

**ARIZONA COURT OF APPEALS**

**DIVISION ONE**

BOBBY R. ROBBINS,

Appellant,

v.

ARIZONA DEPARTMENT OF  
ECONOMIC SECURITY, an Agency,

and

THE NAVAJO NATION,

Appellees.

No. 1 CA-UB 12-0089/90

ADES Appeals Board

No. U-1274936/38-BR

**APPELLEE ARIZONA DEPARTMENT OF ECONOMIC SECURITY'S  
ANSWERING BRIEF**

Thomas C. Horne  
Attorney General  
Firm Bar No. 14000

Carol A. Salvati  
Assistant Attorney General  
State Bar No. 015539  
1275 West Washington  
Phoenix, Arizona 85007  
(602) 364-0767  
(602) 542-9189 (fax)  
PSSAppeals@azag.gov

Attorneys for ADES

## TABLE OF CONTENTS

TABLE OF CITATIONS.....	ii
STATEMENT OF THE CASE AND FACTS.....	1
ISSUES PRESENTED FOR REVIEW .....	5
ARGUMENT .....	6
I.    The Board Properly Interpreted A.R.S. § 23-751.01(I)(1) as Making Applicable to Indian Tribes in Arizona the Same Exclusion for Services Performed as a Member of a Legislative Body that A.R.S. § 23-615(6)(d)(iii)(B) Applies to This State and Its Political Subdivisions.....	6
A.    Standard of Review. ....	6
B.    The Board Properly Interpreted A.R.S. § 23-751.01(I)(1) as Making Applicable to Indian Tribes in Arizona the Same Exclusion for Services Performed as a Member of a Legislative Body that A.R.S. § 23-615(6)(d)(iii)(B) Applies to This State and Its Political Subdivisions. ....	6
II.   Substantial Evidence Supports the Board’s Final Decision Holding that Robbins Had Been Overpaid Unemployment Insurance Benefits Totaling \$2,160 and that His Overpayments Were Properly Classified as Administrative. ....	12
A.    Standard of Review. ....	12
B.    Substantial Evidence Supports the Board’s Final Decision Holding that Robbins Had Been Overpaid Unemployment Insurance Benefits Totaling \$2,160 and that His Overpayments Were Properly Classified as Administrative. ....	13
CONCLUSION .....	15

## TABLE OF CITATIONS

<u>Cases</u>	<u>Page</u>
<i>Baca v. Ariz. Dep't of Econ. Sec.</i> , 191 Ariz. 43, 951 P.2d 1235 (App. 1997) .....	6
<i>Haag v. Steinle</i> , 227 Ariz. 212, 255 P.3d 1016 (App. 2011) .....	6, 10
<i>McKesson Corp. v. Ariz. Health Care Cost Containment Sys.</i> , 230 Ariz. 440, 286 P.3d 784 (App. 2012) .....	6
<i>Orr v. Ariz. Dep't of Econ. Sec.</i> , 158 Ariz. 181, 761 P.2d 1085 (App. 1988) .....	6
<i>Prebula v. Ariz. Dep't of Econ. Sec.</i> , 138 Ariz. 26; 672 P.2d 978 (App. 1983) .....	12
<i>Rice v. Ariz. Dep't of Econ. Sec.</i> , 183 Ariz. 199, 901 P.2d 1242 (App. 1995) .....	12
<i>State v. Bearden</i> , 99 Ariz. 1, 405 P.2d 885 (1965) .....	12
<i>State v. Box</i> , 205 Ariz. 492, 73 P.3d 623 (App. 2003) .....	11
<i>Weller v. Ariz. Dep't of Econ. Sec.</i> , 176 Ariz. 220, 860 P.2d 487 (App. 1993) .....	12
<u>Statutes</u>	
26 U.S.C.A. §§ 3301-11 .....	6
26 U.S.C.A. § 3304(a)(6)(A) .....	7
26 U.S.C.A. § 3309(b)(3)(B) .....	7, 11
26 U.S.C.A. § 3309(b)(3)(E).....	7, 11

<u>Statutes, continued</u>	<u>Page</u>
26 U.S.C.A. § 3309(b)(5).....	7, 11
A.R.S. § 23-615.....	8
A.R.S. § 23-615(6).....	8, 10
A.R.S. § 23-615(6)(c).....	8
A.R.S. § 23-615(6)(d).....	8
A.R.S. § 23-615(6)(d)(iii).....	10
A.R.S. § 23-615(6)(d)(iii)(B).....	4, 5, 6, 10, 11
A.R.S. § 23-615(6)(d)(iii)(E).....	10
A.R.S. § 23-615(6)(d)(v).....	10
A.R.S. § 23-750(A)(2).....	10
A.R.S. § 23-751.01.....	9, 10
A.R.S. § 23-751.01(I)(1).....	4, 5, 6, 9, 11
A.R.S. § 41-1993(B).....	5
Navajo Nation Code Ann. tit. 2, 101(A) (2005).....	1
Navajo Nation Code Ann. tit. 2, 102(A) (2005).....	1
P.L. 106-554, app. G, 114 Stat. 2763A.....	7
 <u>Rule</u>	
A.A.C. R6-3-1301(6).....	14

<u>Federal Register</u>	<u>Page</u>
70 Fed. Reg. 226 (Nov. 25, 2005).....	1
72 Fed. Reg. 55 (Mar. 22, 2007).....	1
73 Fed Reg. 66 (Apr. 4, 2008) .....	1
74 Fed. Reg. 153 (Aug. 11, 2009).....	1
75 Fed. Reg. 190 (Oct. 1, 2010).....	1
77 Fed. Reg. 155 (Aug. 10, 2012).....	1

## STATEMENT OF THE CASE AND FACTS

The Navajo Nation is a federally recognized Indian tribe and has been at all times relevant here.<sup>1</sup> Bobby B. Robbins served as a delegate of the Navajo Nation's legislative body, the Navajo Nation Council,<sup>2</sup> at an annual salary of \$25,000 for four years until January 11, 2011. (Wages IRA 1 at 12-13.)<sup>3</sup> Based on his failure to win reelection, he filed for unemployment compensation benefits five days later. (*Id.* at 13.)

The Arizona Department of Economic Security (ADES or the Department) initially determined that Robbins was eligible for unemployment insurance benefits based on the wages that he had received for his services as a Navajo Nation Council delegate. (*See* OP IRA 1 at 4-7; OP Exs. 3-7.) Robbins subsequently received unemployment insurance benefits totaling \$2,160 for benefit weeks

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1. Indian Entities Recognized and Eligible to Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 155, 47868, 47870 (Aug. 10, 2012); 75 Fed. Reg. 190, 60810, 60812 (Oct. 1, 2010); 74 Fed. Reg. 153, 40218, 40220 (Aug. 11, 2009); 73 Fed. Reg. 66, 18553, 18555 (Apr. 4, 2008); 72 Fed. Reg. 55, 13648, 13649 (Mar. 22, 2007); 70 Fed. Reg. 226, 71194, 71196 (Nov. 25, 2005).

2. The Navajo Nation's legislative branch is the Navajo Nation Council, a body comprised of delegates. Navajo Nation Code Ann. tit. 2, §§ 101(A), 102(A) (2005).

3. In this Brief, ADES distinguishes between the Indices of Record and Exhibits in numbers 1 CA-UB 12-0089 and 12-0090 by referring to the former as the "Wages" Index of Record on Appeal (IRA) and "Wages" Exhibits (Exs.) and the latter as the "Overpayment" [OP] IRA and "OP" Exs.

ending January 29 through March 5, 2011, and April 9 through April 23, 2011.

(OP IRA 1 at 6-7; OP Exs. 3-7.)

The Department retroactively disqualified him from receiving unemployment insurance benefits after determining that the wages from his term as a Navajo Nation Council delegate could not be used to qualify him for unemployment insurance benefits because his services in that capacity were excluded from “employment” as that term was defined for purposes of unemployment insurance coverage. (Wages Ex. 7.) Moreover, based on his disqualification for benefits, ADES determined that he had been overpaid the full amount of the benefits that he had received under his claim. (OP Exs. 8 and 9.) It further classified the cause of the overpaid benefits as “non-fraud.” (*Id.*)

The Department notified Robbins of its determinations by sending him a Determination of Deputy concerning the use of his wages (Wages Ex. 7) and two Determinations of Overpayment that each covered different weeks during which he had received benefits under his claim (OP Exs. 8 and 9). The Determinations were all dated April 28, 2011. (Wages Ex. 7; OP Exs. 8 and 9.) He appealed only from the Determination of Deputy. (Wages Ex. 6.) However, ADES treated that

appeal as an appeal from the Determinations of Overpayment as well.<sup>4</sup> (*See* OP Ex. 1.)

On July 7, 2011, the same ADES Appeal Tribunal (Tribunal) held back-to-back evidentiary hearings on Robbins' appeals, conducting the hearing on the use of his wages (Wages IRA 1) before the hearing on his benefit overpayment (OP IRA 1). The Tribunal affirmed the Determination of Deputy. (Wages IRA 2 at 2.) The Tribunal then affirmed the Determinations of Overpayment in all respects but for the classification of the overpayments, which the Tribunal changed from "non-fraud" to "administrative." (OP IRA 2 at 4.) Robbins petitioned for review of the Tribunal's Decisions. (*See* Wages IRA 3-5; *see* OP IRA 3-4.)

After considering Robbins' petition for review regarding his wages, the ADES Appeals Board (Board) reached the same outcome as the Tribunal had but on different grounds and after substituting its own findings of fact for the Tribunal's. (Wages IRA 6.) The Board's factual findings were as follows:

1. [Robbins'] Indian tribe submitted voluntarily to "common law employee" status for federal tax purposes since the year 2000.
2. [Robbins'] initial claim for UI [unemployment insurance] benefits generated a base period beginning the 4th quarter of 2009.

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4. In relevant part, the Determination of Deputy states as follows: "An appeal of this determination will also be considered as an appeal of the overpayment." (Wages Ex. 7.)



3. [Robbins'] entire earnings during the base period year beginning with the 4th quarter of 2009 through the 3rd quarter of 2010, consisted of payments made to him for his service as a member of the Indian tribe's legislative body.

(*Id.* at 3.) The Board identified the issue before it as “whether the wages claimed qualify to be used by [Robbins] as insured wages in the base period.” (*Id.* at 5.)

In deciding this issue, the Board concluded that “[e]mployment by an Indian tribe,” as defined in A.R.S. § 23-751.01(I)(1), excluded services performed as a member of a Tribe's legislative body. (*Id.* at 3, 5-6.) The Board interpreted A.R.S.

§ 23-751.01(I)(1) as making applicable to Indian tribes in Arizona the same exclusion for services performed as a member of a legislative body that A.R.S. § 23-615(6)(d)(iii)(B) applies to this State and its political subdivisions. (*Id.*)

After considering Robbins' petition for review respecting his benefit overpayments, the Board affirmed the Tribunal's decision, adopting the Tribunal's findings of fact, reasoning, and conclusions of law as its own. (OP IRA 5.)

Robbins timely filed a Request for Review from the Board's decisions, alleging that the Board had erred because “other Council Delegates are being paid UI” and stating that he “disagree[d] w/overpaid benefits.” (Wages IRA 7; OP IRA 6.) Upon review, the Board adhered to its prior decisions, affirming both. (Wages IRA 10; OP IRA 8.) However, Board Member William G. Dade dissented in both decisions, conversely interpreting A.R.S. § 23-751.01(I)(1)'s definition of

“[e]mployment by an Indian tribe” as *including* services performed as a member of a Tribe’s legislative body (Wages IRA 10 at 4-6), an interpretation that would entitle Robbins to the unemployment insurance benefits that he had received and would therefore eliminate his benefit overpayments (OP IRA 8 at 4).

Robbins timely filed Applications for Appeal from the Board’s final decisions. (Wages IRA 9; OP IRA 9.) This Court granted his Applications for Appeal and subsequently consolidated his appeals. (5/25/12 and 7/25/12 Orders.) The Court dismissed the consolidated appeals after Robbins failed to timely file his opening brief. (10/25/12 Order.) After considering Robbins’ motion to reconsider, the Court later reinstated his appeals. (11/29/12 Order.) This Court has jurisdiction under A.R.S. § 41-1993(B).

### **ISSUES PRESENTED FOR REVIEW**

1. Did the Board properly interpret A.R.S. § 23-751.01(I)(1) as making applicable to Indian tribes in Arizona the same exclusion for services performed as a member of a legislative body that A.R.S. § 23-615(6)(d)(iii)(B) applies to this State and its political subdivisions?

2. Does substantial evidence support the Board’s final decision holding that Robbins had been overpaid unemployment insurance benefits totaling \$2,160 for benefit weeks ending January 29 through March 5, 2011, and April 9 through April 23, 2011, and that his overpayments were properly classified as administrative?

## ARGUMENT

### **I. The Board Properly Interpreted A.R.S. § 23-751.01(I)(1) as Making Applicable to Indian Tribes in Arizona the Same Exclusion for Services Performed as a Member of a Legislative Body that A.R.S. § 23-615(6)(d)(iii)(B) Applies to This State and Its Political Subdivisions.**

#### **A. Standard of Review.**

This Court reviews the interpretation of a statute de novo. *Haag v. Steinle*, 227 Ariz. 212, 214, ¶ 9, 255 P.3d 1016, 1018 (App. 2011). While this Court may draw its own legal conclusions in determining if the Board has erred in its interpretation of the law, the Board's interpretation of statutes and ADES rules is entitled to great weight. *Baca v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1997); *see also McKesson Corp. v. Ariz. Health Care Cost Containment Sys.*, 230 Ariz. 440, 443, ¶ 9, 286 P.3d 784, 787 (App. 2012). Moreover, this Court will affirm the decision even where the Board has reached the right result for the wrong reason. *Orr v. Ariz. Dep't of Econ. Sec.*, 158 Ariz. 181, 185, 761 P.2d 1085, 1089 (App. 1988).

#### **B. The Board Properly Interpreted A.R.S. § 23-751.01(I)(1) as Making Applicable to Indian Tribes in Arizona the Same Exclusion for Services Performed as a Member of a Legislative Body that A.R.S. § 23-615(6)(d)(iii)(B) Applies to This State and Its Political Subdivisions.**

Since 2001, Indian tribal governments have been treated similarly to state and local governments under the Federal Unemployment Tax Act (FUTA), 26 U.S.C.A §§ 3301-11 (West 2013). Section 166 of the Community Renewal Tax

Relief Act of 2000, as enacted by the Consolidated Appropriations Act (CAA) in 2001, P.L. 106-554, app. G, 114 Stat. 2763A, 627-28, amended FUTA to treat Indian tribal governments similarly to state and local governments with respect to services performed in their employ by requiring the States to cover such services, with specified exceptions, under their respective unemployment insurance laws as a precondition of their participation in the federal-state program. 26 U.S.C.A § 3304(a)(6)(A).

The CAA also amended FUTA to allow the States to apply the same exceptions from required coverage to Indian tribes as they do to certain services performed in the employ of States and local governments. *See* 26 U.S.C.A § 3309(b)(3)(B), (b)(3)(E), (b)(5). Among the services that the States may except from required coverage are those performed

- as “a member of a legislative body, or a member of the judiciary, of a State or political subdivision thereof, or of an Indian tribe,” 26 U.S.C.A § 3309(b)(3)(B);
- “in a position which, under or pursuant to the State or tribal law, is designated as (i) a major nontenured policymaking or advisory position, or (ii) a policymaking or advisory position the performance of the duties of which ordinarily does not require more than 8 hours per week,” 26 U.S.C.A § 3309(b)(3)(E); and
- “as part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any Federal agency or an agency of a

State or political subdivision thereof or of an Indian tribe, by an individual receiving such work relief or work training,” 26 U.S.C.A § 3309(b)(5).

Arizona Revised Statutes section 23-615 defines “employment” as “any service of whatever nature performed by an employee for the person employing him, including service in interstate commerce” and then enumerates specific types of services that fit within that definition. Subject to the exemptions set forth in A.R.S. § 23-615(6)(d), “services performed after December 31, 1971, in the employ of this state, or any instrumentality, agency or board of this state, or any one or more of the foregoing and one or more other states,” A.R.S. § 23-615(6)(c), constitute “employment.” Among the services that A.R.S. § 23-615(6)(d) exempts from the definition of employment for purposes of A.R.S. § 23-615(6) are the following:

- (iii) [Services] [i]n the employ of a governmental entity referred to in § 23-750, subsection A, paragraph 2, if such service is performed by an individual in the exercise of his duties:

.....

- (B) As a member of a legislative body or the judiciary, of this state or a political subdivision thereof; or

.....

- (E) In a position which, under or pursuant to the state law is designated as a major nontenured policymaking or advisory

position, or a policymaking or advisory position the performance of the duties of which ordinarily does not require more than eight hours per week; or

.....

- (v) As part of an unemployment work-relief or work-training program assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof, by an individual receiving such work-relief or work-training; .....

In 2001, Arizona amended its Employment Security laws by adopting A.R.S. § 23-751.01 to add unemployment insurance coverage for Indian tribes within the state. For the purposes of A.R.S. § 23-751.01, it defined “employment by an Indian tribe” as follows:

“Employment by an Indian tribe” means employment by an Indian tribe as defined in 26 United States Code § 3306(u) or by a tribal unit except that employment by an Indian tribe does not include the exclusions from employment prescribed in § 23-615, paragraph 6, subdivision (d), item (iii), subitems (B) and (E) and § 23-615, paragraph 6, subdivision (d), item (v).

A.R.S. § 23-751.01(I)(1).

The stated exception to “employment by an Indian tribe” renders the definition ambiguous because it could be interpreted as making applicable to Indian tribes in Arizona the same exclusions for certain services that apply to this

State and its political subdivisions under Section 23-615(6), subsections (d)(iii)(B), (d)(iii)(E), and (d)(v) or, conversely, as exempting Indian tribes from those exclusions. “[I]f more than one plausible interpretation of a statute exists, [this Court] typically employ[s] tools of statutory construction.” *Haag*, 227 Ariz. at 214, ¶ 9, 255 P.3d at 1018. This Court then considers “the statute’s context, its language, subject matter and historical background, its effects and consequences, and its spirit and purpose.” *Id.*

The Board properly interpreted A.R.S. § 23-751.01(I)(1) as making applicable to Indian tribes in Arizona the same exclusion for services performed as a member of a legislative body that A.R.S. § 23-615(6)(d)(iii)(B) applies to this State and its political subdivisions. If our Legislature had intended to exempt Indian tribes in Arizona from any of the specified exclusions for services, it would not have had to take any action because the exclusions under Section 23-615(6)(d)(iii) are expressly limited to state or local government entities<sup>5</sup> and the exclusion under Section 23-615(6)(d)(v) is explicitly limited to programs “assisted or financed in whole or in part by any federal agency or an agency of a state or political subdivision thereof.” By inserting the language about the specific

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5. By its own terms, A.R.S. § 23-615(6)(d)(iii) applies to services “in the employ of a governmental entity referred to in § 23- 750(A)(2),” which, in turn, refers to “[t]his state, or a political subdivision thereof, or any instrumentality, agency or board of any one or more of the foregoing or any instrumentality of any of the foregoing and one or more other states or political subdivisions.”

exclusions in the definition of “employment by an Indian tribe,” the Legislature must have meant for the exclusions to apply to the tribes. “[T]he legislature is presumed to know existing law when it enacts a statute, and is presumed not to enact meaningless, redundant, or futile legislation.” *State v. Box*, 205 Ariz. 492, 496, ¶10, 73 P.3d 623, 627 (App. 2003) (internal quotation marks omitted). This construction is reinforced by the fact that the exclusions that the Legislature would be applying to the tribe are the precise ones that federal law allows States to exclude from unemployment compensation coverage. *See* 26 U.S.C.A. § 3309(b)(3)(B), (b)(3)(E), (b)(5). It is too much of a coincidence that the Legislature would choose *only* those and mean that they *were not* excluded.

Therefore, the Board properly interpreted A.R.S. § 23-751.01(I)(1) as making applicable to Indian tribes in Arizona the same exclusion for services performed as a member of a legislative body that A.R.S. § 23-615(6)(d)(iii)(B) applies to this State and its political subdivisions.

Robbins claims for the first time on appeal that he was entitled to receive unemployment insurance benefits because Navajo Nation Council delegates have been defined as “common law employees” under the Navajo Nation Code since 2000. (Opening Brief at 2-3.) His claim fails because ADES found him to be ineligible for benefits not because he was an independent contractor but because his wages were statutorily excluded from “employment.” *See* Wages IRA 10.



**II. Substantial Evidence Supports the Board's Final Decision Holding that Robbins Had Been Overpaid Unemployment Insurance Benefits Totaling \$2,160 and that His Overpayments Were Properly Classified as Administrative.**

**A. Standard of Review.**

“This [C]ourt does not sit as a trier of fact in the review of [A]ppeals [B]oard decisions in unemployment benefits proceedings.” *Prebula v. Ariz. Dep't of Econ. Sec.*, 138 Ariz. 26, 30, 672 P.2d 978, 982 (App. 1983). Instead, this Court views the evidence “in the light most favorable to upholding the decision,” *Weller v. Ariz. Dep't of Econ. Sec.*, 176 Ariz. 220, 224, 860 P.2d 487, 491 (App. 1993), and must “accept the Board’s factual findings unless they are arbitrary, capricious, or an abuse of discretion,” *Rice v. Ariz. Dep't of Econ. Sec.*, 183 Ariz. 199, 201, 901 P.2d 1242, 1244 (App. 1995).

This Court will affirm the Board’s decision if substantial evidence supports it. *Id.* at 201, 901 P.2d at 1244. For purposes of appellate review, our supreme court has defined “substantial evidence” as follows:

Substantial evidence means more than a scintilla and is such proof as a reasonable mind would employ to support the conclusion reached. It is of a character which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed. If reasonable men may fairly differ as to whether certain evidence establishes a fact in issue then such evidence must be considered as substantial.

*State v. Bearden*, 99 Ariz. 1, 4, 405 P.2d 885, 886-87 (1965) (citations omitted).

**B. Substantial Evidence Supports the Board's Final Decision Holding that Robbins Had Been Overpaid Unemployment Insurance Benefits Totaling \$2,160 and that His Overpayments Were Properly Classified as Administrative.**

In his Opening Brief, Robbins implies that the Board erroneously concluded that he had been overpaid unemployment insurance benefits. (OB at 2.) This Court should reject his "claim" because substantial evidence supports the Board's final decision that he had been overpaid unemployment insurance benefits totaling \$2,160 for benefit weeks ending January 29 through March 5, 2011, and April 9 through April 23, 2011, and that his overpayments were properly classified as administrative.

The Department initially determined that Robbins was eligible for unemployment insurance benefits based on the wages that he had received for his services as a Navajo Nation Council delegate. (See OP IRA 1 at 4-7; OP Exs. 3-7.) Robbins subsequently received unemployment insurance benefits totaling \$2,160 for benefit weeks ending January 29 through March 5, 2011, and April 9 through April 23, 2011. (OP IRA 1 at 6-7; OP Exs. 3-7.) At the Tribunal hearing, Robbins acknowledged that he had received \$2,160 in benefits for that time period. (OP IRA 1 at 6-7.)

The Department retroactively disqualified him from receiving unemployment insurance benefits after determining that the wages from his term as a Navajo Nation Council delegate could not be used to qualify him for

unemployment insurance benefits because his services in that capacity were excluded from “employment” as that term was defined for purposes of unemployment insurance coverage. (Wages Ex. 7.) Moreover, based on his disqualification for benefits, ADES determined that he had been overpaid the full amount of the benefits that he had received under his claim. (OP Exs. 8 and 9.) It further classified the cause of the overpaid benefits as “non-fraud.” (*Id.*)

Following a hearing, the Tribunal later affirmed the Determinations of Overpayment in all respects but for the classification of the overpayments, which the Tribunal changed from “non-fraud” to “administrative.” (OP IRA 2 at 4.) “Benefit overpayment classified administrative” means “an overpayment which occurred without fault on the part of the claimant.” A.A.C. R6-3-1301(6). After considering his petition for review, the Board affirmed the Tribunal’s decision, adopting the Tribunal’s findings of fact, reasoning, and conclusions of law as its own. (OP IRA 5.) After considering his request for review, the Board adhered to its prior decision. (OP IRA 8.)

Therefore, substantial evidence supports the Board’s final decision that Robbins had been overpaid unemployment insurance benefits totaling \$2,160 for benefit weeks ending January 29 through March 5, 2011, and April 9 through April 23, 2011, and that his overpayments were properly classified as administrative.

## CONCLUSION

For the foregoing reasons, this Court should affirm the Board's final decisions (1) that Robbins was ineligible for unemployment insurance benefits based on the wages from his term as a Navajo Nation Council Delegate, (2) that he was overpaid benefits totaling \$2,160, and (3) that his overpayments were properly classified as administrative.

Respectfully submitted this 16th day of January 2013.

Thomas C. Horne  
Attorney General

/s/ Carol A. Salvati  
Assistant Attorney General  
Attorneys for ADES