1998

Newspaper Agency Corporation v. Department of Workforces Services (Teresa Ortiz) : Reply Brief

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

Newspaper Agency Corporation, A Utah Corporation, Petitioner, Department of Workforce Services (Teresa Ortiz), Respondent.	 Case No. 980369-CA Priority No. 14

REPLY BRIEF OF PETITIONER Newspaper Agency Corporation

Petition for Review of Agency Action

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Petitioner, Newspaper Agency Corporation ("Newspaper"), by and through its counsel of record, submits this Reply Brief in support of its Petition for Review of Agency Action.

I. ARGUMENT

A. THE DEPARTMENT'S BRIEF CONFUSES THE RELEVANT ISSUE BEFORE THE COURT.

Unable to find a single case in support of its position, the Department of Workforce Services (the "Department") has resorted to name-calling, repeatedly labeling Newspaper's arguments "absurd." The Department's brief, however, reveals a confusion of the key issue in this case. The issue here is not *by what method* an appeal may be filed, but rather, *with what entity* an appeal may be filed. The distinction is easily illustrated: An appellate brief directed to this Court may properly be filed with the Court either by mail or hand delivery. However, it may *not* properly be filed with the Fourth District Court. It is the end destination of the brief which matters (and not the means by which a party delivers it to that destination), since the brief is "filed" only when received by the proper court or agency. *See Maverick Country Store v. Industrial Commission*, 860 P.2d 944, 950 (Utah App. 1996).[1]

Although the Department may argue that dropping off an appeal at an employment center is simply a way to deliver it to the Division of Adjudication, the

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[1] In *Maverick*, this Court held that "actual delivery of the necessary documents" within the statutorily prescribed time limit was a prerequisite to the Industrial Commission's exercise of jurisdiction over an appeal. *Id.*

point is that the appeal is not *filed* until it is received by that agency.[2] In this case, Ms. Ortiz' appeal was not received by the Division of Adjudication until 56 days after it was due.[3] *See* Brief of Petitioner, p. 7. Consequently, the Division of Adjudication was without jurisdiction over the appeal. *See Prowswood v. Mountain Fuel Supply Co.*, 676 P.2d 952, 955 (Utah 1984) ("It is axiomatic in this jurisdiction that failure to timely perfect an appeal is a jurisdictional failure requiring dismissal of the appeal.").

The Department contends that if Newspaper's argument is accepted, claimants could no longer file appeals with the Division of Adjudication by mail or by fax, but would instead be required to personally deliver all appeals to the Division of Adjudication. Newspaper notes, however, that when a claimant files an appeal by mail or by fax *with the Division of Adjudication*, he or she has filed with the proper entity. By contrast, when a claimant "files" an appeal with an employment center, he or she has not filed with the entity authorized by statute to receive the appeal.

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[2] In addition, if this case is any indication, "filing" by way of employment centers is certainly not a very effective method. As noted in Newspaper's opening brief, Ms. Ortiz claims to have delivered two appeals to employment centers prior to filing with the Division of Adjudication, but there is no evidence that those appeals ever made their way to the Division of Adjudication. The Department asserts that, just as mail is "occasionally" lost within the United States Postal Service, appeals may also "occasionally" be lost in the Department's internal mail system. Newspaper submits, however, that the problem is not "occasional" when two appeals "filed" by the same claimant are lost.

[3] Newspaper again notes that Ms. Ortiz did not act in reliance on the Department's improper regulation. Instead, she acted contrary to the simple written instructions provided to her. This is not a case where a party reasonably relied on an agency's improper regulation.

Contrary to the Department's assertions, Newspaper does not ask this Court to require *personal* delivery to the Division of Adjudication, but rather *actual* delivery. Such a holding would be in harmony with Utah case law, which has consistently held that filing requires actual delivery to the proper court or agency. *See Maverick,* 860 P.2d at 950.

The Department's brief asserts that "filing" at employment centers is appropriate because both the Division of Adjudication and the employment centers are sections of the Department, over which the Department "has full administrative control." The Department further states that employment centers "are fully informed that clients may file unemployment insurance appeals at the employment center of their choice," and that "[e]mployment centers regularly forward those appeals to the Division of Adjudication." It is worth noting that there is no support for these assertions in the record; the Department offered no evidence on these points before the Administrative Law Judge. Accordingly, these assertions are not properly considered in this appeal. *See, e.g., Uckerman v. Lincoln Nat'l Life Ins. Co.*, 588 P.2d 142 (Utah 1978). It is telling, however, that even in its extra-record discussion, the Department offers no evidence of any policy requiring employment center personnel to forward appeals to the Division of Adjudication.

In short, Section 35A-4-406(3)(a) is a statute that confers jurisdiction on the Division of Adjudication. Courts and agencies should be extremely reluctant to expand the jurisdiction conferred by the Legislature, regardless of whether they

disagree with the conferring statute or wish that it were broader. By promulgating R994-406-309, the Department has improperly tried to expand the jurisdiction conferred by the Legislature. The Department now tries to justify that expansion by suggesting that the rule is "user friendly."[4] That fact, however, simply does not justify upholding an agency rule that, in essence, amends the agency's governing statute. As noted in Newspaper's opening brief, Utah courts have properly refused to uphold such agency actions. *See, e.g., Sanders v. Brine Shrimp v. Audit Division*, 846 P.2d 1304, 1306 (Utah 1993).

B. THE UTAH EMPLOYMENT SECURITY ACT DOES NOT PROHIBIT THIS COURT FROM RELIEVING NEWSPAPER OF THE COSTS OF MS. ORTIZ' BENEFITS, SINCE THE APPEALS BOARD LACKED JURISDICTION OVER THE APPEAL.

The Department argues that because the Division of Adjudication awarded Ms. Ortiz benefits, Newspaper must be charged for those benefits unless it satisfies an enumerated exception under Utah Code § 35A-4-307, the Utah Employment Security Act. Again, this argument misses the point. Newspaper maintains that the Division of Adjudication was without jurisdiction over Ms. Ortiz' appeal, and that benefits were therefore improperly awarded. For this reason, Newspaper cannot, consistently with due process, be charged for those benefits. It is well-established that a decision of a court or agency which did not have proper jurisdiction is void. *See, e.g.,*

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[4] Newspaper submits that the rule is certainly not "user-friendly" for respondents. If the Department's goal in promulgating the rule was "user-friendliness", it has pursued that goal for claimants at the expense of the due process rights of respondents.

Bradford v. Nagle, 763 P.2d 791, 795 (Utah 1988); *Garcia v. Garcia*, 712 P.2d 288, 291 (Utah 1986). Newspaper submits that this case presents precisely such a situation.

II. CONCLUSION

In conclusion, the Department's brief fails to advance any valid basis for upholding the regulation at issue, R994-406-309. The Legislature conferred jurisdiction on the Division of Adjudication by enacting § 35A-1-202(1)(c), and designated that entity for the receipt of appeals from denials of unemployment benefits. Utah Code § 35A-4-406(3)(a). The statute designates no other entity for that purpose. Regardless of whether the Department wishes the statute were more "user friendly," it is not empowered to amend the statute by promulgating an inconsistent regulation. Accordingly, this Court should reverse the Appeals Board's decision accepting Ms. Ortiz' untimely appeal, and relieve Newspaper of the charges for benefits improperly awarded to Ms. Ortiz.

DATED this 14 day of December, 1998.

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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 1998, I caused to be mailed, postage prepaid, a true and correct copy of the foregoing REPLY BRIEF OF PETITIONER, to the following:

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