

1998

Glazier's Foodtown v. Department of Workforce Services : Petition to Review an Order of Utah Workforce Appeals Board

Utah Court of Appeals

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JURISDICTIONAL STATEMENT

The statutory authority conferring jurisdiction on this Court to hear this appeal is found in 35(a)-4-508 and 63-46(b)-17 of the Utah Code Annotated, as amended.

STATEMENT OF ISSUES

Issues Presented and Standard of Review

1. Has the Department of Workforce Services Appeals Section engaged in an unconstitutional procedure in upholding a claimant's claim for unemployment compensation without allowing petitioner the right to cross-examine the claimant?

Standard of Review: Correctness of error. **Krantz v. Utah Department of Commerce**, 856 P.2d 369, 370-71 (Utah App. 1995); **Semeco Industrial, Inc. v. Auditing Division**, 849 P.2d 1167, 1172 (Utah 1993) (Durham, J. dissenting).

2. Were the Department of Workforce Services' determinations supported by substantial evidence? Did the agency have an incomplete record upon which to make a determination without the cross-examination of the claimant?

Standard of Review: Correctness of error. **Hale Sand and Gravel v. Audit Division**, 842 P.2d 887 (Utah 1992).

3. It is not required to preserve the grounds for this review at the administrative appeal level in that 63-46(b)-17 of the Utah Code Annotated, provides for an appeal from the final ruling.

DETERMINATIVE AUTHORITIES

1. Fifth Amendment of the United States Constitution:

The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate.

2. Constitution of Utah, Article I, Section 7:

No person shall be deprived of life, liberty, or property, without due process of law.

3. Section 63-46(b)-15(4)(e) of the Utah Code Annotated:

The Appellate Court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been prejudiced by

any of the following: The agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure.

4. Section 35(a)-4-508(2)(c) of the Utah Code Annotated:

After affording the parties reasonable opportunity for a fair hearing, the Administrative Law Judge shall make findings and conclusions on that basis, affirm, modify, or reverse the determination of the Division.

5. Section 63-46b-16(4)(h)(iv) of the Utah Code Annotated:

As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicated proceedings. The agency action is otherwise arbitrary or capricious.

6. Administrative Rules, Department of Workforce Services,

R994-102-102(2):

Hearsay, which is information provided by a source whose credibility cannot be tested through cross-examination, has inherent infirmities which make it unreliable. The failure of one party to provide information, either initially or at the appeals hearing, severely limits the amount and quality of the information upon which to base a good decision. Therefore, it is necessary for all parties to actively participate in the decision-making process by providing accurate and complete information in a timely manner to assure the protection of the interest of each party and preserve the social integrity of the unemployment insurance system.

STATEMENT OF THE CASE

1. David A. Swapp (hereinafter "Swapp") filed for unemployment insurance from Glazier's Foodtown in Kanab, Utah (hereinafter Glazier's) after being terminated.

2. The Department of Workforce Services granted Swapp unemployment insurance. (0005-0007)

3. Swapp was terminated from Glazier's for failure to maintain the produce department in a satisfactory manner. (0001-0004)

4. Glazier's appealed the decision to the Appeals Section of the Department of Workforce Services. (0015-0016)

5. A hearing was held before an Administrative Law Judge by telephone conference. Claimant Swapp did not participate in the telephone hearing (000022), even though he was sent notice (000017).

6. The decision of the Administrative Law Judge was rendered against Glazier and in favor of the claimant Swapp. (0040-0042)

7. That decision was appealed to the Appeals Board of the Department of Workforce Services. (0044-0046)

8. A decision of the Appeals Board was thereafter issued against the petitioner Glazier's and in favor of claimant Swapp. (0047-0050)

9. Glazier's made a request for reconsideration. (0053-0055)

10. A decision on the request for reconsideration of the decision of the Appeals Board of the Department of Workforce Services was also in favor of the claimant. (0057-0058)

SUMMARY OF THE ARGUMENT

Glazier's substantive due process rights were violated by the Appeals Section of the Department of Workforce Services, who failed to provide Glazier's with the opportunity to cross-examine the claimant. Glazier's has been substantially prejudiced by not being accorded a due-process hearing which includes the right of cross-examination.

There was not substantial evidence upon which the Administrative Law Judge could render a decision in that the record was not complete without cross-examination of the witnesses.

ARGUMENT

The Constitution of the State of Utah, Article I, Section 7, and the Fifth Amendment to the United States Constitution guarantee to every citizen the right to due process in the taking of their property.

In **D.B., Petitioner v. Division of Occupational Professional Licensing**, 779 P.2d 1145 (Utah App. 1989), held that failure to provide

cross-examination in a hearing regarding the revocation of the worker's license, constituted a violation of due-process rights in the taking of property. Like this case, the Petitioner did not make an objection at the hearing to not being able to cross-examine the claimant. The court cited the Utah Rules of Evidence, 103(d), that such a notification was not required. Glazier's was not represented by counsel at the appellate hearing.

The administrative regulations governing the Department of Workforce Services, R 994-102-102, states that parties are to actively participate in the appeals process so the Administrative Law Judge can have full and complete information upon which to make a decision. This did not occur in this case.

In 35(a)-4-508(2)(c) of the Utah Code Annotated, it is stated that a fair hearing should be accorded all parties. Glazier's did not receive a fair hearing.

Again, in this instance, the claimant Swapp failed to personally participate in the appeal at the hearing. By so doing, he did not allow Glazier's or the Judge to cross-examine him on his written claims. It is not known what the record would look like had such cross-examination occurred.

It is further claimed that there was not substantial evidence to rule in favor of the claimant in reviewing the record as a whole. The failure to cross-examine the claimant could render the entire record inadequate. Such an inadequate record would make the decision arbitrary in that the decision maker did not have all the facts. [63-46(b)-16(4)(g) of the Utah Code Annotated]

The Rhode Island Supreme Court in Pitocco v. Harrington, 707 ATL 2, 692 (R.I.Sup. Ct. 1998), has recently held that the right to build on one's land is a protected property right and cannot be denied arbitrarily and that 42 U.S.C. 1983 thus applies. The Court held that the plaintiff could arguably show a constitutionally protected property interest to build on property and the right could not be arbitrarily withheld. The local official incorrectly determined that there was a zoning violation and arbitrarily denied a building permit without a due-process hearing. The Court ruled that the Fourteenth Amendment due-process clause was actionable under Section 1983 when the wrongful action was taken. Glazier's property was wrongfully assessed for claimant's unemployment compensation by the Department of Workforce Services without a due-process hearing. Glazier's property has been arbitrarily taken. See also Zinermon v. Burch, 494 U.S. 113,125, 110

S. Ct. 975, 983, 108 L.Ed. 2100, 114 (1990), cited by **Pitocco**, *supra*.

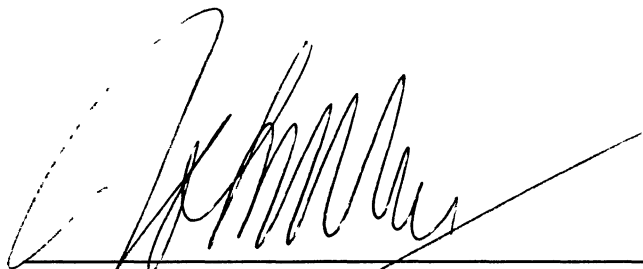
CONCLUSION

Glazier's asks this Court to overturn the Order(s) of the Department of Workforce Services and to restore any assessment that has or will be made against Glazier's Foodtown as a result of Swapp's claim for unemployment insurance.

The property interests of Glazier's was affected by the decision of the Department of Workforce Services Appeal Section and Glazier's Foodtown was not given a fair, due-process hearing allowing Glazier's to cross-examine the claimant before a decision was reached. Accordingly, there was not substantialevidence presented to the Administrative Law Judge to rule against Glazier and for the claimant.

No Addendum is necessary and none is provided.

Respectfully submitted June 25, 1998

A handwritten signature in black ink, appearing to read 'John Preston Creer', is written over a horizontal line. The signature is fluid and cursive.

John Preston Creer
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing BRIEF OF PETITIONER on the Respondent by mailing two copies thereof, postage prepaid, to the Respondent at the following address this 25th day of June 1998:

Loren R. Blauer, Esq.
Department of Workforce Services
140 East 300 South
Salt Lake City, Utah 84111



JOHN PRESTON CREER