he had now earned wages that would re-qualify him for benefits. The new alleged wages consisted of funds that he obtained through settlement of a separate discrimination lawsuit against Wal-Mart. The NJDOL rejected his claim. On March 28, 2012, he initiated a fourth administrative action by appealing this rejection to the Appeals Tribunal. On August 30, 2012, the Appeals Tribunal affirmed the ineligibility finding, finding that the funds he obtained in the settlement were not re-qualifying wages under NJSA § 43:21-4(e)(6).[2] Mr. Custin did not appeal further.

v. Fifth Administrative Action

Finally, on December 30, 2012, Mr. Custin filed a new claim seeking to establish a new "base year" on which to base further benefits. NJDOL reasoned that his eight weeks of work at Target Corp. in late 2012 did not constitute a sufficient number of "base weeks" and did not yield sufficient "base wages" to re-entitle him to unemployment benefits, and declared him ineligible on January 23, 2013. Mr. Custin appealed to the Appeals Tribunal. On March 19, 2013, the Appeals Tribunal affirmed the ineligibility finding.

Mr. Custin and the State Defendants dispute whether he further appealed that March 19, 2013 determination. The State Defendants contend that Mr. Custin appealed it by letter dated August 12, 2013. Mr. Custin vehemently denies this. The parties have placed the relevant papers before me, and I will make preliminary findings on this issue, for purposes of this motion. (*See* pp. 4-5, *infra.*)

> unless the individual has had employment subsequent to the effective date of disqualification for regular benefits **and** has earned in employment remuneration equal to not less than four times the individual's weekly benefit rate.

N.J.S.A. § 43:21-24.19(g) (emphasis added).

[2] N.J.S.A. § 43:21-4(e)(6) provides: "The individual applying for benefits in any successive benefit year has earned at least six times his previous weekly benefit amount and has had four weeks of employment since the beginning of the immediately preceding benefit year. This provision shall be in addition to the earnings requirements specified in paragraph (4) or (5) of this subsection, as applicable."

The State Defendants' Motion to Dismiss

The State Defendants offer a single argument in support of their Motion to Dismiss: that this Court must abstain from exercising jurisdiction over Mr. Custin's claims against them pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). *Younger* abstention is appropriate, they argue, because there is a pending state proceeding, judicial in nature, in which Mr. Custin can assert the same legal claims he brings here. Applying the *Younger* line of cases, I find the State Defendants' argument to be inadequate.

A federal court must abstain from exercising jurisdiction where 1) there is a pending state proceeding 2) implicating important state interests and 3) providing an adequate opportunity to raise constitutional challenges. *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 432 (1982) (citing *Younger*). As the moving party, the state bears the burden of demonstrating that these circumstances exist. *See, e.g., Durga v. Bryan*, 2010 U.S. Dist. LEXIS 106862, *7-8 (D.N.J. Oct. 5, 2010)(Brown, C.J.)("Axiomatically, the State, as the moving party, bears the burden of production and persuasion to prevail in the present motion. That burden is especially critical in the present matter, where the State asks this Court to sidestep its 'virtually unflagging' obligation to consider the pro se complaint of a plaintiff that asserts the denial of rights protected by the United States Constitution.")(quoting *O'Neill v. City of Philadelphia*, 32 F.3d 785, 794 (3d Cir. 1994)).

The "pending" state proceeding, according to the State Defendants, is Mr. Custin's purported appeal of the March 19, 2013 Appeals Tribunal decision in the Fifth Administrative Action, docket number 412,642. (Letter of Christopher M. Kurek filed Dec. 30, 2013 (Doc. No. 80)). Whether a state proceeding is pending is not ordinarily a difficult determination. Here, however, the administrative record is muddled. I conclude that there is no relevant, currently pending proceeding, for the following reasons.

The question is whether there is a pending appeal in the Fifth Administrative Action. That Action bears the docket number 412,642. Mr. Custin's letter of August 12, 2013 does not request any appeal; it does not refer to this this docket number; it does not mention the March 19, 2013 decision of the Appeals Tribunal. Rather, the letter requests permission to file certain documents and seeks the issuance of a subpoena to Wal-Mart prior to an August 22, 2013 hearing. Mr. Custin explains that his August 12, 2013 letter was sent in preparation for a hearing that the Appeals Tribunal scheduled for the following week on the 420,125 docket. He further explains that the 420,125 docket is a "mistaken docket," and that the hearing officer stated as much when Mr. Custin advised him that he was not appealing the March 19, 2013 decision. (*Id.* at p. 2).

Handwritten across the top section of the letter is the number "420,125." Nevertheless, NJDOL appears to have stamped the letter and made additional handwritten notations that the letter constituted an appeal of the March 19, 2013 determination under docket number 412,642.

The provenance of the "420,125" docket notation remains mysterious. When the State Defendants first filed this motion in August of 2013 (Doc. No. 44), they argued that 420,125 was the docket number of the currently pending state proceeding in favor of which they sought *Younger* abstention. They admitted, however, that they did not know what the proceeding was about. Now, the State contends that docket 412,642—the Fifth Administrative Action—is the currently pending proceeding for *Younger* purposes. On December 18, 2013, just days before the State Defendants filed their most recent letter in this matter (Doc. No. 80), the Board of Review issued a notice of appeal recognizing the existence of an appeal of the March 19, 2013 decision in 412,642. That notice attaches Custin's August 2013 letter. (Doc. No. 81 at p. 14).

The record, as I say, is muddled. This much, however, is clear from the documents—and the August 12, 2013 letter in particular. Mr. Custin never evidenced any clear intention to appeal the Appeals Tribunal's decision in the Fifth Administrative Action. I do not find any clear evidence that there is a currently pending state proceeding. The first prong of the *Younger* test is not satisfied.

Even if I found that the State administrative appeal was pending, however, I could not find that the third prong of *Younger* is satisfied. Such an appeal would not afford Mr. Custin the opportunity to pursue the constitutional claims raised in this action.[3] For example, Mr. Custin's allegations that he was denied due process and suffered the application of an allegedly unconstitutional statute (N.J.S.A. § 43:21-5(b)) pertain almost entirely to NJDOL's denial of initial benefits in 2010 (the subject of the now-ended First Administrative Action). The allegedly pending state appeal, however, relates to the Fifth Administrative Action and NJDOL's 2013 determination that Custin was ineligible for a new benefits base year commencing on December 30, 2012. The two proceedings involve separate facts, separate administrative determinations, and separate legal issues. In this action, Mr. Custin challenges the constitutionality of N.J.S.A. 43:21-5(b), which governed his initial disqualification based on his discharge for misconduct. Those issues are unrelated to the Fifth Administrative Action, which involved N.J.S.A. 43:21-4(e) and the calculation of a new base year. In short, even if the claimed appeal

[3] I entered a letter order (Doc. No. 78) requesting that the State Defendants address the issue of whether Mr. Custin's claims could be brought in any purportedly pending state proceeding. (*See* Letter of Kurek, Doc. No. 90). They have not done so.

were pending, it would not afford an opportunity for Mr. Custin to raise the constitutional claims asserted here, and would not satisfy the third part of the *Younger* test. *See Middlesex* at 432 (setting forth element of "adequate opportunity to raise constitutional challenges"); *Habich v. City of Dearborn*, 331 F.3d 524, 530-532 (6th Cir. 2003)(upholding District Court's refusal to abstain as proper, given that ongoing proceeding dealt with narrow issues unrelated to plaintiff's due process challenges to alleged procedural violations and other earlier actions by city, such that plaintiff's claims were collateral to the ongoing proceeding)(citing *Gerstein v. Pugh*, 420 U.S. 103 (1975)(no *Younger* abstention where criminal defendant brings federal suit challenging length of pretrial detention, as that issue was not related to and could not be raised in his defense in the state proceeding)).

Accordingly, the State Defendants have not met their burden of demonstrating that *Younger* abstention is appropriate. Their motion is denied.

The Federal Defendants' Motion to Dismiss

Mr. Custin's suit, insofar as it pertains to the Federal Defendants, challenges the decision of the United States Department of Labor (USDOL) to certify the NJDOL's unemployment compensation program, and alleges that a USDOL regulation, 20 CFR § 615.8(c)(2), is unconstitutional.[4] He names the former Secretary of Labor, the Deputy Secretary of Labor (who was at one point Acting Secretary), and an Assistant Secretary of Labor, not specifying whether he is pursing them in their personal or official capacities. (*See* Doc. No. 38).

The Federal Defendants, appearing in their official capacities (*See* Ltr. Of Karen Stringer (Doc. No. 79) at n.1), argue, *inter alia*, that Mr. Custin lacks standing to sue them because he has neither pled a sufficient connection between their alleged actions and his alleged injury, nor pled that his alleged injury would likely be redressed by the relief sought against them. (*See* Doc. No. 43 at pp. 18-22; Doc. No. 79).

---

[4] A disqualification [from benefits] in a State law, as to any individual who voluntarily left work, was suspended or discharged for misconduct, gross misconduct or the commission or conviction of a crime, or refused an offer of or a referral to work, as provided in sections 202(a) (4) and (6) of the Act...(2) As applied to eligibility for Extended Benefits, shall require that the individual be employed again subsequent to the date of the disqualification before it may be terminated, even though it may have been terminated on other grounds for regular benefits which are not sharable; and if the State law does not also apply this provision to the payment of what would otherwise be sharable regular benefits, the State will not be entitled to a payment under the Act and § 615.14 in regard to such regular compensation[.]

20 CFR § 615.8(c).

A plaintiff must establish his standing to sue under Article III of the United States Constitution. This 'constitutional standing' has three essential elements:

> (1) "the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent', not "conjectural" or "hypothetical[.]"'"
> (2) "there must be a causal connection between the injury and the conduct complained of – the injury has to be 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court.'"
> (3) "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561 (U.S. 1992)(internal citations omitted). At the pleading stage, general factual allegations will suffice to discharge the plaintiff's burden. *Id.* at 561.

In addition, a plaintiff, particularly one challenging agency action, must show that he has "prudential standing." This requires a showing that the plaintiff is asserting his own legal interests, as opposed to those of a third party or the general public, and he must show that his "interests are arguably within the zone of interests intended to be protected by the statute, rule or constitutional provision on which the claim is based." *Davis v. Philadelphia Housing Auth.*, 121 F.3d 92, 96 (3d Cir. 1997). The test is not demanding; it is meant only to screen out suits that are marginally related to or inconsistent with the purposes of the underlying statute. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012).

As discussed below, I find that Mr. Custin lacks standing to bring a claim challenging the USDOL's certification of New Jersey's program, but that he does have standing to challenge 20 CFR § 615.8(c)(2). As to that regulation, however, he has failed to state any cognizable cause of action, and has further failed to bring his facial challenge within the applicable statute of limitation.

1. Improper Certification Claim

I first examine Mr. Custin's claim that the Federal Defendants "abuse their discretion" by "continu[ing] to certify the state of NJ [unemployment insurance] program as compliant to federal law when it is not." (Third Amended Complaint (Doc. 38) at ¶1). That quoted statement is the only factual allegation

in the complaint regarding USDOL's certification of the New Jersey program.[5] I find standing to be lacking because there is no plausible allegation (a) that the federal government's conduct and the alleged injury are causally connected; or (b) that the relief sought (decertification of the State program) would remedy the claimed injury.

Plaintiff's claimed injury— denial of certain unemployment benefits— is apparent. (*Id.* at ¶¶ 1-14). Less apparent, however, is the alleged causal connection between Mr. Custin's injury and the Federal Defendants' certification of the NJDOL's unemployment insurance program. Such a causal connection is not set forth, even generally, in the factual allegations of the complaint. I am mindful that Mr. Custin is proceeding *pro se,* and I have read his complaint and motion papers with a liberal eye. The unexpressed assumption seems to be that the alleged injury would not occurred if the USDOL did not certify the NJDOL's unemployment benefits program as compliant. It is clear that the State denied benefits based on State law. The manner in which a compliant state program would have resulted in an award of benefits is not specified. The alleged connection between the claim and the injury is too remote and speculative to accept in the absence of plausible supporting factual allegations.

In that conclusion I am persuaded by the reasoning of a sister court in a similar case. In *Horack v. Minott*, the District of Delaware agreed with the Secretary of Labor that the plaintiff did not show any of the three elements of constitutional standing. 1995 U.S. Dist. LEXIS 7583, *11-16 (D. Del. May 26, 1995). After the Delaware department of labor denied benefits, that plaintiff brought a facial and as-applied challenge to the statute on which the ineligibility finding was based, and further argued that the USDOL should not have certified the state program. The District Court found that the denial was premised on the state's application of its own statute. Because "the federal government played no role in the decision of the State of Delaware to deny unemployment compensation to plaintiff there is an insufficient causal link between defendant [Secretary of Labor's] conduct and plaintiff's alleged injury." *Id.* at *12-14.

Here, too, the actual denials of which Mr. Custin complains were the product of the State's application of its own statutes. The federal government's certification of the state program is simply too far removed from the alleged injury to confer standing.

---

[5] The only other mention of the USDOL and certification is in the demand for relief: "an injunction to prevent further certification of the state of New Jersey unemployment program by the U.S. Secretary of Labor and barring the state against any further federal funding until the state of New Jersey is in conformity with the Constitution of the United States and the Social Security Act." (*Id.* at 'DEMAND').

If anything distinguishes this case from *Horack*, it is Mr. Custin's statement in his papers defending against this motion that he was denied procedural due process due to the failure to decertify (a claim that he has not pled). (Letter Brief., Doc. 81 at part II, p. 6). Again, it is difficult to understand why NJDOL's alleged procedural irregularities would not have occurred if USDOL had denied certification of the state program.[6] Lacking plausible factual allegations, I cannot find the requisite causal connection.

Closely related is another problem. Even if causation is assumed, I cannot find any reasonable allegation that the relief sought would redress Mr. Custin's injury. He seeks "an injunction to prevent further certification of the state of New Jersey unemployment program by the U.S. Secretary of Labor and barring the state against any further federal funding until the state of New Jersey is in conformity with the Constitution of the United States and the Social Security Act." (Third Am. Comp. (Doc. 38) at 'DEMAND'). This remedy would not restore his benefits. The immediate effect of the requested remedy would be to strip New Jersey's unemployment benefits program of funding. Were that to occur, neither Mr. Custin's nor anyone else's benefits would be paid by the State. *See Horack* at *14-15. Mr. Custin's complaint does not specifically articulate how decertification would "compel [NJDOL] to amend its criteria for unemployment compensation benefits"—that is, to re-write the various state statutes under which his claims were rejected—in such a way as to ensure that he would receive benefits. *See id.* at *15. The claim is a highly contingent one that I cannot accept without more specific factual allegations. The complaint falls well short of alleging that Mr. Custin's injuries would likely be redressed if this Court granted the relief sought. *See id.*

For these two independent reasons, Mr. Custin's challenge to the federal certification of the state unemployment insurance program fails for lack of standing.

2. Unconstitutional Regulation Claim

i. Standing

Mr. Custin's Third Amended Complaint alleges that the Federal Defendants "use an unconstitutional and absurd federal regulation [20] CFR [§] 615.8(c)(2)[.]" (Doc. 38 at ¶ 1). It demands "a declaration that 20 CFR § 615.8(c)(2) and [N.J.S.A. §] 43:21-24.19 are unconstitutional – laws which violate the intent of Congress in passing the SSA and are offensive to due process and which aggravate a disproportional loss already suffered on the original disqualification." (*Id.* at 'DEMAND'). These allegations are quite general and nonspecific, and there are no other factual allegations concerning this

[6] Except perhaps in the trivial sense that, but for federal certification, the State program might never have existed at all.

facial challenge to the regulation. That said, I consider the entire record before me to determine whether Mr. Custin might have standing.

Mr. Custin's letter brief suggests that this claim relates to his Third Administrative Appeal. In the Third Administrative Appeal, the NJDOL's Appeals Tribunal upheld the denial of extended benefits to Mr. Custin, finding that his failure to secure any employment since he was first discharged rendered him ineligible under N.J.S.A. § 43:21-24.19(g). (*See* 9/18/12 Decision of the Appeals Tribunal (Doc. No. 43 at Ex. E)). This denial of extended benefits seems to be what the Complaint refers to as the "aggravat[ion of] a disproportional loss already suffered on the original disqualification."

The challenged federal regulation states that "A disqualification [from benefits] in a State law...(2) As applied to eligibility for Extended Benefits, shall require that the individual be employed again subsequent to the date of the disqualification before it may be terminated, even though it may have been terminated on other grounds for regular benefits which are not sharable; and if the State law does not also apply this provision to the payment of what would otherwise be sharable regular benefits, the State will not be entitled to a payment under the Act and § 615.14 in regard to such regular compensation[.]" 20 CFR § 615.8(c). The regulation thus imposes a condition: state law "shall require" that certain disqualified individuals "be employed again" before their disqualification is terminated and they may recover extended benefits.

As it happens, the New Jersey statute under which Mr. Custin was found ineligible is somewhat stricter than the federal regulation requires. *See* N.J.S.A. § 43:21-24.19(g) (quoted at n.1, above). New Jersey's statute adds the requirement that the claimant, when re-employed, earn not less than four times his weekly benefits rate. *See* N.J.S.A. § 43:21-24.19(g). It appears that Mr. Custin would have been found ineligible even if the state statute exactly mirrored the less strict federal regulation. But federal law does set a floor beneath which state regulation cannot go. Thus, on the liberal assumption that Mr. Custin is challenging the constitutionality of that federal "floor," his injury may be 'fairly traceable' to the federal regulation, which interlocks with the applicable State statute. If the conditions on benefits imposed by the federal statute were deemed unconstitutional, then it is possible that analogous conditions in the State statute would fall as well. Therefore the relief requested (invalidation of the federal regulation) would likely redress his injury. And, of course, he also seeks invalidation of the State statute itself.

Under a liberal interpretation of these *pro se* pleadings, I find that standing has been adequately alleged as to the claim of unconstitutional regulation.

ii. Failure to State a Claim

Included in the Federal Defendants' motion to dismiss is the argument that Mr. Custin "has failed to provide sufficient facts to show an entitlement to relief." (Br. in Supp. of Mot. to Dismiss at 22).

Mr. Custin's claims with respect to 20 CFR § 615.8(c)(2) seem to be that it violates (a) the Eighth Amendment, (b) the Due Process Clause of the Fourteenth Amendment, and (c) the "when due" clause of the Social Security Act, 42 U.S.C. 503(a)(1). The Federal Defendants respond that Mr. Custin "does not even assert whether he is claiming a violation of substantive or procedural due process[,] and the eighth amendment is clearly inapplicable. Moreover, the contested provision is based on requirements of the Extended Unemployment Benefits Act. 53 FR 27926, *27933."

To this portion of the Federal Defendants' motion I apply the usual standard for motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). The moving party, ordinarily the defendant, bears the burden of showing that no claim has been stated, *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005), and the well-pleaded factual allegations of the complaint must be taken as true, with all reasonable inferences drawn in plaintiff's favor. *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). The question is whether the factual allegations are sufficient to raise a plaintiff's right to relief above a speculative level, to the point of being "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Umland v. PLANCO Fin. Servs., Inc.*, 542 F.3d 59, 64 (3d Cir. 2008). While "[t]he plausibility standard is not akin to a 'probability requirement' . . . it asks for more than a sheer possibility." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Where, as here, the plaintiff is proceeding *pro se*, the complaint is "to be liberally construed," and, "however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007).

I first turn to the Eighth Amendment to the United States Constitution, which provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and usual punishments inflicted." The Supreme Court has stated: "Given that the Amendment is addressed to bail, fines, and punishments, our cases long have understood it to apply primarily, and perhaps exclusively, to criminal prosecutions and punishments." *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 262 (1989)(holding that excessive fines clause does not apply to punitive damages in a civil suit). At issue here is the USDOL's decision to require a formerly disqualified claimant to first be re-employed for at least some period of time before being eligible for extended unemployment benefits. That is obviously unrelated to bail. It does not constitute a fine, either. *See id.* at 266-68 ("[T]he history of the Eighth Amendment convinces us that the Excessive Fines Clause was intended to limit

only those fines directly imposed by, and payable to, the government."). Finally, the application of the Federal Defendants' regulation is not a punishment for a crime, let alone a cruel and unusual one. *See Gregg v. Georgia*, 428 U.S. 153, 172-173 (1976) (framing Eighth Amendment inquiry as whether, and to what extent, conduct may be formally punished as criminal); *Estelle v. Gamble*, 429 U.S. 97, 103 n. 7 (1976). Mr. Custin, therefore, has no cognizable claim under the Eighth Amendment.

Next, Mr. Custin appears to claim that 20 CFR § 615.8(c)(2), on its face, deprives persons of property without due process of law. (*See* Third Amended Complaint at ¶1). Without question, "[p]rocedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause," and this includes government benefits. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Mr. Custin's assertion that the challenged regulation deprives persons of due process rings hollow, however. There is no allegation in the Third Amended Complaint that the regulation somehow strips away any of the standard procedural safeguards furnished by the rest of the Social Security Act, and the regulation is not susceptible of such a reading. Mr. Custin himself took full advantage of these procedures when he appealed the NJDOL's rejection of his application for extended benefits. Viewing the Third Amended Complaint as liberally as possible, I still am unable to extract any concrete factual allegation or articulated theory. The Court is left to speculate as to how 20 CFR § 615.8(c)(2) is alleged to work a deprivation of due process. Accordingly, I find that Mr. Custin has failed to state any cognizable claim under the Due Process Clause of the Fourteenth Amendment.

Finally, Mr. Custin's facially attacks 20 CFR § 615.8(c)(2) by claiming that it violates the Social Security Act's "when due" clause, 42 U.S.C. § 503(a)(1). (Third Amended Complaint at ¶1). Section 503(a)(1) conditions payments from the USDOL to state bodies (like NJDOL) on a finding by the Secretary of Labor that the state's law "includes provision for [] such methods of administration....as are found by the Secretary of Labor to be reasonably calculated to insure full payment of unemployment compensation when due." 42 U.S.C. § 503(a)(1). Again, the USDOL regulation challenged here requires states to condition the receipt of extended benefits on disqualified candidates' having first returned to work. I am unable to discern how that USDOL regulation is alleged to violate a Social Security Act provision that generally requires state bureaucracies to function properly. I find, therefore, that Mr. Custin has not alleged any cognizable legal claim concerning 20 CFR § 615.8(c)(2).

iii. Statute of Limitations

Even if one or more of Mr. Custin's claims concerning 20 CFR § 615.8(c)(2) were sufficiently pled, it would be barred by the statute of

limitations. Because these claims are facial challenges to the regulation, the six-year limitations period began to run when the regulation was promulgated in 1988.

"Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401. The threshold question is when the "right of action first accrue[s]" in the context of a facial challenge to a regulation. In *Pennsylvania Dep't of Public Welfare v. U.S. Dep't of Health and Human Services*, 101 F.3d 939 (3d Cir. 1996), a plaintiff challenged the validity of a regulation, alleging inadequate notice and comment procedures. The Third Circuit held that such a claim accrued— and was also ripe for resolution— when the rule was promulgated. It affirmed a dismissal based on the statute of limitations. *Id.* at 944-47.

Logically, this accrual rule governs a facial challenge to a rule promulgated by an agency. "On a facial challenge to a regulation, the limitations period begins to run when the agency publishes the regulation in the Federal Register." *Dunn-McCampbell Royalty Interest v. National Park Serv.*, 112 F.3d 1283, 1287 (5th Cir. 1997) In *Dunn-McCampbell*, the Fifth Circuit stated that facial challenges have a six-year statute of limitations commencing when a rule is promulgated. *Id.* A fresh limitations period arises, however, when the agency subsequently *applies* the rule against a party who challenges such *application* on statutory or constitutional grounds. *Id.; see Wind River Mining Corp. v. United States*, 946 F.2d 710, 716 (9th Cir. 1991) ("a substantive challenge to an agency decision alleging lack of agency authority may be brought within six years of the agency's application of that decision to the specific challenger" (emphasis added)).

Here, Mr. Custin challenges the Constitutional and statutory validity of 20 CFR § 615.8(c) on its face, seeking a declaratory judgment. The issues he asserts arose at the time of promulgation, and were likewise fit for resolution immediately thereafter. *See Pennsylvania Dep't of Public Welfare*, 101 F.3d at 946-947; *Strahan v. Linnon*, 967 F. Supp. 581, 607 (D. Mass. 1997) ("plaintiff's challenge to 50 C.F.R. § 402.03 is such a 'policy-based' facial challenge in that his claim is that the regulation is plainly inconsistent with Congress' mandate in the ESA. Accordingly, the 'grounds for such [a] challenge[] [should have been] apparent to any interested citizen within a six-year period following the promulgation of the [regulation].'... *Wind River Mining* [*Corp. v. United States*, 946 F.2d 710, 715 (9th Cir. 1991)] excuses litigants from the six-year requirement only when the challenger 'file[s] a complaint for review of the adverse application of the [regulation] to the particular challenger.' That exception does not apply to the plaintiff." (citations omitted)). Mr. Custin does not bring an 'as applied' challenge which might potentially accrue at a later date. *Cf. Dunn-McCampbell*, 112 F.3d at 1287; *Wind River*, 946 F.2d at 716.

I emphasize the distinction between a facial and as-applied challenge. A specific challenge to an actual application of the regulation against Mr. Custin by the Federal Defendants might entitle him to a "fresh" limitations period. It is an open question, whether a state decision pursuant to a state statute that conforms, as required, to federal law, can be said to be a fresh "application" of federal law. For present purposes, however, it is clear that Mr. Custin's challenges are facial in nature.

The contents of 20 CFR § 615.8(c) were published in the Federal Reporter on July 25, 1988. 53 Fed Reg 27937 (July 25, 1988). A facial challenge had to be brought within six years of that date. It has therefore been time-barred for over nineteen years.

Conclusion

For the reasons set forth above, the State Defendants' Motion to Dismiss on *Younger* abstention grounds is **DENIED.** The Federal Defendants' Motion to Dismiss is **GRANTED**, and Plaintiff's claims against the Federal Defendants are hereby **DISMISSED WITHOUT PREJUDICE.** An appropriate order will follow.

HON. KEVIN MCNULTY
United States District Judge

Dated: January 31, 2014
Newark, New Jersey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN M. CUSTIN, **Plaintiff,** **v.** **HAROLD J. WIRTHS, State of New Jersey Commissioner of Labor; JOSEPH SIEBER, GERALD YARBROUGH, JERALD L. MADDOW, New Jersey Board of Review; HILDA S. SOLIS, U.S. Secretary of Labor; SETH D. HARRIS, Acting U.S. Secretary of Labor, and JANE OATES, U.S. Assistant Secretary of Employment and Training Administration** **Defendants.**	Civ. No. 12-910 (KM) **ORDER**

THIS MATTER having been opened to the Court on Motions to Dismiss the Complaint by Defendants Hilda S. Solis, Seth D. Harris, and Jane Oates (collectively, the "Federal Defendants") [ECF No. 43], and by Harold J. Wirths, Joseph Sieber, Gerald Yarbrough, and Jerald L. Maddow (collectively, the "State Defendants") [ECF No. 44] pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6); and the Plaintiff (pro se) having opposed the motions [ECF Nos. 42, 81]; and the Defendants having submitted additional materials in support of their motions [ECF Nos. 79, 80]; and this Court having considered the papers before it pursuant to Federal Rule of Civil Procedure 78(b); for the reasons stated in the Opinion filed on this date, and for good cause shown:

IT IS this 31st day of January, 2014,

ORDERED that the Federal Defendants' Motion to Dismiss is **GRANTED**; and Plaintiff's claims against the Federal Defendants are hereby **DISMISSED WITHOUT PREJUDICE**, and it is further

ORDERED that the State Defendants' Motion to Dismiss is **DENIED.**

Kevin McNulty

HON. KEVIN MCNULTY, U.S.D.J.

APPENDIX

APPENDIX D

Case # 12cv910

UNITED STATES DISTRICT COURT

FOR NEW JERSEY

John M. Custin,

Plaintiff-Appellant,

v.

Harold J. Wirths,et al.

Defendants/Appellees.

The United States District Court

For New Jersey

Discovery Orders of the Magistrate Judge and U.S. District Court of New Jersey

John M. Custin

P.O. Box 5631

Christiansted, VI 00823

APPENDIX

APPENDIX D

Case # 12cv910

UNITED STATES DISTRICT COURT

FOR NEW JERSEY

John M. Custin,

Plaintiff-Appellant,

v.

Harold J. Wirths,et al.

Defendants/Appellees.

The United States District Court

For New Jersey

Discovery Orders of the Magistrate Judge and U.S. District Court of New Jersey

John M. Custin

P.O. Box 5631

Christiansted, VI 00823

FOR THE COURT:
s/ William T. Walsh
William T. Walsh,
Clerk of Court

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Chambers of
Michael A. Hammer
United States Magistrate Judge

Martin Luther King Jr. Federal
Bldg. & U.S. Courthouse
50 Walnut Street, Room 2042
Newark, NJ 07102
(973) 776-7858

February 8, 2017

To: John M. Custin, Pro Se
54 Chestnut Drive
Wayne, NJ 07470

All counsel of record

LETTER OPINION AND ORDER

RE: **John M. Custin v. Harold J. Wirths, et. al.**
Civil Action No. 12-910 (KM)(MAH)

Dear Litigants:

Presently before the Court is Plaintiff pro se John M. Custin's motion to compel compliance with subpoenas served on non-parties New Jersey Department of Labor and Workforce Development ("NJDOL-WD"), New Jersey Department of Labor-Unemployment Insurance ("NJDOL-UI"), and Equifax Workforce Solutions, Inc. ("Equifax"). [D.E. 146]. For the reasons set forth below, Plaintiff's motion is denied in part and granted in part.

Background

This action was filed by pro se Plaintiff, John M. Custin, alleging constitutional and statutory violations in connection with the process of applying for unemployment benefits following his termination of employment with Walmart in April 2010. See generally Third Am. Compl., D.E. 38. Plaintiff's five applications for unemployment benefits to the New Jersey Department of Labor (NJDOL) were denied, as were Plaintiff's appeals of those determinations with the agency's first appellate level, the Appeals Tribunal, and the agency's final appeal level, the Board of Review. Id. Plaintiff filed suit in this Court against the Commissioner of the NJDOL, Harold Wirths, three officials who sat on the Board of Review, Joseph Sieber, Gerald Yarbrough, and Jerald Maddow (collectively, "State Defendants"), the current and former United States Secretary of Labor, and the Assistant Secretary of Employment and Training Administration (collectively, "Federal Defendants"). Id.

On January 31, 2014, Judge McNulty granted the Federal Defendants' motion to dismiss Plaintiff's Third Amended Complaint. D.E. 82. On March 22, 2016, upon the State Defendants' motion, Judge McNulty dismissed with prejudice all of Plaintiff's claims based on alleged violations of the Eighth Amendment and the Social Security Act, and dismissed with prejudice all claims against Defendant NJDOL. D.E. 130. However, Judge McNulty denied the State Defendant's motion as it pertained to Plaintiff's claims based on alleged violations of the Due Process Clause of the Fourteenth Amendment. Id. Thus, Plaintiff's claims against individual Defendants Wirths, Sieber, Yarbrough, and Maddow, which allege violations of Plaintiff's due process rights are currently still viable in this action. The claims alleging violations of the Due Process Clause of the Fourteen Amendment, as articulated in Plaintiff's Third Amended Complaint, include (1) failing to provide Plaintiff with a copy of all documents used in his hearings; (2) failing to notify Plaintiff of his appellate rights, (3) failing to provide proper notice of hearings, and (4) failing to consider key evidence necessary for Plaintiff's appeal. Third Am. Compl. ¶2-14.

From February 2016 to May 2016, Plaintiff served a total of six document subpoenas on NJDOL-WD, NJDOL-UI, and Equifax, a human resources contracting company, seeking information pertaining to his claims. See Pl.'s Mot. to Compel, D.E. 146. Specifically, Plaintiff sought, from non-party NJDOL-WD: (1) the notice mailed to Plaintiff for a hearing with the Board of Review scheduled for March 26, 2012, (2) the "complete record on appeal submitted to the Board of Review," for appeal dated July 15, 2010, for docket numbers 284 and 329, (3) the "minutes and recording of the appeal proceeding of the Board of Review," appeal dated July 15, 2010, for docket numbers 284 and 329, and (4) a "list of all claimants for the [NJDOL] scheduled telephone hearing[s] in which there was an issue of monetary ineligibly in regard to a claim for UI benefits between the dates of January 2012 [to] March 2012 and January 2016 and March 2016. See Subpoenas, D.E. 151. From non-party NJDOL-UI, Plaintiff sought: (5) any document indicting that NJDOL provided prior notice to Plaintiff regarding evidence that was to be used against Plaintiff at the June 28, 2010 hearing. Id. From non-party Equifax, Plaintiff sought: (6) any documents showing which "records were sent to any party...in regard to the UI claim of Ms. Teresa Goral." Id.

Both NJDOL-WD and NJDOL-UI failed to respond to the subpoenas in any way. Equifax, through its corporate counsel, responded to Plaintiff's subpoena by indicating that it would not produce any documents identified in the subpoena without a court order, as the documents requested were considered "confidential." Exh. B. to Pl.'s Mot. to Compel, D.E. 146-3.

On July 14, 2016, Plaintiff filed the present motion to compel compliance with his subpoenas. D.E. 146. None of the non-parties subject to the subpoenas filed opposition to the motion to compel. However, Defendants filed a three-page opposition letter asserting that since the claims against the NJDOL had been dismissed in their entirety, the information sought was not relevant to the remaining claims against the individual Defendants. Defs.' Opp'n, D.E. 148. Furthermore, Defendants argued that the records were confidential under the statute that governs the administration of the unemployment benefits, N.J.S.A. 43: 21-11(g). Id.

Discussion

Federal Rule of Civil Procedure 45(d)(2)(B)(I) sets forth the procedure by which this Court may compel compliance with a subpoena, stating that "[a]t any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection."

The permissible scope of discovery under Rule 45 is the same as under Rule 26(b), which provides that "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense ... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Where the subpoenaing party shows the documents sought to be relevant, "the resisting non-party must 'explain why discovery should not be permitted.'" Biotechnology Value Fund, L.P. v. Celera Corp., 2014 WL 4272732, *1 (D.N. J. Aug. 28, 2014) (citing Miller v. Allstate Fire & Cas. Ins. Co., 2009 WL 700142 (W.D. Pa. Mar. 17, 2009)). The Court, in assessing the reasonableness of a subpoena, should balance several competing factors including: "(1) relevance, (2) the need of the party for the documents, (3) the breadth of the document request, (4) the time period covered by it, (5) the particularity with which the documents are described, (6) the burden imposed, and (7) the subpoena recipient's status as a nonparty to the litigation." Id. at *2 (internal citations omitted). Based on this framework, each discovery request contained in Plaintiff's subpoenas will be discussed in turn below.

I. The notice mailed to Plaintiff for a hearing scheduled with the Board of Review scheduled for March 26, 2012.

Plaintiff's operative complaint alleges that Board of Review members violated his due process rights for failing to provide proper notice of Plaintiff's hearings. As such, the existence or nonexistence of a notice for Plaintiff's hearing is clearly relevant to Plaintiff's claim.

Defendants argue that this record is confidential because under N.J.S.A. 43: 21-11(g), "All records, reports and other information obtained from employers and employees under this chapter, except to the extent necessary for the proper administration of this chapter, shall be confidential and shall not be published or open to public...and shall not be subject to subpoena or admissible in evidence in any civil action." Id. However, because the statute clearly only protects "information obtained from employers and employees," a hearing notice is not considered confidential. See Paff v. New Jersey Dept. of Labor, Bd. of Review, 379 N.J. Super. 346, 356-357 (App. Div. 2005).

Therefore, Plaintiff's motion to compel compliance with his request for production of the hearing notice is hereby **GRANTED.**

II. The "complete record on appeal submitted to the Board of Review," for appeal dated July 15, 2010, for case numbers 284 and 329.

Plaintiff's operative complaint alleges that Board of Review members violated his procedural due process rights by upholding the Appeals Tribunal's decision "despite the fact that

the [Appeals] Tribunal submitted an incomplete 'record on appeal'" which excluded key evidence necessary for the appeal. Third Am. Compl. ¶2-14. As such, the record on appeal submitted to the Board of Review would clearly be relevant insofar as it is "reasonably calculated to lead to the discovery of admissible evidence to proving Plaintiff's claim." Fed. R. Civ. P. 26(b)(1).

Again, Defendants argue that this material is protected by N.J.S.A. 43: 21-11(g). Defs.' Opp'n, D.E. 148. Because the statute only applies to "records, reports and other information obtained from employers and employees," the NJDOL shall provide to Plaintiff any responsive records which are not considered confidential under the statute.

Furthermore, for any material that the NJDOL deems confidential under the statute, the agency must produce a sworn statement of agency personnel "setting forth in detail the following information: (1) the search undertaken to satisfy the request; (2) the documents found that are responsive to the request; (3) the determination of whether the document or any part thereof is confidential and the source of the confidential information; [and] (4) a statement of the agency's document retention/destruction policy and the last date on which documents that may have been responsive to the request were destroyed." See Paff v. New Jersey Dept. of Labor, 392 N.J. Super. 334, 341 (App. Div. 2007). The sworn statement must also have attached to it "an index of all documents deemed by the agency to be confidential in whole or in part, with an accurate description of the documents deemed confidential." Id. Therefore, Plaintiff's motion to compel compliance with his request for production of the record of his appeals is hereby **GRANTED.**

III. The "minutes and recording of the appeal proceeding of the Board of Review," for appeal dated July 15, 2010, for case numbers 284 and 329.

As stated above, Plaintiff's operative complaint alleges that Board of Review members violated his procedural due process rights by upholding the Appeals Tribunal's decision "despite the fact that the [Appeals] Tribunal submitted an incomplete 'record on appeal'" which excluded key evidence necessary for Plaintiff's appeal. Third Am. Compl. ¶2-14. As such, "the minutes and recording of the appeal to the Board of Review" would be relevant insofar as it is "reasonably calculated to lead to the discovery of admissible evidence to proving Plaintiff's claim." Fed. R. Civ. P. 26(b)(1).

As explained above, the NJDOL must provide any responsive documents which are not deemed confidential under N.J.S.A. 43-21-11(g). For any documents the NJDOL deems confidential, the agency must provide Plaintiff with the sworn statement of agency personnel and index of confidential documents, as described above. Therefore, Plaintiff's motion to compel compliance with his request for production of the "minutes and recording" of his appeal is hereby **GRANTED.**

IV. A "list of all claimants" scheduled for NJDOL telephone hearings "in which there was an issue of monetary ineligibly in regard to a claim for [unemployment insurance] benefits between the dates of January 2012 and March 2012 and January 2016 and March 2016."

Plaintiff's complaint alleges violations of his due process rights in connection with the process of applying for unemployment benefits with the NJDOL Board of Review. Because Plaintiff's claims are unique to him, information regarding other claimants' processes is not to his claim, and therefore, not discoverable. Therefore, Plaintiff's motion to compel compliance with this request is **DENIED.**

V. Any document indicting that NJDOL provided prior notice to Plaintiff regarding evidence that was to be used against Plaintiff at the June 28, 2010 hearing.

Plaintiff's operative complaint alleges that the Board of Review members violated his due process rights by failing to provide Plaintiff with a copy of all documents used in his hearings. As such, the existence or nonexistence of these notices would be relevant insofar as it is "reasonably calculated to lead to the discovery of admissible evidence to proving Plaintiff's claim." Fed. R. Civ. P. 26(b)(1).

As explained above, because this request does not ask for information "obtained from employers and employees," the information is not confidential and therefore, Plaintiff's request to compel compliance with this document demand is hereby **GRANTED.**

VI. Records from Equifax indicating which "records were sent to any party... in regard to the [unemployment insurance] claim of Ms. Teresa Goral."

In his moving papers, Plaintiff fails to articulate why records relating to another person's unemployment insurance claim would be relevant to his claims. Because plaintiff's claims are unique to him, insofar as they allege violations of his due process rights in connection with the process of applying for unemployment benefits, information regarding another claimant's claim is not relevant and therefore, not discoverable. Therefore, Plaintiff's motion to compel compliance with this request is **DENIED.**

Conclusion

Upon consideration of the parties' submissions and the applicable law, Plaintiff's motion to compel compliance with his subpoenas [D.E. 146] is **DENIED IN PART AND GRANTED IN PART.**

So Ordered,

/s Michael A. Hammer
UNITED STATES MAGISTRATE JUDGE

Full docket text for document 187:

TEXT ORDER: As discussed during the November 15, 2017 telephone conference, on or before December 15, 2017, Plaintiff shall submit an item-by-item list of all remaining discovery requests to Defendants. After each such item, Plaintiff shall provide a brief explanation of that item's relevance to the claims remaining in the case. Defendant shall respond on an item-by-item basis, on or before January 15, 2018. So Ordered by Magistrate Judge Michael A. Hammer on 11/15/2017. (MAH)

PACER Service Center			
Transaction Receipt			
06/06/2020 10:25:39			
PACER Login:	jc9953	**Client Code:**	
Description:	History/Documents	**Search Criteria:**	2:12-cv-00910-KM-MAH
Billable Pages:	1	**Cost:**	0.10

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN M. CUSTIN,	
Plaintiff,	**Civil Action No. 12-910 (KM) (MAH)**
v.	**ORDER**
HAROLD J. WIRTHS, et al.,	
Defendant.	

This Matter, having come before the court by way of Plaintiff's letter dated February 20, 2018 [D.E. 194] and Defendant's letter dated March 5, 2018 [D.E. 195];

and for good cause shown:

IT IS ON THIS 6th day of March 2018,

ORDERED that Plaintiff's remaining written discovery demands are denied as moot, as Defendants' counsel has represented, as an officer of the court, that Defendants have produced all responsive documents; and it is further

ORDERED that fact discovery shall remain open until **April 30, 2018**; and it is further

ORDERED that Plaintiff shall submit to a deposition in New Jersey. Plaintiff shall notify Defendants by **March 16, 2018** of three (3) proposed dates for his deposition. If Plaintiff fails to comply, Defendants shall notify the Court by **March 23, 2018** and the Court will set a date. To the extent that Plaintiff seeks reimbursement or an advance for travel expenses associated with his deposition, that request is denied because Plaintiff is a party and therefore not entitled to reimbursement.

/s Michael A. Hammer
UNITED STATES MAGISTRATE JUDGE

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

JOHN M. CUSTIN, **Plaintiff,** **v.** **HAROLD J. WIRTHS, et al.,** **Defendants.**	Civ. No. 12-910 (KM) **MEMORANDUM & ORDER**

KEVIN MCNULTY, U.S.D.J.:

The plaintiff, John M. Custin ("Custin") appeals (ECF no. 198) from a discovery order of Magistrate Judge Michael A. Hammer.

The standard of review of such a nondispositive order is well established:

> If a party objects to a magistrate judge's order regarding a nondispositive matter, the district court "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Id.; 28 U.S.C. § 636(b)(1)(A). This standard requires the District Court to review findings of fact for clear error and to review matters of law de novo. Haines v. Liggett Grp. Inc., 975 F.2d 81, 91 (3d Cir. 1992).

Equal Employment Opportunity Comm'n v. City of Long Branch, 866 F.3d 93, 99 (3d Cir. 2017). *See also* Fed. R. Civ. P. 72(a); L. Civ. R. 72.1(c)(1)(A). Where the appeal seeks review of a matter within the core competence of the Magistrate Judge, such as a discovery dispute, this Court will defer to the Magistrate Judge's discretion. *See Cooper Hospital/Univ. Med. Ctr. v. Sullivan*, 183 F.R.D.

119, 127 (D.N.J. 1998); *Deluccia v. City of Paterson*, No. 09-703, 2012 WL 909548, at *1 (D.N.J. March 15, 2012).[1]

There have been multiple rounds of repetitive discovery demands by the plaintiff, to which the defendant has responded. In an attempt to impose order, Judge Hammer required plaintiff to submit an itemized list of all outstanding discovery requests, and directed the defendants to respond, which they did. The plaintiff then filed an additional 45 requests for admission, 39 interrogatories and 13 requests for production of documents.

Defendants objected, primarily on the grounds that the requests were vague and unintelligible, that they were not addressed to defendants in their individual capacities (as required by prior rulings), and requested information already produced. (ECF no. 192) Another exchange of letters and objections followed. (ECF nos. 194, 195, 197) Most pertinently, in a letter dated March 5, 2018, counsel for the State defendants represented that all relevant documents had been produced, repeated their demand for a deposition of the plaintiff, and objected to plaintiff's demand that the defendants advance travel costs and legal fees. (ECF no. 195)

Judge Hammer then entered the Order that is the subject of this appeal. That Order provides as follows:

> This Matter, having come before the court by way of Plaintiff's letter dated February 20, 2018 [D.E. 194] and Defendant's letter dated March 5, 2018 [D.E. 195];
>
> and for good cause shown:
>
> IT IS ON THIS 6th day of March 2018,

---

1 The standard of review of nondispositive matters has sometimes been referred to as abuse of discretion. As a practical matter, it makes little difference, because abuse-of-discretion review incorporates plenary review of legal questions and clear-error review of factual questions. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (a court "by definition abuses its discretion when it makes an error of law"); *Doeblers' Pennsylvania Hybrids, Inc. v. Doebler*, 442 F.3d 812, 819 (3d Cir. 2006) (abuse of discretion may encompass "a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact").

> ORDERED that Plaintiff's remaining written discovery demands are denied as moot, as Defendants' counsel has represented, as an officer of the court, that Defendants have produced all responsive documents; and it is further
>
> ORDERED that fact discovery shall remain open until April 30, 2018; and it is further
>
> ORDERED that Plaintiff shall submit to a deposition in New Jersey. Plaintiff shall notify Defendants by March 16, 2018 of three (3) proposed dates for his deposition. If Plaintiff fails to comply, Defendants shall notify the Court by March 23, 2018 and the Court will set a date. To the extent that Plaintiff seeks reimbursement or an advance for travel expenses associated with his deposition, that request is denied because Plaintiff is a party and therefore not entitled to reimbursement.

("Order", ECF no. 196)

Deference "is especially appropriate where the Magistrate Judge has managed this case from the outset and developed a thorough knowledge of the proceedings." *Lithuanian Commerce Corp., Ltd. v. Sara Lee Hosiery*, 177 F.R.D. 205, 214 (D.N.J. 1997) (internal quotations omitted); *see Deluccia*, 2012 WL 909548, at *1 (same). This is just such a matter. This case, filed in 2012, has long been under the management of Magistrate Judge Hammer, who is thoroughly familiar with the proceedings, the parties, and the issues.

Defense counsel represented more than once that all responsive documents had been produced. The plaintiff expresses disbelief, but offers nothing concrete. The Magistrate Judge is moreover empowered to place reasonable limits on discovery. Given that all document discovery had been produced and (as Judge Hammer noted) discovery was not yet closed, I see no error of any kind in his order.

ORDER

For the reasons set forth above,

IT IS this 11th day of June, 2018

ORDERED that the plaintiff's appeal (ECF no. 198) is DENIED, and the Order of the Magistrate Judge (ECF no. 196) is AFFIRMED.

HON. KEVIN MCNULTY, U.S.D.J.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN M. CUSTIN,	:	
Plaintiffs,	:	**Civil Action No. 12-910 (KM) (MAH)**
v.	:	
HAROLD J. WIRTHS, et al.,	:	**ORDER**
Defendants.	:	

This matter, having come before the Court by way of Plaintiff's motion to compel Defendants to provide responsive answers to discovery [D.E. 213] and Plaintiff's motion seeking leave to increase the number of interrogatories allowed under Rule 33 [D.E. 214];[1]

[1] By way of background, the Undersigned instructed Plaintiff to "submit an item-by-item list of all remaining discovery requests to Defendants." *See* November 15, 2017 Order, D.E. 187. In accordance with that Order, Plaintiff submitted a 48-page list of his remaining discovery requests on December 14, 2017. *See* D.E. 189. On February 12, 2018, Defendants filed their responses to Plaintiff's list. *See* D.E. 192. The Undersigned issued a Text Order on February 14, 2018, noting that Defendants had served Plaintiff with its responses to Plaintiff's discovery requests, and "it therefore appearing that the parties have served and responded to any written discovery in this matter[.]" *See* D.E. 193.

On February 20, 2018, Plaintiff filed a letter stating that "although the Defendants physically responded they did not respond responsively as required by [the Federal Rules of Civil Procedure]." *See* D.E. 194. On March 5, 2018, Defendants filed a letter in response, representing that "any documents in Defendants' possession that are relevant to the limited remaining issues in this case . . . have already been produced." *See* March 5, 2018 Letter, D.E. 195. On March 6, 2018, the Undersigned denied as moot Plaintiff's remaining written discovery demands as outlined in his February 20, 2018 letter [D.E. 194], noting that "Defendants' counsel has represented, as an officer of the court, that Defendants have produced all responsive documents[.]" *See* March 6, 2018 Order, D.E. 196. On March 16, 2018, Plaintiff filed an appeal of this Order, *see* D.E. 198.

The District Judge denied Plaintiff's appeal on June 12, 2018, noting that the defense counsel represented more than once that all responsive documents had been produced, and that the Magistrate Judge is empowered to place reasonable limits on discovery. *See* Memorandum and Order, D.E. 218.

and Defendants having opposed these motions [D.E. 217], arguing that the discovery at issue in both motions is the subject of Plaintiff's appeal of the Undersigned's Order [D.E. 196] denying Plaintiff's remaining written discovery demands, *see* D.E. 198;

and the District Judge having denied Plaintiff's appeal, *see* D.E. 218;

and the Court finding that Plaintiff's motion to compel merely restates the same requests already considered by this Court in the Undersigned's March 6, 2018 Order [D.E. 198] and upheld by the District Judge [D.E. 218];[2]

and the Court also finding that Plaintiff's motion to increase the number of interrogatories relies on conclusory statements and fails to set forth why the increased number of interrogatories are reasonably necessary or relevant;[3]

---

[2] Plaintiff's motion specifically seeks an order compelling the Defendants to provide responsive answers to Plaintiff's December 14, 2017 discovery requests. It is clear from the record, however, that this Court has, on more than one occasion, determined the Defendants' responses were sufficient and denied Plaintiff's request for more complete responses. In his February 20, 2018 letter to the Court [D.E. 194], the Plaintiff argued that all of the Defendants' discovery responses were deficient. The Undersigned considered the argument and denied Plaintiff's remaining written discovery requests as moot in light of the fact that the Defendants represented that they had produced all responsive documents. *See* March 6, 2018 Order, D.E. 197. Additionally, Plaintiff's appeal of the Undersigned's decision was denied by the District Judge. Plaintiff's instant motion requests the same relief despite the Court already ruling on this issue, but Plaintiff fails to articulate any new basis for the Court to reconsider its prior ruling.

[3] Plaintiff states that he requests more interrogatories "to obtain discovery regarding non-privileged matters that are relevant to the claims or defenses in this civil action." Plaintiff contends that his request is not unreasonably cumulative or duplicative because there are "several complex issues" in this matter, and he did not have the opportunity to obtain answers to his interrogatories due to the Defendants' failure to provide meaningful answers to Plaintiff's interrogatories and Admissions. However, as noted earlier, Plaintiff's argument that Defendants failed to respond to his interrogatories is without merit. The Undersigned and the District Judge have determined that Defendants have sufficiently responded to Plaintiff's demands. Moreover, the Undersigned found, and the District Judge agreed, that Plaintiff's remaining written discovery demands were denied as moot. Plaintiff's motion to increase the number of interrogatories appears to ignore the Court's many rulings on the issue of further written discovery.

To the extent Plaintiff argues that new discovery uncovered by the subpoenas "may raise

and for no good cause shown:

IT IS on this 20th day of August 2018,

ORDERED that Plaintiff's motions to compel [D.E. 213] and increase the number of interrogatories [D.E. 214] are denied.

/s Michael A. Hammer
UNITED STATES MAGISTRATE JUDGE

a whole new set of claims[,]" Plaintiff fails to point to any specific discovery to support this claim. Nor has Plaintiff otherwise provided any support beyond conclusory statements for his motion to increase the number of interrogatories. The Court therefore finds that Plaintiff has not shown that these additional interrogatories are not duplicative or cannot be obtained from other sources more convenient, less burdensome, or less expensive.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN M. CUSTIN,	
Plaintiff,	**Civil Action No. 12-910 (KM) (MAH)**
v.	**ORDER**
HAROLD J. WIRTHS, et al.,	
Defendant.	

This matter having come before the Court pursuant to an Order requiring each party to submit a status report setting forth the status of the litigation and all tasks that remain to be completed [D.E. 224];

and Defendants having filed a status report on May 3, 2019 [D.E. 225];

and Plaintiff having also filed a status report on that date [D.E. 226];

and Defendants having replied to Plaintiff's status report on May 10, 2019 [D.E. 227];

and Plaintiff having responded to Defendant's reply [D.E. 228];

and the Court having reviewed the parties' submissions;

and Defendants' status report representing that there is ". . . no discovery remaining to be completed[,]" Defs. Status Report, May 3, 2019, D.E. 225, at 1;

and, as such, it appearing that Defendants' request that the Court enter a briefing schedule setting forth deadlines by which any dispositive motions must be filed, *id.* at 2;

and Plaintiff's status report representing that he will seek leave to file a Fourth Amended Complaint adding multiple new Defendants and new allegations, Pl. Status Report, May 3, 2019, D.E. 226, at 1;

and Plaintiff's status report further representing that he " . . . may file a Motion to Show Cause enforcing the stipulation of facts[,]" *id.*;

and Plaintiff's status report further representing that "[o]n April 12, 2018, [he] lawfully served upon the Defendants' attorney . . . Rule 34 Fifth Request for the Production of Documents, Rule 33 'Fifth Set of Interrogatories', and Rule 36 'Sixth Request for Admissions[,]' which was before the April 30, 2018, fact discovery deadline set forth in this Court's March 6, 2018, Order [D.E. 196], *id.*;

and Plaintiff's status report further representing that he has not received responses to those written discovery demands, *id.*;

and the Court observing that Plaintiff filed a Third Amended Complaint on August 6, 2013 [D.E. 38], nearly six years ago;

and the Court further observing that the deadline to file any motion to amend was June 1, 2013, *see* Pretrial Scheduling Order, March 4, 2013, D.E. 20, and Plaintiff never sought extension of that deadline, nor has Plaintiff provided the Court with any good cause as to why he should be permitted to file such a motion at this late stage in the litigation;

and to the extent that Plaintiff seeks an Order from this Court compelling Defendants to respond to his "Rule 34 Fifth Request for the Production of Documents, Rule 33 'Fifth Set of Interrogatories', and Rule 36 'Sixth Request for Admissions[,]'" Pl. Status Report, May 3, 2019, D.E. 226, at 1, the Court has already ruled on same;[1]

---

[1] On March 6, 2018, this Court entered an Order [D.E. 196] denying as moot Plaintiff's remaining written discovery demands because Defendants' counsel had represented, as an officer of the court, that Defendants had produced all responsive documents. Plaintiff appealed this Court's March 6, 2018, ruling to District Judge Kevin McNulty [D.E. 198]. District Judge McNulty denied Plaintiff's appeal and affirmed this Court's ruling [D.E. 218].

IT IS on this 22nd day of May 2019,

ORDERED that, to the extent that Plaintiff seeks leave to file a Fourth Amended Complaint adding multiple new Defendants and new allegations, that request is **denied**; and it is further

ORDERED that, to the extent that Plaintiff seeks an Order from this Court compelling Defendants to respond to his "Rule 34 Fifth Request for the Production of Documents, Rule 33 'Fifth Set of Interrogatories', and Rule 36 'Sixth Request for Admissions[,]'" Pl. Status Report, May 3, 2019, D.E. 226, at 1, that request is **denied**;[2] and it is further

ORDERED that, as fact discovery is now closed, Defendants' request to file a dispositive motion is **granted**; and it is further

ORDERED that any motion for summary judgment shall be filed by **June 21, 2019**, with opposition thereto being due by **July 1, 2019**, and any reply thereto being due by **July 8, 2019**.

s/ Michael A. Hammer
UNITED STATES MAGISTRATE JUDGE

Plaintiff seems to believe, and accordingly argue, that the April 30, 2018, deadline for fact discovery allowed him to serve additional written discovery requests until that date. *See* Pl. Reply Letter, May 7, 2019, D.E. 228, at 1 ("Plaintiff lawfully served . . . discovery requests on 4/12/2018 . . . well before the April 30th deadline set for the conclusion of fact discovery . . ."). That is incorrect. The Court denied his additional, written discovery demands on March 6, 2018 [D.E. 198]. To the extent that Plaintiff seeks reconsideration of the Court's March 6, 2018, Order denying his written discovery demands, Plaintiff fails to show any intervening change in controlling law, evidence not previously available, or any clear error of law or manifest injustice. *See Carmichael v. Everson,* 2004 U.S. Dist. LEXIS 11742 (D.N.J. May 21, 2004) (noting that the three grounds for relief for a motion for reconsideration are: "(1) an intervening change in controlling law has occurred; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or prevent manifest injustice.").

[2] The Court need not address Plaintiff's request that he "'. . . may file a Motion to Show Cause enforcing the stipulation of facts[,]" as such is merely hypothetical at this point.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN M. CUSTIN, **Plaintiff,** **v.** **HAROLD J. WIRTHS, et al.,** **Defendants.**	**Civil Action No. 12-910 (KM)** **ORDER**

This matter having come before the Court on various correspondence submitted by the parties pertaining to the completion of written discovery and the Plaintiff's request to extend the deadline for discovery [see, e.g., D.E. 115, 116, 119, 124];

and the Court having reviewed the correspondence;

and it appearing that the Scheduling Order entered on November 5, 2015 [D.E. 108] required Defendant to respond to Plaintiff's discovery requests by November 23, 2015;

and it further appearing that although more than two months have passed since expiration of that deadline, Defendant has failed to produce written discovery to Plaintiff;

and it appearing that Plaintiff requests an extension of the deadline to complete discovery, and Defendant does not object to the request;

and for good cause shown;

IT IS on this 5th day of February 2016,

ORDERED that:

849

1. Defendant will serve all outstanding written discovery on Plaintiff on or before **March 7, 2016.** Failure to comply may result in the imposition of sanctions for failure to comply with the Court's Orders under Fed. R. Civ. P. 16 and 37.

2. All fact discovery shall be completed by **May 5, 2016.**

3. As set forth in the November 5, 2015, Order, neither party will introduce expert testimony in this matter.

4. It appearing that (a) the Attorney General of New Jersey is not authorized to accept service on behalf of the individual defendants, (b) Plaintiff cites no caselaw or authority for the proposition that this Court can order the Attorney General to accept service for the individual defendants, (c) location information for two of the three defendants is available on the Department of Labor website, and (d) Plaintiff has not adequately explained his own efforts to locate and serve the individual defendants or why he cannot do so, the Court denies Plaintiff's request that the Court order the Attorney General of the New Jersey to accept service from the U.S. Marshal on behalf of the individual defendants.

5. The in-person status conference scheduled for February 29, 2016 is adjourned until **May 3, 2016 at 11:00 a.m.**

s/ Michael A. Hammer
United States Magistrate Judge

Additional material from this filing is available in the Clerk's Office.