

1989

Phyllis E. Nelson v. Board of Review of the Industrial Commission of Utah, Department of Employment Security, and Dan's Foods, Inc. : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca1

 Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

R. Paul Van Dam; Attorney General; Winston M. Faux; Special Assistant Attorney General; Attorney for Respondents.

Robert Macri; Attorney for Appellant.

Recommended Citation

Brief of Appellant, *Nelson v. Dan's Foods, Inc.*, No. 890705 (Utah Court of Appeals, 1989).
https://digitalcommons.law.byu.edu/byu_ca1/2363

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

TABLE OF CONTENTS

* * * * *

Table of Authorities	1
Statement of Issues	2
Determinative Constitutional Provisions, Statutes, or Ordinances	4
Statement of the Case	5
Summary of the Argument	6
Detail of the Argument	9
Conclusion	23
Addendum	24
Certificate of Mailing	25

Table of Authorities

Duggan v. Potlach Forest 441 P.2d 172, 92 Idaho 62
Sokol v. Public Utilities Commn. 418 P.2d 265 53 Cal Reprtr 673
Cansena v. Dept. of Public Welfare 449 P.2d 957, 9 Ariz App 120
McConnell v. State 492 P.2d 1003, 1971 N.M. App.

Statement of Issues Presented for Review

* * * * *

1. Was the Hearing held on September 22, 1989 such that due process was afforded Petitioner Phyllis Nelson?

Were the matters of ultimate motive for the dismissal sufficiently well considered?

Was the dismissal disproportionate to the policy considerations?

Were the acts of Phyllis Nelson such that a less experienced employee would have been replaced?

Was adequate consideration given to the informal relationship established between Phyllis Nelson and customers who went through her check-out stand?

Was the purpose of the dismissal to save Dan's Foods, the employer, employee benefits?

Was the separation from the employer made under the provisions of "equity and good conscience" under circumstances not caused or aggravated by the employer?

2. Was enough evidence received at the Administrative Hearing on September 22, 1989 such that the above issues were fairly heard?

Was Phyllis Nelson denied due process in her hearing because of her unfamiliarity with the process and the fact she was not represented at the hearing by counsel?

3. Whether or not Federal Rules governing redemption of coupons were violated, and whether testimony to this fact was determinative?

4. Was Dan's Foods Inc. precluded from disallowing unemployment compensation to Phyllis Nelson because of their promises to her at the time of her termination?

Determinative Constitutional Provisions, Statutes, or Ordinances

* * * * *

63-46b-17 U.C.A. (See Addendum)

475-7C-4 Utah Administrative Code

Amendments 5, 14 U.S. Constitution

Statement of the Case

This is an Appeal from a decision made by Christopher W. Love, Administrative Law Judge with the Utah Department of Employment Security, dated November 20, 1989 and upheld on appeal by the Board of Review of the Industrial Commission of Utah Department of Employment Security filed December 12, 1989.

An Appeal Petition was filed with the Court of Appeals on December 12, 1989 by Phyllis Nelson, Pro Se.

In the September 22, 1989 decision of the Administrative Law Judge Phyllis Nelson was denied employment benefits pursuant to her termination of employment with Dan's Foods, Inc. The Board of Appeals by a 2 to 1 decision affirmed the Administrative Law Judge's ruling.

Robert Macri, Esq. entered the case just prior to the original date for Appellant's Brief being due. By Stipulation the date for submission of Appellant's Brief was continued to April 2nd, 1990.

Summary of the Argument

Phyllis Nelson was an employee of Dan's Foods serving loyally for approximately 18 years with good references and reports and nothing against her work record.

Phyllis Nelson was a valued employee and had regular customers who chose to shop with her. Thus, she was a public relations asset to the company.

Some time before the alleged violation, new policies with respect to double coupons were initiated by Dan's Foods Inc. Phyllis Nelson was informed of these changes in policy.

The supervisor on duty over the checkers was entitled to waive certain rules with respect to coupons, and to authorize redemption of coupons after the purchase of items.

Phyllis Nelson was found to have accepted certain coupons for certain items several days after the items were purchased by her regular customers. Therefore, she showed faith and trust in them and did testify that she remembered in certain cases that these items had in fact been purchased by the customers.

As a result of a complaint by a customer, unsubstantiated and unidentified, as a procedure was initiated whereby the tapes of employee Nelson were reviewed to determine whether or not credit was given on coupons when items were not in fact purchased

Petitioner admitted that she did on occasion allow late credit for customers who claimed to have purchased the goods, or who she remembered had purchased the goods, when they brought their coupons in subsequently.

It was determined that Petitioner had benefits which were about to vest, and that her salary would have supported four part time workers for whom no benefits would necessarily have had to be paid by Dan's Foods, Inc. Further, it was testified that on several occasions managers approached Petitioner asking her whether or not she would be willing to quit, prior to the incident complained by Dan's Foods which serves as the basis for the termination.

At the Hearing before the Administrative Law Judge in September of 1989, Phyllis Nelson was not represented by counsel and the record is clear that she was unable to present a coherent defense of her position.

The issues that she raised in defense of herself and against Dan's Foods Inc., for duress were not properly presented to the Court. Although an attorney is not required in litigation at this level or at any level, still it is clear from the record that Mrs. Nelson was not able to present her case.

Given the fact that this is a "one shot" opportunity for an elderly employee, loyal to Dan's Foods Inc. it is manifest that justice was not done and due process not afforded her at

the hearing. Additional evidence should be accepted and a remand should be ordered.

Detail of the Argument

* * * * *

WAS THE HEARING HELD ON SEPTEMBER 22, 1989 SUCH THAT DUE PROCESS WAS AFFORDED PETITIONER PHYLLIS NELSON?

WERE THE MATTERS OF ULTIMATE MOTIVE FOR THE DISMISSAL SUFFICIENTLY WELL CONSIDERED?

WAS THE DISMISSAL DISAPPROPORTIONATE TO THE POLICY CONSIDERATIONS?

WERE THE ACTS OF PHYLLIS NELSON SUCH THAT A LESS EXPERIENCED EMPLOYEE WOULD HAVE BEEN REPLACED?

WAS ADEQUATE CONSIDERATION GIVE TO THE INFORMAL RELATIONSHIP ESTABLISHED BETWEEN PHYLLIS NELSON AND CUSTOMERS WHO WENT THROUGH HER CHECK-OUT STAND?

WAS THE PURPOSE OF THE DISMISSAL TO SAVE DAN'S FOODS, THE EMPLOYER, EMPLOYEE BENEFITS?

WAS THE SEPARATION FROM THE EMPLOYER MADE UNDER THE PROVISIONS OF "EQUITY AND GOOD CONSCIENCE" UNDER CIRCUMSTANCES NOT CAUSED OR AGGRAVATED BY THE EMPLOYER?

Phyllis Nelson has proceeded pro se in bringing her appeal to the denial of unemployment compensation as a result of representations made by Dan's Foods Inc.

Phyllis Nelson was an employee of Dan's Foods Inc. since June 2, 1970 (transcript at page 28, bottom).

She was separated from her employment on July 8, 1989, although two weeks vacation was granted after the termination (page 29 of transcript, top of page).

It was a full-time position for which she was paid \$7.35 an hour (ibid).

At the time of the termination the supervisor, "Randy" told Petitioner "that day that I sign the quit form, he said 'you can either quit and get your unemployment, but you have to wait six weeks, or I will terminate you and you can't get unemployment and you . . . '" (Transcript at page 30, middle of page).

Randy, who is Randy Bradshaw, is reported as having related that a customer had come up to him and inquired why a certain checker was allowing coupons and doubling coupons for items that the person did not purchase.

It was determined that the machines which had recently been installed in the Dan's Foods Market would detail what refunds and coupons were being authorized on any given day at any given machine. Dan's Foods thus set up a monitoring system on Petitioner's check stand (transcript at page 31 et seq.).

It was alleged as a result of these detailed tapes that Claimant violated the coupon policy of Dan's Foods Inc. in a number of ways; specifically, of allowing more items, or allowing more coupons than items actually purchased. (Transcript at page 33, bottom of page).

It should be pointed out here that no details of the exact violations are cited on the record; instead, questions about three "Clorox Supers" doubling policy and other procedures are raised. (*Page 33 et seq.*)

The conclusion on page 34 of the transcript by Scott Shannon

Director of Loss Prevention for Dan's Foods is that " . . . I think consistently everyday there was something that was considered out of company policy." Further, Mr. Shannon declared that Phyllis was very comfortable with the policy.

Without discussing or being challenged on the issue of Petitioner's awareness of policies, Mr. Shannon concludes on page 35 without foundation or testimony that Phyllis was aware of the policy she was violating and this was a violation of Federal Legislation.

He admits that "the doubling of coupons is, is a very delicate procedure and if it's not handling properly we, it doesn't serve us any purpose at all. We end up losing money." ^(T. at 35.) He further does not state what Federal Laws are involved, despite inquiry by Robert Watson of the Gibbons Company which represents Dan's Foods in all unemployment insurance matters. Mr. Watson, without objection by Petitioner, asks the question "Did you conclude that she was capable or at least knowledgeable of the policies?" and Mr. Shannon concludes "uh huh."

After making the conclusion, Mr. Shannon presented the detail tapes which he had previously reserved.

Mrs. Nelson explained at this time (transcript at page 36, top of page), according to Mrs. Nelson that she gave good customers certain leeway in coupon policy. At that point Mr. Shannon paraded the horribles by declaring that "the company couldn't afford to allow customers six months or a year ago

if they bought, bought groceries that bring in a coupon and say, 'well you remember six months ago I bought this. I should be able to get money off'." This was never the testimony of any party.

It should be noted that at no time is Mrs. Nelson questioned on policies during the Hearing before the Administrative Law Judge.

In the transcript at page 48 it is clear that the conclusions of the Dan's Foods Inc. employees are what have led to Petitioner's dismissal. Yvonne Sandell, Loss Prevention Manager on page 48, bottom of page, states "Phyllis, kept avoiding the issue. We, tried to go over the detail tapes with her and she said she didn't remember doing them. First off, when we first brought into the interview we asked her about . . . before we even brought all the detail tapes, we asked her if she understood Dan's policies as far as coupons, how to ring coupons up. She said she understood all that. And then we went on to ask her about these tapes and she, didn't have any answers for them except one . . . the original one to the customer. She said it was just a customer who had been there a few days before and she remembered that she wanted to use some coupons."

On page 49 Sandell again states in response to a question by Mr. Watson, "Were there detailed questions asked regarding to her comprehension of the policy?" "Yes, uh huh. and she said she understood that."

Conclusions are the order of the day, even in questions, so for example, on page 49, Mr. Watson asks "But in, and, in your opinion, in your professional opinion as an auditor and also as investigation connected, this does show blatant misconduct regarding the coupon system?" Sandell only replies "It shows policy violations, yes."

Mrs. Nelson's spotless record with Dan's Foods is discussed in an interchange between the Judge and Ms. Sandell on transcript at page 51. Again, with respect to Ms. Sandell's knowledge of whether Mrs. Nelson understood the coupon procedure, Ms. Sandell can only declare at the top of page 52, "Yes, I believe she did. I might want to rectify that, I did work for Dan's part time starting last June, but I've only been in my position since January."

Mrs. Nelson's efforts to defend herself against the charges raised by the tape issues have led to much amusement which will be recounted later and which we believe may be in hearing, less than one required by due process; still she mentions why she granted cigarette and coffee coupons on page 56 through 59.

Importantly, the store manager has the authority to give back credit on coupons. Thus it is clearly not a violation of Federal Policy; if the Store Manager can do it, then surely a checker can do it with the approval of the Store Manager. Mrs. Nelson testifies on page 87 that often voids have to be rung before a manager can approve them.

The Judge further gets to the gist of the argument on page 59 when he asks "Would . . . if I was a store manager and chose not to follow that policy (of requiring manager approval for back dating coupons), could I tell my checkers that in certain instances you can do this without checking with me? Do they have that kind of authority, that's my question?" Ms. Sandell testifies "Yeah, it's their store." And the Judge enquires "So there's a possibility you could implement a policy that might not necessarily be consistent with what you or Mr. Shannon felt were good rules?"

In addition to the other informal problems above-cited . . . including the lack of foundation with respect to the conclusions that Mrs. Nelson knew the policies regarding the couponing, the fact that Mrs. Nelson could not formulate a question as required in the interrogation process and she was faced with a professional, Mrs. Watson, and the fact that there is no conclusive evidence that there was anyone watching the till to determine that no other person rang up on Mrs. Nelson's till and the lack of foundation for the conclusion that Mrs. Nelson was reported by an unidentified individual as giving retroactive coupons, and the confusion that Mrs. Nelson was reported by an unidentified individual as giving retroactive coupons, and the confusion with respect to the store policy and Federal Regulations on couponing, we have on page 60 of the transcript the fact that the tapes which were admitted into evidence were not properly authenticated.

Mrs. Nelson's retirement issues are discussed on page 68 and 69 of the transcript and the fact of the matter is she is shown to be unskilled in the cross examination process; still she did elicit from Randy Bradshaw that "As a manager, who had recently come to the operation I took you aside and may have reprimanded you, and if you consider that belittling you, that is what I did. I told you that you couldn't come across as being competent if you weren't exactly sure what you were doing, so my position as manager, that was my job. And if you felt belittled, then that's what occurred." (Transcript at page 69, middle of page).

Most importantly, the store manager testifies on page 72 that "There has not been any misappropriation of anything of a nature that can be considered misappropriation of company funds."

Further, on page 72, no one has been terminated for policy theft while Randy has been manager in instances such as this.

Mrs. Nelson's testimony on page 72 is extremely competent. She said "they have changed the coupon policy, I'm not really positive that I rung all these up. And I do know that Randy told me that if I would quit he would give me a good recommendation. He said, "you'll get every vacation pay" . . . wasn't mentioned. He said, "you'll get everything that's

coming to you. We're not trying to cheat you out of your unemployment or anything," and he did say that, "you will be penalized six weeks and not get any unemployment, but after the six weeks you will. And I'm not too familiar with unemployment and . . ."

Further, on page 73, Mrs. Nelson testifies competently to the issue of discrimination against employees with her benefits. She indicates that the previous manager asked whether she was planning to quit right away or retire, and was told that he could hire four part time workers for what he was paying her.

Mrs. Nelson also declares that another checked in her till (transcript at page 76, middle of page). Further, that another number could ring in if they wanted to until her till was taken out (ibid).

In addition to the inconsistency demonstrated by couponing policies at Dan's Foods, previously cited, we have Mrs. Nelson's competent testimony that she is entitled to use her own judgment regarding approval of coupons or voids, or anything of that nature. She says "well, usually, as a general rule, they'll tell you 'use your own judgement; you know, use your common sense, I've heard that expression." (transcript at page 81).

The unavailability of the manager is discussed on pages 80 and 81 and concludes with the fact that in response to Mr. Watson's question, "has the manager refused, you know a request for you to authorize a coupon or to approve a void or to . . . , Mrs. Nelson replies, "Yes, on numerous occasions I've had, where I have called for a check okay that I called and no one comes, and I have asked the . . . "

Further, Mrs. Nelson testifies that in cases of refunds, the manager has stated "I'll get it later, we're busy."

Further, that although Mrs. Nelson testified that the manager has not outright refused to okay coupons or checks or void the cash register, that he has said he would do it later and forgotten.

Insofar as the policy regarding checking coupons off at the end of the order, the judge recognized on page 84 that this is a system more prone to error than other systems; Mr. Bradshaw, the store manager agrees that this is the case.

WAS ENOUGH EVIDENCE RECEIVED AT THE ADMINISTRATIVE HEARING ON SEPTEMBER 22, 1989 SUCH THAT THE ABOVE ISSUES WERE FAIRLY HEARD?

WAS PHYLLIS NELSON DENIED DUE PROCESS IN HER HEARING BECAUSE OF HER UNFAMILIARITY WITH THE PROCESS AND THE FACT SHE WAS NOT REPRESENTED AT THE HEARING BY COUNSEL?

The fact that Mrs. Nelson did not understand the process is manifest throughout the record of the proceedings

It should be noted that Dan's Foods Inc. had a professional Administrative Agent present at the hearing who was familiar with the policies and procedures and it is also clear that Mrs Nelson was neither employed nor received unemployment compensation and felt she could not afford an attorney and managed to spot the record with examples of her inexperience in the area. A sprinkling of these occur , on,for example, page 26 where the interchange occurs as follows:

Nelson: I don't know where . . . about the one on discharge, I, it would . . . Randy just called me up and told me to come in, he wanted to talk to me.

JUDGE: Okay. I'm . . . we'll talk about that. . .

Nelson: I have no idea.

Judge: All forms that you have completed and . . .

Nelson: I, I was going . . . he told me I had my choice. He said I would get my unemployment but I would . . .

Judge: Well, we'll talk about these in a a minute. . .

On page 38,

Judge: Okay. Mrs. Nelson, do you have some questions you'd like to direct to Mr. Shannon?

Nelson: Well, now, I, didn't like, take anything from some three or four weeks ago bought. Like this one lady I told you about.brought.

Judge: Is there a way we can ask this as a question?

Nelson: Well, isn't it true for one thing? . . .

Then on page 39:

Judge: Okay. We'll ask that question of Yvonne then. Is there another question you would like to direct to Mr. Shannon?

Nelson: Well this one here is what I'm trying to understand why there is no store coupon. Isn't it true, too, the policy on the coupons has been changed about three times because when you first came out now this is how we were instructed on the coupons. You came in with your coupons and I would take an item.

Judge: Let's, let him . . . ask a question. I know this^{is} hard.

Nelson: Okay.

Judge: Ask a question and let him answer it.

Nelson: Well, when we first came out with coupons, now what I would do I would take the item, that you got your cereal, and I would take the coupon.

Judge: Again I'm interrupting you because I don't want to hear what . . .

Nelson: Oh oh.

At page 43:

Nelson: Could I ask Scott something? I don't recall this at all.

Judge: Recall what?

Nelson: This giving me a chance to give my opinion of Randy. I didn't think Randy was hard to work for except for constantly . . .

Judge: Okay. You don't recall? Is the question as to . . .

Then at page 53:

Judge: Okay, Ms. Nelson do you have questions for Ms. Sandell?

Nelson: Yes. Yvonne, isn't it true that, now on these . . . when we got our coupons, alright, I had a . . .

Judge: You started out real great with that isn't true and then. . .

Nelson: Yeah.

Judge: . . . you started digressing into testimony here. (chuckle).

One only has to see the interplay between Watson and the Judge to see how the matter is done professionally and to see

that the efforts to defend herself were beyond Mrs. Nelson's experience.

It is a principle of equity that one must be heard before his rights are adjudged. This principle is applicable in proceedings before Administrative bodies. See United States Constitution Amendments 5-14 and Duggan v. Potlatch Forest, Inc. 441 P.2d 172, 92 Idaho 62).

While there is no rule of universal application concerning the right of an individual to present his (her) views at a hearing prior to institution of action affecting his (her) substantial rights and what is due process depends on the circumstances and varies with the subject matter and necessities of the situation. Sokol v. Public Utilities Commission 418 P.2d 265 53 Cal. Rptr 673.

This is surely the case that when a person that has been aggrieved by an action taken by a governmental agency, such a person has a constitutional right to a hearing on the issues. Gamache v Department of Public Welfare 449 P.2d 957 9 Ariz. App. 120.

It is clear from administrative law that the Hearing Officer is not required to assume the duties of the counsel for the protestant. See for example McConnell v. State 492 P.2d 1003 (1971 N.M. App.); however in this case it is clear that as a result of the non intervention of the Hearing Officer and

the inability to make clear her defense by Petitioner, that due process was denied.

WHETHER OR NOT FEDERAL RULES GOVERNING REDEMPTION OF COUPONS WERE VIOLATED, AND WHETHER TESTIMONY TO THIS FACT WAS DE-TERMINATIVE?

Above is discussed the many conclusions reached by various witnesses that Federal Rules governing the redemption of coupons prevented Phyllis Nelson from doing what she did. No citation to these rules appears in the record. No citation appears at any time. The conclusion is not supported by the allegations since the managers have testified, as discussed above, the fact that they have the right to waive these requirements.

WAS DAN'S FOODS INC. PRECLUDED FROM DIS-ALLOWING UNEMPLOYMENT COMPENSATION TO PHYLLIS NELSON BECAUSE OF THEIR PROMISES TO HER AT THE TIME OF HER TERMINATION?

The Dan's agent was clear in his explanation that Dan's Foods would not interfere with Mrs. Nelson's unemployment if she would quit. It is clear that they were pressuring her to quit as discussed above because of the pension problems and the fact that they could hire four part-time workers for her one salary. Petitioner declares that 475-7C-4 of the Utah Administrative Code declares that the Employer may be required to pay unemployment if (b) The separation from the employer would have resulted in an allowance of benefits made under the provisions of "equity and good conscience" under circumstances NOT CAUSED OR AGGRAVATED BY THE

EMPLOYER.

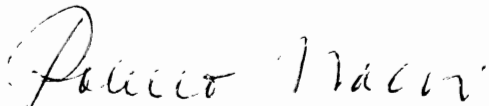
We would argue that both on the basis of contract law and this statute that Dan's should not be relieved of the burden of paying unemployment coverage to Mrs. Nelson.

CONCLUSION

* * * * *

63-46b-17 U.C.A. permits this Court to remand the action for further evidentiary hearing. In this case it is clear that Mrs. Nelson was denied due process both as a result of the customary procedures applied in the hearing and her own unfamiliarity with these procedures. As a result, a spotty and incomplete record was established, peripheral issues were not properly adjudicated and in order to provide a remedy for this out-of-work and impecunious worker, a remand is the just resolution.

DATED this 2nd day of April, 1990.


ROBERT MACRI
Attorney for Petitioner

ADDENDUM

* * * * *

63-46b-17. Judicial review — Type of relief.

(1) (a) In either the review of informal adjudicative proceedings by the district court or the review of formal adjudicative proceedings by an appellate court, the court may award damages or compensation only to the extent expressly authorized by statute.

(b) In granting relief, the court may:

- (i) order agency action required by law;
- (ii) order the agency to exercise its discretion as required by law;
- (iii) set aside or modify agency action;
- (iv) enjoin or stay the effective date of agency action; or
- (v) remand the matter to the agency for further proceedings.

(2) Decisions on petitions for judicial review of final agency action are reviewable by a higher court, if authorized by statute.

1987

CERTIFICATE OF MAILING

I hereby certify I personally mailed a true and correct copy of the foregoing BRIEF OF APPELLANT this 2nd day of April, 1990 to Winston M. Faux, Special Assistant Attorney General, The Industrial Commission of Utah, Department of Employment Security, 1234 South Main Street, P. O. Box 11600, Salt Lake City, Utah 84147 and to R. Paul Van Dam, Attorney General of Utah, State Capitol Building, Salt Lake City, Utah 84114.

Robert M. ...