2016

Fur Breeders Agricultural Cooperative, (Employer No. 002612-0). Petitioner/Appellant, vs. Department of Workforce Services, Workforce Appeals Board, Respondent/Appellee. : Reply Brief

Utah Court of Appeals

R. Scott Rawlings; attorney for appellant.
Nathan R. White; attorney for appellee.

IN THE UTAH COURT OF APEALS

Fur Breeders Agricultural Cooperative, (Employer No. 002612-0).	:	
Petitioner/Appellant,	:	
vs.	:	
Department of Workforce Services,	:	**Appellate Case No. 20161064-CA**
Workforce Appeals Board,	:	
Respondent/Appellee.	:	

REPLY BRIEF OF APPELLANT

APPEAL

Appeal from Decision of Workforce Appeals Board

Department of Workforce Services

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ARGUMENT

Appellant FBAC respectfully disputes the contentions of Respondent Workforce Service in its assertions Petitioner FBAC failed to martial evidence sufficient to establish an independently established business. FBAC re-assets the testimony of, as included in its initial brief "addendum" of UPD Secondary Employment Office, by and through its coordinator, Kenneth Hansen.

FBAC assets that the case law, statues and administrative rules have not given fair and adequate consideration. In support thereof, FBAC asserts that the Board failed to give consideration to the testimony relevant to the unique nature of the relationship between UPD off-duty officers and their employer, UPD. As previously cited and annotated, UPD requires, by State law and UPD policy that any and all off-duty officers could only perform the security and provide the police presence to third party, private contractors, but through the voluntary application of UPD officers seeking off-duty employment to be administered solely and independently of any and all third parties. Mr. Hansen provided first hand testimony and knowledge as to the policies, procedures, administration, assignment and intermediary role of UPD Secondary Employment Office in his capacity as the designated, named and serving coordinator for said office.

In the matter of *Petro-Hunt,LLC v. Dept't of Workforce Servs,* 197 P3d. 107 (Utah App 2008), the Court ratified and found that Utah Admin. Code R994-204-303(1)(b) provides seven factors intended to aid a decision maker's analysis of whether a worker was customarily engaged in an independently established business. Further, the Court noted that these factors are "...intended only as aids in the analysis of the facts of each case. As stated in Respondent's brief at page 16, having drawn from the decision in *Petro-Hunt*:

> ...indeed, the degree of importance of each factor varies depending on the service and the factual context in which it is performed. *Id.* "The appropriate weight to assign to each factor in the test for whether an individual is an employee or an independent contractor is a fact-sensitive question that will differ in every case due to the individuality of fact patterns and the vagaries of various vocations..."

FBAC contends that the clear and undisputed testimony of UPD Employment Office coordinator, Kenneth Hansen provided the residuum of legal evidence competent in a court of law as to the following:

1. Both State law and UPD policy mandated that any off-duty officer could only perform security and provide police present after application and acceptance into UPD Secondary Employment Office, which stand as a separate and distinct entity apart for UPD as a State law enforcement agency;

2. Only by and through UPD Secondary Employment Office, as the sole and exclusive means by which an off-duty officer may ply his/her unique certified skill and training in law enforcement:

3. Participation in UPD Secondary Employment was strictly voluntary by UPD officers;

4. UPD Secondary Employment Office was and is a separate and distinct entity from UPD as a law duly designated and authorized State law enforcement agency:

5. UPD Secondary Employment Office operated and served as a business entity for the benefit of off-duty UPD officers, providing services which included, but not limited to: invoicing, collection of fees, record keeping relative to dates, times, hours and rate of pay for each officer.

6. UPD Secondary Employment Office, serving for and on behalf of UPD off-duty officers was the sole, designated entity by which private, third-parties, i.e. FBAC could contact and arrange for the requested and desired off-duty police presence.

A reasonable and fair reading and examination of the Board decision and its clearly stated adoption of the record to the Findings and Conclusion of Law issued by ALJ Hon. Gary Gibbs. The record is absent any discussion of the

direct testimony of Kenneth Hansen and his role as coordinator for UPD Secondary Employment Office. The decision of the Board is silent as to the mandate that all UPD officers seeking Secondary Employment must submit to, apply and be accepted into said program. Likewise, Mr. Hansen provided uncontroverted testimony as to the means and methods offered by and to UPD off-duty officers under is "Power Detail" software program which sets standards of for dress, department service requirements while performing off-duty police presence for private third parties. Having seemingly failed or ignored the testimony of Mr. Hansen, issues relative to the guidelines set forth at Utah Admin. Code R994-204-303, which were clearly met for and on behalf of each respective off-duty officer by and through UPD Secondary Employment Office. Mr. Hansen's uncontroverted testimony, as cited in Petitioner's Brief and Addendum; UPD Secondary Employment Office provides, in the spirit of the Rule, by and through its software "Power Point", what is essentially the clearing house to meet independent contractor status which included, but not limited to officer invoicing to private third party clients, collection

of fees, record retention relative to dates, times, hours and rate of pay for each respective officer. Again, emphasizing that UPD Secondary Employment Office clearly functions and stands for the sole benefit of UPD off-duty officers. It is

UPD Secondary Employment Office that classifies off-duty officers as independent contractors and not the private, individual clients, i.e. FBAC.

Further in support of Petitioner's contention that the Board seemingly failed to consider the nature of the relationship between FBAC and UPD off-duty officers in the following particulars (as testified to by FBAC General Manager Christopher Falco (as cited in Petitioner's brief with a transcript of testimony in Petitioner's Addendum), as follows:

1. FBAC did NOT (emphasis added) classify UPD off-duty officers as independent contractors, the same having been established and represented by UPD Secondary Employment Office;

2. FBAC had neither knowledge of nor communications with UPD off-duty officers who provided police presence;

3. All UPD off-duty officers, as designated independent contractors by UPD Secondary Employment Office were assigned, supervised and reported directly to UPD Secondary Employment and NOT (emphasis added) FBAC;

4. FBAC had no input, control or any other indicia of employer-employee personnel input or decision authority relative to either the services rendered as a whole or with any single individual officers. All officers served at the sole discretion of UPD Secondary Employment Office;

5. FBAC had no input in or access to UPD Secondary Employment software known as "Power Detail";

6. FBAC provided no direction, supervision, equipment or other indicia of employer-employee relationship to UPD off duty officers;

7. FBAC provided UPD off-duty officers no tools or equipment to perform the police presence sought;

8. UPD off-duty officers, at all relevant times to providing police presence to FBAC and other clients were subject to an over-riding requirement to respond to dispatch calls from their employer, UPD;

9. FBAC's sole and only contact with and contractual agreements were made with, by and between, UPD Secondary Employment Office (as the entity authorized to represent qualified UPD off-duty officers;

10. FBAC would receive an invoice from UPD Secondary Employment Office listing each off-duty officer by name and social security number for the sole purpose of issuing payments for services rendered. All such payments were submitted directly to UPD Secondary Employment Office for dissemination to each respective officer having performed service; and

11. At year end, FBAC would comply with Federal law and issue the duly authorized and accepted 1099 IRS form for each officer identified by the pay roll records as solely submitted from UPD Secondary Employment Office.

Respondent FBAC challenges the decision of Workforce Appeals Board for its failure to take due, fair and adequate notice of the relationship between UPD off duty officers, the significant and sole role of UPD Secondary Employment Office as the only entity by which FBAC and/or any other of the numberless third-party clients seeking police presence and security could contract for such services, and the very clear LACK (emphasis added) of control, input or direction from FBAC to UPD off-duty officers

In support of Petitioner's assertion that the Board failed to fairly, adequately and reasonably consider the role of UPD Secondary Employment Office in meeting and fulfilling the requirements set forth at §35A-4-204, UCA and Utah Admin. Code R994-204-303 in the seminal decision issued by the Utah Supreme Court in *First National Bank of Boston v. County Board of Equalization,* 799 P.2d 1163 (Utah 1990) wherein the Court held that " '[s]ubstantial evidence is that quantum and quality of relevant evidence that is adequate to convince a

reasonable mind to support a conclusion." *Id* at 1165 the Court state that the appellate courts, when applying the substantial evidence test of the Utah Administrative Procedures Act (UAPA), Utah Code Ann. §63-46b-16(4) are required to consider not only the evidence supporting the Board's findings but also the evidence negating them. *Id.* See *Swider*, 824 P.2d at 451, *Grace Drilling,* 776 P.2d at 68. Respondent FBAC reaffirms its argument in its initial Brief; UPD off duty officers compose a unique set of skilled personnel that belies the strictures imposed under §35A-4-204 and Utah Admin. Code R994-204-303 in three (3) significant and fundamental ways:

1. UPD off duty officers are precluded by law and UPD policy to employ their highly specialized training skills and talents outside the strictures of UPD Secondary Employment Office;

2. UPD Secondary Employment Office provides and meets both the spirit and letter of the law under §35A-402-204 and Utah Admin. Code R994-204-303:

3. Workforce Service Appeals Board did not give reasonable, fair or possibly any consideration to UPD Secondary Employment Office as the entity ensuring that UPD off duty officers were in compliance with and eligible for independent contractor designation.

CONCLUSION

Petitioner FBAC has demonstrated that the spirit and letter of both State Statute and Administrative Rules have substantially been filled necessary to infer independent contractor status on UPD off-duty officers. Further, Petitioner FBAC had no input, say, control or otherwise in either the designation of UPD off-duty officers as independent contractors and reasonably relied upon the representation of UPD Secondary Employment Office inasmuch as said entity was and is the only means by which UPD off-duty officers may be retained to provide the essential police presence given the unique nature of Petitioner's business enterprise.

DATED this 10th day of July, 2017.

R. SCOTT RAWLINGS
Attorney for Petitioner/Appellant

Certificate of Compliance With Rule 24(f)(1)

I hereby certify that:

1. This brief complies with the type volume limitation of Utah R. App. P.

24(f)(1) because this brief contains 2,052 words, excluding the parts of the exempted by Utah R. App. P 24(f)(1)(B).

2. This brief complies with the typeface requirements of Utah R. P. 27(b) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 13 point Times New Roman.

DATED this 10th day of July, 2017.

/s/ R. Scott Rawlings

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing REPLY BRIEF OF APPELLANT was mailed by first class mail this 10th day of July, 2017, to the following:

Nathan R. White
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/ /s/ R. Scott Rawlings

ADDENDUM

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824 P.2d 448 (Utah App. 1991)

DEPARTMENT OF the AIR FORCE, Petitioner,

v.

Robert J. SWIDER and Department of Employment Security, Respondents.

No. 910069-CA.

Court of Appeals of Utah.

December 6, 1991

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Dee V. Benson, Robert H. Wilde and Clare A. Jones, Midvale, for petitioner.

R. Paul Van Dam and Emma R. Thomas, Salt Lake City, for respondents.

Before JACKSON, ORME and RUSSON, JJ.

ORME, Judge:

Petitioner, the United States Air Force, challenges a decision of the Board of Review of the Industrial Commission granting unemployment benefits to an Air Force employee terminated for drug use. We affirm.

FACTS

In 1986, the United States Air Force adopted a "zero tolerance" anti-drug policy for its workforce, and informed employees they could be discharged for possessing or using illegal drugs on base, or working under the effects of such drugs. In May of 1990, the Air Force announced plans to supplement the policy with a comprehensive drug testing program for all civilian employees.

From December of 1970 until May of 1990, respondent Robert J. Swider was employed by the Air Force as an aircraft mechanic at Hill Air Force Base. In July of 1989, Swider spoke to Vicky Brown, a fellow employee at the base, about frequent on-base cocaine use Swider had observed

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among his co-workers. Brown asked Swider if she could pass the information along to his supervisor, a Mr. Stevenson, and Swider agreed. Brown then engaged in a series of conversations with Stevenson, in which she relayed Swider's observations. As a result of his contact with Brown, Stevenson contacted the Air Force Office of Special Investigations (OSI) and informed them of possible on-base drug use among employees.

OSI subsequently installed surveillance cameras in Swider's work area, and several of Swider's co-employees were filmed inhaling cocaine. These co-workers were eventually arrested and interviewed by OSI personnel, at which time one of them identified Swider, who had not been shown on the videotape using drugs, as also having used cocaine on base. In November of 1989, Swider received death threats, allegedly from individuals who had discovered it was he who leaked information about their drug use to OSI. Swider asked his supervisor what protection the Air Force could offer him, and his supervisor directed him to OSI.

Swider met with OSI agents in December of 1989. During the course of their discussion, Swider admitted to the agents that he had smoked marijuana while on a rafting trip in May of 1989. He also informed them that, subsequent to that incident, he had been completely drug-free for eight months. In January of 1990, Swider enrolled himself in a 30-day drug rehabilitation program. With full disclosure of his intention to do so, he was given time off by the Air Force to enter the program, and successfully completed it. [1]

In February of 1990, an OSI report was issued, concluding that Swider's employment should be terminated because of his off-base drug use in May of 1989. Swider was discharged from Hill Air Force Base a full year after the instance of drug use, in May of 1990. The next month, he applied to the Department of Employment Security for unemployment benefits. He was initially denied all benefits on the ground that he had been discharged for "just cause." [2] Swider appealed the decision to an Administrative Law Judge (ALJ), who reversed the initial denial. The Air Force then appealed to the Industrial Commission's Board of Review, which affirmed the ALJ's decision to grant benefits.

The Air Force now seeks our review, challenging the Board's decision on two grounds. First, the Air Force assails the Board's factual findings that Swider (1) voluntarily reported his drug use to the OSI and (2) was insulated from discipline because he voluntarily entered a drug rehabilitation program. [3] Further, the Air Force challenges the Board's determination that Swider's actions were not "culpable" for purposes of establishing a "just cause"

termination.

STANDARDS OF REVIEW

This court's review of decisions of the Board of Review is governed by provisions

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of the Utah Administrative Procedures Act (UAPA). That act controls judicial review of formal adjudicative proceedings, and requires reversal of a Board decision when:

(d) the agency has erroneously interpreted or applied the law;

....

(g) the agency action is based on a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

....

Utah Code Ann. § 63-46b-16(4) (1989).

Petitioner Air Force first challenges the correctness of the Board's findings of fact. In accordance with the mandate just quoted, this court grants great deference to an agency's findings, and will uphold them if they are "supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1989). See *Grace Drilling Co. v. Board of Review,* 776 P.2d 63, 67 (Utah App.1989). "Substantial evidence" has been defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Id. at 68 (quoting *Idaho State Ins. Fund v. Hunnicutt,* 110 Idaho 257, 715 P.2d 927, 930 (1985)). In applying the substantial evidence test, we review the "whole record" before the court, and consider both evidence that supports the Board's findings and evidence that fairly detracts from them. Id. It is the petitioner's duty to properly present the record, by marshaling all of the evidence supporting the findings and showing that, despite that evidence and all reasonable inferences that can be drawn therefrom, the findings are not supported by substantial evidence. Id. See *Heinecke v. Department of Commerce,* 810 P.2d 459, 464 (Utah App.1991); *Sampson v. Richins,* 770 P.2d 998, 1002 (Utah App.), cert. denied, 776 P.2d 916 (Utah 1989).

The Air Force's second claim--that the Board erred in concluding Swider was not "culpable"--turns to a significant degree on factual findings concerning Swider's conduct while employed, and on the extent to which we should defer to the Board's determination of how that conduct "affects the continuance of the employment relationship." Utah Admin.Code R475-5b-102 (1990) (defining "culpability"). In *Morton Int'l, Inc. v. Utah State Tax Comm'n,* 814 P.2d 581 (Utah 1991), the Utah Supreme Court held that where "there is a grant of discretion to the agency concerning the language in question, either expressly made in the statute or implied from the statutory language," id. at 589, the agency is entitled to a degree of deference such that it should be affirmed if its decision is reasonable and rational. Id. We conclude the requisite grant of discretion was made by the Legislature to the Board, as evidenced by the statutory language permitting a denial of benefits where a termination is for "just cause ... if so found by the commission." Utah Code Ann. § 35-4-5(b)(1) (1991 Supp.) (emphasis added). See *Tasters Ltd. v. Department of Employment Sec.,* 819 P.2d 361, 364-66 (Utah App.1991) (recognizing similar language to constitute express grant of discretion); Johnson-Bowles Co. v. Department of Commerce, No. 900558, slip op. at 15-16, (Utah Ct.App. Nov. 29, 1991) (same). [4]

ANALYSIS

This court has previously recognized the Air Force's legitimate interest in maintaining a drug-free work environment, and its right to enforce its "zero tolerance" drug policy. See, e.g., *Department of Air Force v. Department of Employment Sec.,*

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786 P.2d 1361, 1364 n. 3 (Utah App.), cert. denied, *United States v. Industrial Comm'n,* 795 P.2d 1138 (1990). [5] However, the question before us is not whether the Air Force was, as a matter of basic employment law, within its rights when it discharged Swider. Instead, we are asked to decide the completely separate issue of whether the Board could reasonably conclude Swider was not discharged for "just cause" under the state's unemployment scheme, as would warrant his deprivation of a terminated employee's usual right to collect unemployment benefits. See Utah Admin.Code R475-5b-101 (1990). Accordingly, our analysis is limited to a consideration of (1) whether the Board of Review's factual findings concerning Swider's activities while employed are supported by substantial evidence in the record as a whole and (2) whether those findings reasonably support the Board's conclusion that Swider's discharge was not for "just cause," due to a lack of culpability.

I. Findings Were Supported By Substantial Evidence

In concluding Swider was discharged without just cause for purposes of his entitlement to unemployment benefits, the Board first compared Swider's conduct with that of the claimant in an earlier case, in which the Board had affirmed

a denial of unemployment benefits to one of Swider's co-workers, Dennis L. Wagstaff. The Board in the instant proceeding found that, in the Wagstaff matter, "the employer had presented adequate evidence to support the conclusion that the claimant voluntarily abused drugs while on the Air Base, in violation of known rules which prohibited such abuse." Further, Wagstaff "did not report his drug usage or seek assistance to overcome the problem of drug abuse."

The Board then distinguished between the instant case and the Wagstaff case on two grounds, concluding that those differences suggested a different result. First, the Board found that while Wagstaff had not voluntarily admitted his drug use to his employer, "the [Air Force] learned of [Swider's] problem with drugs because the claimant himself brought the matter to the attention of the proper authorities." Second, the Board determined Swider had "volunteered for and was accepted into a drug rehabilitation program approved by the Air Force," while Wagstaff had not, and stated that "Air Force policy provides that employees who seek the assistance of such a rehabilitation program and remain drug free thereafter 'will not be subject to disciplinary action.' " Given these distinguishing facts, the Board concluded that Swider was eligible for unemployment benefits even though it had determined his co-worker, Wagstaff, was not. The Air Force now challenges these two findings.

With regard to the first finding--that Swider brought his drug use to the attention of Air Force investigators--the Air Force expressly acknowledges that "on December 1, 1989, Mr. Swider 'brought himself to the attention of the authorities.' " Nonetheless, the Air Force attempts to diminish the significance of Swider's admission by pointing out that the admission occurred in December of 1989--several months after the OSI investigation had begun bearing fruit, and one month after a co-employee had identified Swider as an on-base cocaine user. The Air Force speculates that, given the timing of his confession to OSI officials, Swider only turned himself in to speed the inevitable. Be that as it may, the Board of Review could, nonetheless, have been impressed by the simple fact that Swider turned himself in at all, and an admission of any kind does distinguish Swider's conduct from that of Wagstaff. [6] Further, the Air Force's explanation

for Swider's admission is wholly unsubstantiated in the record. There is no evidence to suggest Swider came forward simply to hasten the inevitable. In fact, there was no evidence presented that Swider even knew he had been implicated. The Board was entitled to find that Swider came forward to gain Air Force protection after receiving the death threats. Because it is uncontroverted that Swider voluntarily confessed his past drug use to OSI agents, we uphold the Board's finding on that issue.

Second, the Air Force claims the Board wrongly interpreted Air Force policy in finding that Swider's voluntary enrollment in a drug rehabilitation program protected him from disciplinary action. In making its finding of disciplinary immunity, the Board relied on a May 1989 notice circulated by the Air Force to all civilian employees at Hill Air Force Base. The notice informed employees that a drug testing program would be implemented no sooner than sixty days from the date of the letter, and continued, with our emphasis:

While the Air Force cannot tolerate the use of illegal drugs, we encourage any employee who has a substance abuse problem to seek appropriate counseling and rehabilitation assistance. Employees who voluntarily identify themselves as having an illegal drug problem within the timeframes established by the program, seek counseling, or rehabilitation, agree to a last chance agreement and refrain from using illegal drugs will not be subject to disciplinary action.

The Air Force claims that the phrase "timeframes established by the program" refers to the sixty-day period between the date of the notice and the commencement of the drug testing program. Since Swider did not come forward until some eight months after the date of the letter, the Air Force asserts, he did not fall within the sixty-day "window" and could therefore be disciplined. That assertion is incorrect. The letter stated only that the program would be implemented in a minimum of sixty days; it made no reference to the sixty-day period being a "window" of immunity, after which period an employee could be terminated regardless. [7] Further, it is impossible to reconcile the Air Force's position with the letter's statement that the program, which was being announced prospectively, was to establish the time frame for disciplinary immunity. We do not understand how, when the program was to establish the time frame, the Air Force can plausibly contend that the time frame ended before the program was implemented. Accordingly, we reject the challenge to the Board's finding in this regard.

For the above-mentioned reasons, we hold that there is substantial evidence in the record as a whole to support the Board's findings which are challenged by the Air Force in this appeal.

II. Respondent Was Not Culpable

Rule 475-5b-101 of the Utah Administrative Code states that an employee is ineligible to receive unemployment benefits when the employee has been terminated for "just cause," i.e., when the "job separation ... is necessary due to

the seriousness of actual or potential harm to the employer." Rule 475-5b-102 then sets forth the three factors which establish just cause, and which are necessary for a determination of ineligibility for unemployment

insurance benefits. Those factors are: (1) knowledge on the part of the employee as to the conduct the employer expected, (2) conduct that was within the employee's power and capacity to control, and (3) culpability. It is uncontroverted that Swider's conduct satisfied the elements of knowledge and control. Therefore, we consider only whether he was culpable.

Culpability is defined in Rule 475-5b-102 as

the seriousness of the conduct or the severity of the offense as it affects continuance of the employment relationship. The discharge must have been necessary to avoid actual or potential harm to the employer's rightful interests. A discharge would not be considered "necessary" if it is not consistent with reasonable employment practices.

Utah Admin.Code R475-5b-102 (1990). In determining if certain conduct is culpable, Rule 475-5b-102 states:

The wrongness of the conduct must be considered in the context of the particular employment and how it affects the employer's rights. If the conduct was an isolated incident of poor judgment and there is no expectation that the conduct will be continued or repeated, potential harm may not be shown and therefore it is not necessary to discharge the employee.

Id. Further, the rule emphasizes that "longevity and prior work record are important in determining if the act or omission is an isolated incident or a good faith error in judgment." Id.

Swider was employed by the Air Force for almost twenty years. During that time he received twenty awards and commendations for his work performance, consistently received laudatory appraisals from his superiors, and was never subjected to discipline prior to his termination. He acted in important additional capacities at the base, serving as an alternate supervisor and a Hazardous Waste Site Monitor. Swider's supervisor testified that he was unaware of any specific problem resulting from Swider's work, much less from his smoking marijuana on vacation. The supervisor also testified that Swider's work was dependable, and that Swider had always seemed quite capable of performing his duties. The Board believed that, with the exception of an isolated incident of marijuana use in May of 1989, he had been completely drug free for eight months. It was reasonable for the Board to have concluded there was no expectation that Swider's drug use would have been continued or repeated. He caused the on-base drug use of his co-workers to be called to the attention of the proper authorities. He also entered and completed a voluntary drug rehabilitation program.

Given Swider's exemplary work history, his demonstrated desire to distance himself from drugs, and evidence indicating Swider's past drug use was an isolated incident, it was reasonable and rational for the Board to conclude Swider's conduct was not sufficiently culpable to render his termination one for "just cause" for purposes of adjudicating his entitlement to unemployment benefits.

CONCLUSION

There was substantial evidence in the record to support the Board's findings of fact. Further, it was reasonable for the Board to conclude that Swider's conduct lacked culpability, as the term is used in the regulations of the Department of Employment Security. Accordingly, we affirm the Board's decision.

JACKSON and RUSSON, JJ., concur.

Notes:

[1] It is not altogether clear why, if he had been drug-free for so long, Swider elected to enter a drug rehabilitation program at this time.

[2] Utah Code Ann. § 35-4-5(b)(1) (1991 Supp.) disallows unemployment benefits to those "discharged for just cause ... if so found by the commission."

[3] The Air Force also refers repeatedly to evidence of on-base cocaine use by Swider, and questions why both the ALJ and the Board of Review failed to acknowledge Swider had used cocaine while on base. The Air Force presumes the incriminating evidence was improperly excluded as hearsay, and claims it should have been admitted as an admission by a party opponent under Utah R.Evid. 801(d)(2). We agree that at least some of the inculpatory evidence falls within the scope of Rule 801(d)(2), but do not agree it was excluded for evidentiary reasons. Instead, it appears the ALJ and Board decided not to believe it. The ALJ stated that "[t]he evidence in this case is in dispute as to whether or not the claimant actually used a controlled substance on Hill Air Force Base premises. The Air Force Office of Special Investigations Report contained some discrepancies as far as dates and informational data. The claimant emphatically denies using cocaine on the employer's premises." The ALJ and Board were not obligated to credit the OSI report or third-person testimony over Swider's own testimony; they were free to believe Swider, as they apparently did. See Hurley v. Board of

Review, 767 P.2d 524, 526-27 (Utah 1988) (an agency's findings of fact are accorded substantial deference, and "will not be overturned if based on substantial evidence, even if another conclusion from the evidence is permissible").

[4] Prior to Morton Int'l, we would also have concluded the Board's decision was entitled to this same degree of deference but would have reached that conclusion by focusing more on the Board's expertise and experience than on the nature of the Legislature's grant of authority to the Board. See, e.g., Taylor v. Utah State Training School, 775 P.2d 432, 434 (Utah App.1989) (when an agency decision involves application of the relevant rules of law to the facts, "a [reviewing] court should afford great deference to the technical expertise or more extensive experience of the responsible agency") (quoting Department of Admin. Servs. v. Public Serv. Comm'n, 658 P.2d 601, 610 (Utah 1983)).

[5] The Air Force's interest has been deemed "especially imperative" where its employees are engaged in sensitive, highly technical tasks, such as assembling or repairing jet aircraft. See Department of Air Force, 786 P.2d at 1364. See also Johnson v. Department of Employment Sec., 782 P.2d 965, 972 (Utah App.1989) (Orme, J., concurring) (a government contractor constructing national defense products "is entitled to insist, in an aggressive and uncompromising way, on an absolutely drug-free workforce and not merely a drug-free workplace ").

[6] Moreover, the Board may have been impressed by Swider's prior disclosure to Brown of cocaine use in his work area, and his express authorization that she pass the information along to his supervisor. Although, by emphasizing that Swider turned himself in, the Board's finding does not appear to place any significance on his "whistle-blowing," the clear causal link would not have escaped the Board's attention. The "whistle-blowing" led to the death threats, which led to Swider's referral to OSI, which led to his disclosure to OSI that he had smoked marijuana while on vacation some months previous.

[7] Additional language in the letter supports this position:

However, if an employee is otherwise determined to use illegal drugs, he or she will be subject to disciplinary action, including possible removal from Federal service. Once this program is implemented, removal action will be proposed for any employee receiving a second positive [urine] test, refusing to obtain counseling or rehabilitation after being found to use illegal drugs, or adulterating or substituting a [urine] specimen.

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799 P.2d 1163 (Utah 1990)

FIRST NATIONAL BANK OF BOSTON, Petitioner,

v.

COUNTY BOARD OF EQUALIZATION OF SALT LAKE COUNTY, State of

Utah; Utah State Tax Commission, Respondents.

No. 890278.

Supreme Court of Utah.

October 16, 1990

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J. Frederic Voros, Jr., Salt Lake City, for petitioner.

Bill Thomas Peters, Salt Lake City, for County Bd. of Equalization.

R. Paul Van Dam, Brian L. Tarbet, Salt Lake City, for Tax Com'n.

HALL, Chief Justice:

This case is a review of an order of the Utah State Tax Commission ("Tax Commission") setting the assessment on property owned by First National Bank of Boston ("First National") and from a denial of First National's request for reconsideration. First National challenges the accuracy of the Tax Commission's finding that the expense ratio on the property is 25 percent.

The property at issue in this case is an office building located in Salt Lake City, Utah, and subject to assessment by Salt Lake County pursuant to Utah Code Ann. § 59-2-301 (1987). Salt Lake County assessed the property at $5,176,440 for the year 1987. First National appealed the assessment to the Salt Lake County Board of Equalization ("Board of Equalization"), which adjusted the value of the property to $4,580,850 based on evidence presented at the hearing.

First National appealed the decision of the Board of Equalization to the Tax Commission. At a formal hearing before the Tax Commission, First National asserted that the fair market value of the property was approximately $3.7 million. Salt Lake County contended that the property's fair market value was $4.7 million. On April 28, 1989, the Tax Commission entered its findings of fact and conclusions of law, determining that the fair market value of the property was $4,200,000.

The Tax Commission calculated the fair market assessment value of the property by using the income approach to value method. Elements of the income approach to value included the following formula and data presented at the formal hearing:

1. $14 per square foot less an adjustment for free rent, or $11.67 per square foot;

2. capitalization rate of 10.9 percent;

3. an expense ratio of 25 percent; [1]

4. a stabilized vacancy rate of 10 percent; and

5. the area size of the building, which is 58,252 square feet.

Although the expense ratio is disputed, the formula for the calculation of the assessment is not in dispute: 58,252 total sq. ft. X 11.67 effective rent - 10% vacancy rate - $170,095 expenses (25% expense ratio) (disputed figure) / 10.9% capitalization rate = $4,200,000 taxable amount. The Tax Commission arrived at a final taxable

Page 1165

amount of $4,200,000 by using the 25 percent expense ratio. [2] First National calculated the taxable amount to be $3,690,429 by using a 31 percent expense ratio. [3]

The only issue for review is the accuracy of the Tax Commissions findings of fact, specifically, whether the Tax Commission erred in calculating the expense ratio portion of the formula at 25 percent. The other elements of the formula are not in dispute.

The Administrative Procedures Act [4] governs our review of the Tax Commission's assessment. Section 63-46b-16(4) states:

(4) 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 substantially prejudiced by any of the following:

...;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole

The State Tax Commission shall administer and supervise the tax laws of the State. It shall assess mines and public utilities and adjust and equalize the valuation and assessment of property among the several counties. It shall have such other powers of original assessment as the Legislature may provide. Under such regulations in such cases and within such limitations as the Legislature may prescribe, it shall review proposed bond issues, revise the tax levies of local governmental units, and equalize the assessment and valuation of property within the counties. The duties imposed upon the State Board of Equalization by the Constitution and Laws of this State shall be performed by the State Tax Commission.

In each county of this State there shall be a County Board of Equalization consisting of the Board of County Commissioners of said county. The County Boards of Equalization shall adjust and equalize the valuation and assessment of the real and personal property within their respective counties, subject to such regulation and control by the State Tax Commission as may be prescribed by law. The State Tax Commission and the County Boards of Equalization shall each have such other powers as may be prescribed by the Legislature.

[9] Section 59-1-210 states in pertinent part:

The powers and duties of the commission are as follows:

...;

(7) to exercise supervision over assessors and county boards of equalization, and over other county officers in the performance of their duties relating to the assessment of property and collection of taxes, so that all assessments of property are just and equal, according to fair market value, and that the tax burden is distributed without favor or discrimination;

...;

(23) to correct any error in any assessment made by it at any time before the tax is due and report the correction to the county auditor, who shall enter the corrected assessment upon the assessment roll;

...;

(25) to perform any further duties imposed by law, and exercise all powers necessary in the performance of its duties;

...;

(27) to comply with the procedures and requirements of Chapter 46b, Title 63, in its adjudicative proceedings.

[10] Utah Power & Light Co. v. State Tax Comm'n, 590 P.2d 332, 335 (Utah 1979).

[11] Hurley v. Board of Review of Indus. Comm'n, 767 P.2d 524, 526-27 (Utah 1988); Utah Power & Light, 590 P.2d at 335.

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record before the court

....

Section 63-46b-16(4)(g) requires an appellate court to review the "whole record" to determine whether the agency's action is "supported by substantial evidence." "Substantial evidence" is that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion. [5] An appellate court applying the "substantial evidence test" must consider both the evidence that supports the Tax Commission's factual findings and the evidence that detracts from the findings. [6] Nevertheless, the party challenging the findings--in this case, the taxpayer--must marshal all of the evidence supporting the findings and show that despite the supporting facts, the Tax Commission's findings are not supported by substantial evidence. [7]

Nothing in the record indicates how the Tax Commission arrived at the figures for expenses and the 25 percent expense ratio. First National has presented expense figures that were entered into evidence and has explained how those figures fit into the formula to arrive at the $3,690,429 fair market value.

Despite the fact that both parties presented evidence of expense figures significantly higher than the Tax Commission's findings, the Board of Equalization and the Tax Commission argue that the Tax Commission is not bound by the evidence presented by either party but may make findings of its own. They base their argument upon the broad grant of authority bestowed upon the Tax Commission in the Utah Constitution [8] and Utah Code Annotated. [9]

Nowhere in the Utah Constitution or Utah Code Annotated does the legislature give the Tax Commission the unbridled discretion to make findings of fact beyond the scope of what is presented in the hearings or inferences to be drawn therefrom. Although it is a "universally recognized rule" that this court must "take some cognizance of the expertise of the agency in its particular field and accordingly to give some deference to its determination," [10] the agency's decision must rest upon some sound evidentiary basis, not a creation of fiat. [11]

It is unclear from the record how the Tax Commission arrived at the figures it used in calculating the fair market value of petitioner's property. First National has upheld its burden to marshal all of the evidence in support of the Tax Commission's findings and has shown that on the record before us those findings are inconsistent with the evidence presented.

We remand for the purpose of requiring the Tax Commission to more fully articulate the basis for its findings and determination of fair market value in light of the evidence presented in the hearing.

HOWE, Associate C.J., and STEWART, DURHAM and ZIMMERMAN, JJ., concur.

Notes:

[1] The expense ratio is calculated by dividing the square foot expense figure, in this case, $3.47 per square foot, by the income from rental rates, $14 per square foot face rate ($11.67 per square foot when adjusted for free rent given as inducements or incentives to tenants).

[2] The method the Tax Commission used to arrive at the $4,200,000 figure is unclear; however, if some of the figures contained in the findings of fact are used, the calculation would be as follows: 58,252 sq. ft. X $11.67 (679,800.84) - 10% vacancy rate (67,980.08) - $170,095 expenses / 10.9% capitalization rate = $4,052,529.9. Nevertheless, the Tax Commission valued the property at $4,200,000.

[3] The figures used by First National are as follows: 58,252 X $11.67 (679,800.84) - 10% vacancy rate (67,980.08) - $209,564 expenses (31% expense ratio) / 10.9% capitalization rate = $3,690,429 taxable amount.

[4] Utah Code Ann. §§ 63-46b-1 to -22 (1989).

[5] See Consolo v. FMC, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026-27, 16 L.Ed.2d 131 (1966); Idaho State Ins. Fund v. Hunnicutt, 110 Idaho 257, 715 P.2d 927, 930-31 (1985); Grace Drilling v. Board of Review, 776 P.2d 63, 68 (Utah Ct.App.1989).

[6] See Grace Drilling, 776 P.2d at 68. We note that prior to the repeal of Utah Code Ann. § 54-7-16 (1953) and the enactment of section 63-46b-16 (1989), an appellate court's review of an agency's findings of fact was limited to reversing only when the findings were arbitrary and capricious and "without foundation in fact." The agency's findings would be upheld if there was evidence of any substance whatever which could reasonably be regarded as supporting the finding. See, e.g., Utah Dep't of Admin. Serv. v. Public Serv. Comm'n, 658 P.2d 601, 608-09 (Utah 1983).

[7] See Cornish Town v. Koller, 758 P.2d 919, 922 (Utah 1988); Grace Drilling, 776 P.2d at 68.

[8] Article XIII, section 11 states in pertinent part:

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776 P.2d 63 (Utah App. 1989)

GRACE DRILLING COMPANY, Petitioner,

v.

BOARD OF REVIEW OF the INDUSTRIAL COMMISSION OF UTAH,

Department of Employment Security, and Gordon E.

Goodale, Respondents.

No. 880572-CA.

Court of Appeals of Utah.

June 2, 1989

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Frederick M. MacDonald, Salt Lake City, for petitioner.

R. Paul Van Dam and Alan Hennebold, Salt Lake City, for respondents.

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Before BILLINGS, GARFF, and JACKSON, JJ.

OPINION

BILLINGS, Judge:

Petitioner Grace Drilling Company appeals from the decision of the Board of Review of the Industrial Commission ("Board") awarding Gordon E. Goodale unemployment compensation benefits. The Board concluded Mr. Goodale was not discharged from his employment for disqualifying conduct under Utah Code Ann. § 35-4-5(b)(1) (1988). We affirm the Board's determination.

FACTS

We review only those facts relevant to the issues presented. In January 1988, Mr. Goodale was hired by Grace Drilling to work as a foreman on two of its oil drilling rigs in Uintah County, Utah. As a condition of employment, Mr. Goodale agreed to abide by Grace Drilling's safety manual, work rules, and regulations. Mr. Goodale also consented to submit to random drug testing. Both Grace Drilling's safety manual and the consent forms signed by Mr. Goodale clearly stated that testing positive on a drug screen while on duty was cause for discharge. Mr. Goodale acknowledged that he had read and understood the manual, drug policy, and consent form.

While at work on March 17, 1988, Mr. Goodale was randomly selected for drug testing. He voluntarily submitted a urine sample and executed another consent form. On the form, Mr. Goodale disclosed that he had been taking Advil within the past seven days. Mr. Goodale also verbally informed his supervisor that he had been taking two prescription drugs for lower back pain, the names of which he could not recall. He offered to go home to retrieve the names of the drugs, but Mr. Goodale's supervisor informed him that it was unnecessary. Instead, the supervisor informed Mr. Goodale that if the test results were positive, he would be given an opportunity to present the names of the other two drugs for Grace Drilling to consider. The drug test was conducted and Mr. Goodale's urine sample tested positive for marijuana. Mr. Goodale was discharged on March 24, 1988, without being given an opportunity to provide the names of the two prescription drugs he told his supervisor he had been using prior to the drug test.

Mr. Goodale filed for and was awarded unemployment benefits. Grace Drilling appealed the Department of Employment Security's initial determination by notice dated May 12, 1988. At the administrative hearing, Grace Drilling's representative had no personal knowledge of Mr. Goodale's drug test or the circumstances surrounding his discharge. Furthermore, the written test results were not offered into evidence, and Grace Drilling failed to call any witness who had administered the test or who was otherwise familiar with the testing procedures. Instead, Grace Drilling's representative merely testified as to what she had been told by others about Mr. Goodale's test results.

At the conclusion of the hearing, the appeal referee requested further information, including a copy of the test results which Grace Drilling agreed to provide. The record was left open for this purpose. However, Grace Drilling later advised the appeal referee that it would not provide the test report. Accordingly, the appeal referee affirmed the Department of Employment Security's initial disposition awarding Mr. Goodale benefits based on the available evidence in the record. Specifically, the appeal referee found that Grace Drilling failed to provide sufficient foundation to support the validity of a positive test result, and its hearsay testimony that Mr. Goodale tested positive was contested by sworn testimony. The appeal referee also found that Grace Drilling refused to verify the positive test

result or offer evidence negating the possibility that the prescription drugs reportedly taken by Mr. Goodale could have affected the outcome of the test. Accordingly, since no other reasons were given by Grace Drilling for terminating Mr. Goodale, the appeal referee concluded that he was entitled to unemployment benefits.

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Following the appeal referee's decision, Grace Drilling filed its appeal and submitted to the Board the written test report originally requested by the appeal referee. The Board refused to accept the proffered report stating that "[t]o consider such evidence would deny the claimant due process by depriving him of the right to challenge and rebut the information contained therein." The Board further concluded the appeal referee's decision was a correct application of the Utah Employment Security Act, supported by competent evidence, and therefore, affirmed the award of unemployment compensation benefits to Mr. Goodale.

Grace Drilling raises two issues in this appeal claiming, (1) there is substantial evidence that Mr. Goodale was terminated for just cause because he tested positive for drug use while on duty, and (2) the Board abused its discretion in refusing to consider the proffered test results.

STANDARDS OF REVIEW UNDER THE UTAH ADMINISTRATIVE PROCEDURES ACT

These proceedings were commenced after January 1, 1988, and thus our review is governed by Utah Code Ann. § 63-46b-16(4) (1988) of the Utah Administrative Procedures Act ("UAPA"). [1] Section 63-46b-16(4) governs judicial review of formal adjudicative proceedings and provides:

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 substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

Grace Drilling claims the Board's findings of fact are not supported by substantial evidence as required under § 63-46b-16(4)(g). No reported Utah case to date has directly addressed whether the UAPA modifies the standard for reviewing the Board's findings of fact previously utilized

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by Utah courts. Thus, the issue is one of first impression.

Standard for Reviewing the Board's Factual Findings Prior to the UAPA

Prior to the UAPA, the standards for reviewing administrative agency proceedings on appeal were a combination of specific statutory provisions governing judicial review of particular agency determinations, interpreted in light of "established principles governing judicial review of administrative agencies generally." See *Utah Dep't of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 607 (Utah 1983).

Utah Code Ann. § 35-4-10(i) (1988) (superseded by § 63-46b-16(4)(g)) set forth the standard for reviewing the Board's findings of fact and provided in relevant part:

In any judicial proceeding under this section, the findings of the commission and the board of review as to the facts if supported by evidence, are conclusive and the jurisdiction of the court is confined to questions of law.

One of the earlier Utah Supreme Court decisions interpreting this provision held the Board's findings of fact

will be affirmed "if there is evidence of any substance whatever which can reasonably be regarded as supporting the determination made...." *Kennecott Copper Corp. Employees v. Department of Employment Sec.*, 13 Utah 2d 262, 372 P.2d 987, 989 (1962). This standard has been followed on a number of occasions, including the Utah Supreme Court's landmark pronouncements concerning judicial review of administrative proceedings in *Utah Dep't of Admin. Servs. v. Public Serv. Comm'n*, 658 P.2d 601, 607-12 (Utah 1983). In Administrative Services, the court stated in dicta, "in reviewing decisions on unemployment compensation ... we have declared that we will sustain the findings of the Board if 'there is evidence of any substance whatever which can reasonably be regarded as supporting the determination made....' " Id. at 609 (quoting Kennecott Copper, 372 P.2d at 989) (emphasis in original). [2]

However, there are also a number of Utah decisions that, without elaboration, have used different terminology in discussing the applicable standard for reviewing the Board's findings of fact. For example, in Northwest Foods Ltd. v. Board of Review, 731 P.2d 470, 471 (Utah 1986), the Utah Supreme Court declared that the Board's findings of fact "are conclusive and binding, and are to be sustained if supported by competent and substantial evidence in the record." [3]

Notwithstanding these variations in terminology, under the UAPA, it is clear that the Board's findings of fact will be affirmed only if they are "supported by substantial evidence when viewed in light of the whole record before the court." Utah Code Ann. § 63-46b-16(4)(g) (1988). This "substantial evidence test" grants appellate courts greater latitude in reviewing the record than was previously granted under the Utah Employment Security Act's "any evidence of substance test."

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UAPA's "Substantial Evidence" Test [4]

Substantial evidence is "more than a mere 'scintilla' of evidence ... though 'something less than the weight of the evidence.' " *Idaho State Ins. Fund v. Hunnicutt*, 110 Idaho 257, 715 P.2d 927, 930 (1985) (quoting *Consolo v. FMC*, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966)). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' " Id. [5]

In applying the "substantial evidence test," we review the "whole record" before the court, and this review is distinguishable "from both a de novo review and the 'any competent evidence' standard of review." [6] Moreover, under the "whole record test," a court must consider not only the evidence supporting the Board's factual findings, but also the evidence that "fairly detracts from the weight of the [Board's] evidence." [7] It is also important to note that the "whole record test" necessarily requires that a party challenging the Board's findings of fact must marshall all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence. *Cf. Cornish Town v. Koller*, 758 P.2d 919, 922 (Utah 1988) (to mount an attack on a trial court's findings of fact "an appellant must marshall the evidence supporting the trial court's findings"). See also *Sampson v. Richins*, 770 P.2d 998, 1002 (Utah Ct.App.1989).

In undertaking such a review, this court will not substitute its judgment as between two reasonably conflicting views, even though we may have come to a different conclusion had the case come before us for de novo review. See *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 233 S.E.2d 538, 541 (1977). Cf. *Stegen v. Department of Employment Sec.*, 751 P.2d 1160, 1163 (Utah Ct.App.1988). It is the province of the Board, not appellate courts, to resolve conflicting evidence, and where inconsistent inferences can be drawn from the same evidence, it is for the Board to draw the inferences. *Board of Educ. of Montgomery County v. Paynter*, 303 Md. 22, 491 A.2d 1186, 1193 (1985).

TERMINATION FOR CAUSE

The Board concluded Grace Drilling failed to meet its burden of establishing

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Mr. Goodale was terminated from his employment for just cause as it did not establish he tested positive for drug use while on duty. Grace Drilling argues it met its burden through the proper application of Utah Code Ann. § 34-38-10(2)(a) (1988), which creates a rebuttable presumption in favor of the employer that drug test results are valid so long as certain testing procedure criteria are met as specified in § 34-38-6. [8] For purposes of discussion, we assume without deciding that the Utah Drug and Alcohol Testing statute, Utah Code Ann. §§ 34-38-1 to -15 (1988), applies to administrative hearings such as the one before us, but nevertheless, we find Grace Drilling's reliance on its provisions misguided.

Grace Drilling argues that it complied with the statutory requirements and therefore, Mr. Goodale was terminated for cause because he failed to rebut the presumption that he tested positive for marijuana while on duty. However, based on the Board's findings of fact, Grace Drilling failed to demonstrate that its testing procedures met the enumerated criteria set forth in § 34-38-6. For example, § 34-38-6(3)(b) requires that an employee be given an opportunity to

provide information concerning any prescription drugs presently or previously taken. The Board found that at the time Mr. Goodale was tested, he was using two unidentified prescription drugs and was not given an opportunity to identify the drugs before he was discharged.

More importantly, Grace Drilling failed to demonstrate that its testing procedures "conform[ed] to scientifically accepted analytical methods and procedures." See § 34-38-6(5). The only testimony offered by Grace Drilling to meet the statutory requirement was the hearsay testimony of its office manager who admitted she had no personal knowledge of the testing procedures or test results, and who, therefore, clearly was not qualified to provide the necessary foundation for receiving the positive test results into evidence. Conversely, Mr. Goodale's sworn testimony states that he had not used marijuana while working for Grace Drilling and that he had been taking two unknown prescription drugs which conceivably could have affected the test results.

In sum, there was simply no competent evidence before the Board entitling Grace Drilling to the statutory presumption. Neither was there competent evidence demonstrating that Mr. Goodale tested positive for marijuana while on duty. The office manager's hearsay testimony, standing alone, could not provide a basis to establish Mr. Goodale tested positive. See, e.g., *Mayes v. Department of Employment Sec.*, 754 P.2d 989, 992 (Utah Ct.App.1988) (findings cannot be based entirely on hearsay evidence). Accordingly, we find no error in refusing to grant Grace Drilling the statutory presumption set forth in § 34-38-10(2)(a). In the absence of any

competent evidence demonstrating that Mr. Goodale tested positive for marijuana while on duty, and in light of Mr. Goodale's sworn testimony to the contrary, the Board's conclusion that Mr. Goodale was not terminated for disqualifying conduct under the Employment Security Act is supported by substantial evidence in the record.

COMMISSION'S REFUSAL TO CONSIDER PROFFERED TEST RESULTS

We next address Grace Drilling's claim the Board abused its discretion [9] in refusing to reopen the record to consider the proffered test results which allegedly demonstrated that Mr. Goodale had tested positive for marijuana. Grace Drilling concedes it refused to submit the test results at the administrative hearing but claims it was trying to avoid confidentiality problems and protect Mr. Goodale's privacy interests. We are not persuaded by Grace Drilling's argument.

First, it is undisputed that Mr. Goodale was discharged solely because he tested positive for illegal drugs while on duty. It reasonably follows that the test results were crucial to Grace Drilling's burden of establishing that Mr. Goodale was discharged for "just cause." Grace Drilling was given two opportunities to present the results and lay the appropriate foundation for receiving them into evidence. Grace Drilling declined on both occasions, and its post-hearing confidentiality justification simply is not persuasive as the appeal referee could have taken the appropriate precautions to protect the confidentiality of the report.

In short, the test results were clearly available at the time of the hearing and the Board so noted. The Board declined to consider the test results stating to do so would have deprived Mr. Goodale of the opportunity to rebut or cross-examine. We agree. Elementary fairness in unemployment compensation adjudications includes a party's right to see adverse evidence and be afforded an opportunity to rebut such evidence. See, e.g., *Lanier-Brugh, Inc. v. Industrial Comm'n*, 761 P.2d 572, 575-76 (Utah Ct.App.1988). Grace Drilling argues that Mr. Goodale could be given an opportunity to challenge the results if the matter were merely remanded to the appeal referee to take additional evidence. However, we do not believe granting parties "three bites at the apple" is consonant with efficient administrative procedure. Grace Drilling had ample opportunity to present its case and failed to meet its burden. We hold the Board did not abuse its discretion in refusing to consider the test results.

Based on the foregoing, the Board's order granting Mr. Goodale unemployment compensation benefits is affirmed.

GARFF and JACKSON, JJ., concur.

Notes:

[1] See Utah Code Ann. §§ 63-46b-1 to -22 (1988 Supp.). Section 63-46b-22(1) provides that the UAPA applies to "all agency adjudicative proceedings commenced by or before an agency on or after January 1, 1988...." Additionally, § 63-46b-1(1)(b) provides, with our emphasis, that the UAPA governs judicial review of agency actions "[e]xcept as set forth in Subsection (2), and except as otherwise provided by a statute superseding provisions of [UAPA] by explicit reference to [UAPA]...." The Utah Employment Security Act has no such superseding provisions concerning judicial review, and therefore our review is governed by § 63-46b-16(4). We also note that the UAPA is substantially similar to the Uniform Model State Administrative Procedure Act (1981), 14 U.L.A. 69 (1988) ("MSAPA"). See Utah A.P.A. 1988-89, comments of the

Utah Administrative Law Advisory Committee at 10 (April 25, 1988). Specifically, § 63-46b-16(4)(a)-(h) "are patterned after the comparable provisions in the MSAPA (Sections 5-116(c)(1) through 5-116(c)(8))." Utah A.P.A.1988-89, supra, at 15.

[2] See also, e.g., West Jordan v. Department of Employment Sec., 656 P.2d 411, 413 (Utah 1982) (findings of fact are conclusive "if supported by evidence of any substance"); Taylor v. Department of Employment Sec., 647 P.2d 1, 1 (Utah 1982). Accord Grinnell v. Board of Review, 732 P.2d 113, 115 (Utah 1987) (per curiam); Terminal Serv. Co. v. Board of Review, 714 P.2d 298, 299 (Utah 1986) (per curiam); Mayes v. Department of Employment Sec., 754 P.2d 989, 991 (Utah Ct.App.1988); Jim Whetton Buick v. Department of Employment Sec., 752 P.2d 358, 360 (Utah Ct.App.1988); Stegen v. Department of Employment Sec., 751 P.2d 1160, 1162 (Utah Ct.App.1988).

[3] See also, e.g., Covington v. Board of Review, 737 P.2d 207, 209 (Utah 1987) (findings must be supported by "substantial evidence"); Salt Lake City Corp. v. Department of Employment Sec., 657 P.2d 1312, 1315 (Utah 1982); *Stegen v. Department of Employment Sec.*, 751 P.2d 1160, 1163 (Utah Ct.App.1988) (we affirm Board's findings if they have "substantial support in the record," citing Northwest Foods, 731 P.2d at 471); Chrysler Dodge Country v. Department of Employment Sec., 751 P.2d 278, 281 (Utah Ct.App.1988).

[4] See, supra, note 1. In the absence of Utah authority interpreting provisions of the MSAPA, we turn to those jurisdictions with similar provisions for guidance.

[5] See also Hockaday v. D.C. Dep't of Employment Servs., 443 A.2d 8, 12 (D.C.1982); Board of Educ. of Montgomery County v. Paynter, 303 Md. 22, 491 A.2d 1186, 1193 (1985); Wright v. State Real Estate Comm'n, 208 Neb. 467, 304 N.W.2d 39, 44 (1981); Cook v. Employment Div., 47 Or.App. 437, 614 P.2d 1193, 1195 (1980); Sweet v. State Technical Inst. at Memphis, 617 S.W.2d 158, 161 (Tenn.Ct.App.1981); Roberts v. Employment Sec. Comm'n of Wyoming, 745 P.2d 1355, 1357 (Wyo.1987).

[6] Thompson v. Wake County Bd. of Educ., 292 N.C. 406, 233 S.E.2d 538, 541 (1977) (citing Universal Camera Corp. v. N.L.R.B., 340 U.S. 474, 71 S.Ct. 456, 95 L.Ed. 456 (1951)). Accord Guntharp v. Cobb County, Georgia, 168 Ga.App. 33, 307 S.E.2d 925, 927 (1983) (decision supported by some or any evidence rule does not mean the decision was supported by "substantial evidence"); Midstate Oil Co. v. Missouri Comm'n on Human Rights, 679 S.W.2d 842, 846 (Mo.1984) (substantial evidence test is different than "some" evidence test).

[7] Thompson, 233 S.E.2d at 541. See also, e.g., Seven Islands Land Co. v. Maine Land Use Regulation Comm'n, 450 A.2d 475, 479 (Me.1982); Beebee v. Haslett Pub. Schools, 406 Mich. 224, 278 N.W.2d 37, 39-40 (1979); Lackey v. North Carolina Dep't of Human Resources, 306 N.C. 231, 293 S.E.2d 171, 176 (1982).

This requirement most distinguishes the "substantial evidence test" from the "any evidence rule." Under the latter test, a court's limited review was qualitative in that it only considered whether there was any competent evidence in the record supporting the Board's determination. In essence, courts reviewed only that portion of the record supporting the Board's findings. In contrast, the "substantial evidence test" is both a qualitative and "quantitative" inquiry. We now review both sides of the record to determine whether the Board's findings are supported by substantial evidence. See generally In re Southview Presbyterian Church, 62 N.C.App. 45, 302 S.E.2d 298, 299 (1983) (substantial evidence test requires court to consider contradictory evidence, and the evidence required to support agency determination "is greater than that required under the 'any competent evidence' standard of review").

[8] Section 34-38-6, entitled "Requirements for collection and testing," provides as follows:

All sample collection and testing for drugs and alcohol under this chapter shall be performed in accordance with the following conditions:

(1) The collection of samples shall be performed under reasonable and sanitary conditions;

(2) Samples shall be collected and tested with due regard to the privacy of the individual being tested, and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;

(3) Sample collection shall be documented, and the documentation procedures shall include:

(a) labeling of samples so as reasonably to preclude the probability of erroneous identification of test results; and

(b) an opportunity for the employee or prospective employee to provide notification of any information which he considers relevant to the test, including identification of currently or recently used prescription or nonprescription drugs, or other relevant medical information.

(4) Sample collection, storage, and transportation to the place of testing shall be performed so as reasonably to preclude the probability of sample contamination or

adulteration; and

(5) Sample testing shall conform to scientifically accepted analytical methods and procedures. Testing shall include verification or confirmation of any positive test result by gas chromotography, gas chromotography-mass spectroscopy, or other comparably reliable analytical method, before the result of any test may be used as a basis for any action by an employer under Section 34-38-8.

[9] Compare Utah Code Ann. § 63-46b-16(4)(h)(i) (1988) with Utah Admin R. 475-10d-3(2) (1987-88).

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2008 UT App 391

PETRO-HUNT, LLC, Petitioner,

v.

DEPARTMENT OF WORKFORCE SERVICES, DIVISION OF ADJUDICATION, Workforce Appeals Board, and Bambi Elliot, Respondents.

No. 20080002-CA.

Court of Appeals of Utah.

October 30, 2008

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Rick D. Roskelley and Littler Mendelson, Las Vegas, Nevada, for Petitioner.

Geoffrey T. Landward, Salt Lake City, for Respondents.

Before Judges GREENWOOD, BENCH, and BILLINGS.

OPINION

GREENWOOD, Presiding Judge:

¶ 1 Petitioner Petro-Hunt, LLC (Petro-Hunt) appeals the Workforce Appeals Board's (Appeals Board) conclusion that Bambi Elliot was a Petro-Hunt employee, not an independent contractor, and her wages are therefore subject to unemployment insurance taxes. We affirm.

BACKGROUND

¶ 2 Elliot worked for Petro-Hunt, an oil and gas exploration company, from approximately September 2005 to January 2006. While working for Petro-Hunt, Elliot " generally performed work that fit within the duties of landmen." In the oil and gas industry, landmen typically assist companies with acquiring land and mineral leases, performing due diligence on those leases, and performing other lease-related assignments. Landmen can be company employees, conducting most of their work at the company site, or " contract landmen," performing most of their duties out in the field and at local courthouses. This case calls into question whether Elliot was a company landman or a contract landman.

¶ 3 Prior to working for Petro-Hunt, Elliot performed landman services for two other companies, Hingeline Land and Title (Hingeline) and Bowman and Associates (Bowman). Bowman had contracted to provide landman services for Petro-Hunt; however, in September 2005, Petro-Hunt canceled the Bowman contract. At approximately the same time, Petro-Hunt hired several of Bowman's employees, including Elliot. Elliot was specifically hired by Petro-Hunt to work on the Paradise Leases, an endeavor that was projected to last one year.[1] Under the terms of her contract with Petro-Hunt, Elliot received $200 per day in compensation, $15 per day as a per diem, and 44.5¢ per mile for all miles driven with her personal car. The contract categorized Elliot as a broker and independent contractor, and contained confidentiality

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and non-compete clauses. Petro-Hunt did not withhold any taxes for Elliot and provided her with 1099 independent contractor tax forms.

¶ 4 As part of her responsibilities for Petro-Hunt, Elliot was expected to perform due diligence on the Paradise Leases. She reviewed lease title documents and records, completed data entry, compiled reports and spreadsheets, filed documents, made copies, and answered phones and emails. She worked in the company's office in Ephraim, Utah, during regular business hours, working approximately forty to sixty hours a week. To complete her assignments, Elliot worked primarily from her own laptop computer, on which she " assimilated, consolidated, and organized the data and reports submitted by the field landmen." While she was with Petro-Hunt, Elliot did not advertise her services and she " did not indicate she wished to obtain any other clients because she was working full-time for Petro-Hunt."

¶ 5 At the close of the Paradise Leases project, in January 2007, Elliot was released from her employment with Petro-Hunt. She worked for Baseline, another oil and gas company, for approximately three months, then filed for unemployment compensation in April 2007. Robert Goodwin, a field auditor for the Utah Department of Workforce Services, investigated the status of Elliot's employment, and in the spring of 2007, concluded that Elliot " performed a personal service for Petro-Hunt," the service she provided constituted " covered employment," and, thus, Petro-Hunt was required to pay unemployment

insurance taxes for the wages it had paid to Elliot.

¶ 6 Petro-Hunt appealed Goodwin's decision, and on September 6, 2007, an administrative law judge (ALJ) presided over a hearing on the matter. Two days prior to the hearing, Petro-Hunt filed a motion seeking a continuance and permission to conduct discovery " in the form of interrogatories, requests for the production of documents and a deposition of [Elliot]." The ALJ denied Petro-Hunt's motion and proceeded with the hearing.

¶ 7 After the September hearing, the ALJ issued findings of fact and conclusions of law, in which she determined that Elliot provided covered employment services for Petro-Hunt and, accordingly, the wages Petro-Hunt paid to Elliot were subject to unemployment insurance taxes. Petro-Hunt appealed the ALJ's decision to the Appeals Board. After additional briefing, the Appeals Board unanimously affirmed the ALJ's decision. Petro-Hunt appeals.

ISSUES AND STANDARDS OF REVIEW

¶ 8 Petro-Hunt argues that by denying its motion for formal discovery and a continuance, the Appeals Board violated its right to due process " and [its] ability to prepare and conduct a defense." While Petro-Hunt categorizes this discovery issue as a constitutional question, the proper standard of review for the Appeals Board's discovery ruling is abuse of discretion. *See* Utah Code Ann. § 63G-4-403 (Supp.2008) (stating that appellate court shall grant relief if, among other reasons, " the agency action is ... an abuse of the discretion delegated to the agency by statute"); *cf.Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co.*, 846 P.2d 1245, 1255 (Utah 1992) (holding that administrative agency " acted arbitrarily and capriciously in denying petitioners' request for discovery").

¶ 9 Petro-Hunt also asserts that the Appeals Board erred by refusing to adopt Texas law that classifies landmen as independent contractors and by failing to properly apply " principles of Utah law" regarding independent contractor professions. And finally, Petro-Hunt challenges the Appeals Board's ultimate conclusion that Elliot was a Petro-Hunt employee as opposed to an independent contractor. " This court will reverse the Board's ultimate determination [on whether Elliot was an employee or an independent contractor], and upset its intermediate conclusions, only if we conclude they are irrational or unreasonable." *Tasters Ltd., v. Department of Employment Sec.*, 863 P.2d 12, 19 (Utah Ct.App.1993).

ANALYSIS

I. Due Process

¶ 10 Petro-Hunt argues that it was denied due process because the Appeals Board refused

to allow it the opportunity to conduct formal discovery. Its argument is based on the following two principles: First, that entities subject to an administrative hearing have " a due process right to receive a fair trial in front of a fair tribunal," and second, that " the modern rules of civil procedure were developed and subsequently adopted by each level of the judiciary from federal and state courts *to administrative agencies.* " (Emphasis added.) As discussed below, neither of these two principles support Petro-Hunt's assertion of error.

¶ 11 While it is true that " every person who brings a claim ... at a hearing held before an administrative agency has a due process right to receive a fair trial in front of a fair tribunal," *Bunnell v. Industrial Comm'n,* 740 P.2d 1331, 1333 (Utah 1987), we cannot say that this fairness requirement necessarily includes a constitutional right to formal discovery in administrative proceedings. *Cf.Salt Lake Citizens Congress,* 846 P.2d at 1255 (holding that administrative agency " acted arbitrarily and capriciously in denying petitioners' request for discovery"). *But seeSims v. National Transp. Safety Bd.,* 662 F.2d 668, 671-72 (10th Cir.1981) (noting that some " [c]ircuits have expressed the view that judicially reversible unfairness may result from a denial of discovery"). " At a minimum," the procedural fairness mandate requires " '[t]imely and adequate notice and an opportunity to be heard in a meaningful way.' " *In re Worthen,* 926 P.2d 853, 876 (Utah 1996) (alteration in original) (quoting *Nelson v. Jacobsen,* 669 P.2d 1207, 1211 (Utah 1983)). And while due process requirements are " ' flexible and call [ ] for the procedural protections that the given situation demands,' " *id.* (quoting *Labrum v. Utah State Bd. of Pardons,* 870 P.2d 902, 911 (Utah 1993)), we see no constitutional right, either implied or explicit, to formal discovery in administrative proceedings. *AccordBeaver County v. Utah State Tax Comm'n,* 916 P.2d 344, 352 (Utah 1996) (" [D]iscovery in administrative proceedings is available only if governing statutes or agency rules so provide."); *Sims,* 662 F.2d at 671 (" ' There is no basic constitutional right to pretrial discovery in administrative proceedings.' " (quoting *Silverman v. Commodity Futures Trading Comm'n,* 549 F.2d 28, 33 (7th Cir.1977))); *State ex rel. Hoover v. Smith,* 198 W.Va. 507, 482 S.E.2d 124, 134 (1997) (" Generally, there is no constitutional right to pre-hearing discovery in administrative proceedings."); 2 Am.Jur.2d *Administrative Law* § 327 (1994) (" There is no constitutional right to pretrial discovery in administrative proceedings.").

¶ 12 Perhaps the flaw in Petro-Hunt's argument stems from its misconception that Utah's administrative agencies have formally adopted the Utah Rules of Civil Procedure.[2] This

is, however, not the case. Instead, the Utah Administrative Procedures Act (UAPA) provides that in formal adjudicative proceedings, administrative agencies " may, by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses." Utah Code Ann. § 63G-4-205(1) (Supp.2008). And only if an agency chooses not to craft its own discovery rules do the Utah Rules of Civil Procedure apply. *See id.* (" If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure.").

¶ 13 In this instance, it is clear that the Department of Workforce Services has specifically adopted administrative rules that govern discovery procedures for unemployment insurance proceedings. *See* Utah Admin. Code R994-508-108. Rule R994-508-108 of the Utah Administrative Code states that formal discovery is only appropriate in limited circumstances:

(2) The use of formal discovery procedures in unemployment insurance appeals proceedings [is] rarely necessary and tend[s] to increase costs while delaying decisions. Formal discovery may be allowed for unemployment insurance hearings *only if so directed by the ALJ and*

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when each of the following elements is present:

(a) informal discovery is inadequate to obtain the information required;

(b) there is no other available alternative that would be less costly or less intimidating;

(c) it is not unduly burdensome;

(d) it is necessary for the parties to properly prepare for the hearing; and

(e) it does not cause unreasonable delays.

Id. R. R994-508-108(2) (emphasis added). Thus, in lieu of crafting an explicit right to formal discovery in unemployment insurance proceedings, the Department of Workforce Services has determined that the party requesting formal discovery has the burden to establish that certain factors have been met before its request will be granted, and the Appeals Board has the discretion to determine if the requesting party has met its burden. Based on this statutory scheme, we conclude that there is no constitutional right to formal discovery in unemployment insurance proceedings.

¶ 14 Further, as Petro-Hunt conceded at oral argument, it does not challenge this overall statutory scheme; rather, it only challenges the Appeals Board's ultimate conclusion on a constitutional basis. Although Petro-Hunt could have challenged the Appeals Board's denial of formal discovery as an abuse of discretion, it has not done so. *See generally* Utah Code Ann. § 63G-4-403(4)(h)(i) (stating relief may be obtained if the agency has abused its discretion). Nevertheless, in order to address the issue of fairness raised by Petro-Hunt, we note the following. In its request for formal discovery, Petro-Hunt cited the aforementioned rule and then provided a bald assertion that formal discovery was appropriate. More precisely, Petro-Hunt reiterated the factors that must be met for formal discovery to be allowed and then stated that " [e]ach of these factors is met here." Petro-Hunt, however, failed to provide any details of how each requirement was actually met. In spite of Petro-Hunt's terse argument, the Appeals Board made findings on each of the rule's requirements before concluding that formal discovery was inappropriate. The Appeals Board specifically concluded that: (1) " [t]here is no evidence in the record establishing informal discovery was inadequate to obtain the information Petro-Hunt was seeking, or that [Elliot] was uncooperative with Petro-Hunt's informal requests, if there were any" ; (2) " Petro-Hunt has not shown ... that there were no other available alternatives beyond interrogatories, requests for production, and [Elliot] traveling to Las Vegas to have her deposition taken" ; (3) Petro-Hunt's requests were costly and intimidating, would have significantly delayed the hearing, and been unduly burdensome for Elliot, " especially ... considering that [Elliot] received Petro-Hunt's discovery requests" only a few days before the scheduled hearing; (4) Elliot had testified regarding all of the factors used to determine if she was an employee or an independent contractor and there was no evidence presented to indicate that she had lied; (5) although Petro-Hunt was requesting Elliot's tax returns, the ALJ had already requested the same, and Elliot testified that she could not find them, thus, formal requests for the returns were not likely to have produced a different result; and (6) Petro Hunt was provided " a full opportunity to see the evidence presented against it, to call and examine its own witnesses, and to cross-examine witnesses who testified against it."

¶ 15 In challenging the Appeals Board's denial of its request for formal discovery, Petro-Hunt identifies no evidence indicating that informal discovery procedures were inadequate, that there were no less costly or intimidating means available to gain access to the desired information, or that the requests would not have caused unreasonable delay. Instead, Petro-Hunt merely argues that it was prevented from presenting evidence that independent landmen " have been traditionally engaged by the oil and gas industry on an independent contract basis" and that

Elliot " conducted and continues to conduct an independently established trade and occupation as a broker of oil, gas and mineral leases." Petro-Hunt also asserts that it was denied the opportunity to request Elliot's tax returns to establish that Elliot " was engaged as an independent contractor for other companies."

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However, even assuming that Petro-Hunt's assertions are true, Petro-Hunt is not alleviated from the obligation to establish that informal discovery procedures were inadequate to obtain the desired information. Because Petro-Hunt does not present any evidence indicating that it attempted to obtain this information through informal procedures, or that it met the additional requirements for formal discovery, we determine that there was no abuse of discretion in the Appeals Board's decision to deny Petro-Hunt's request for formal discovery. Moreover, we believe that Petro-Hunt was provided a fair hearing under the circumstances.

II. Texas and Utah Law Regarding Landmen

¶ 16 Petro-Hunt next argues that the Appeals Board erred as a matter of law by refusing to adopt a Texas statute which generally defines landmen as independent contractors, and by refusing to recognize Utah precedent that automatically recognizes members of certain professions as independent contractors. As a basis for its Texas law argument, Petro-Hunt asserts that where Utah law is silent on a matter, i.e., contains no regulations regarding independent landmen, we should look to the law of sister states, such as Texas, as persuasive authority. This argument, however, is unpersuasive because even though Utah law does not address landmen specifically, it clearly requires tribunals to examine the facts of each case and analyze specific factors when determining whether an individual is an independent contractor or an employee for purposes of unemployment compensation.

¶ 17 More specifically, Utah Code section 35A-4-204 states that an individual performing services for wages under a contract of hire is considered an employee

unless it is shown to the satisfaction of the division that:

(a) the individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the contract of hire for services; and

(b) the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's contract of hire and in fact.

Utah Code Ann. § 35A-4-204(3) (Supp.2008). Further, administrative rule R994-204-303 lists several factors that should be analyzed to determine if these two statutorily required circumstances exist. *See generally* Utah Admin. Code R994-204-303.

¶ 18 The administrative code goes on to explain that when making an employee/independent contractor determination, the facts of each case should be given " [s]pecial scrutiny" and " [t]he factors listed in ... [the administrative code] are intended only as aids in the analysis of the facts of each case. The degree of importance of each factor varies depending on the service and the factual context in which it is performed." *Id.* Based on this statutory authority, we reject Petro-Hunt's notion that Utah statutory law mandates categorizing landmen as independent contractors in favor of recognizing that Utah law requires a specific inquiry into the facts present in each case when making an independent contractor determination. Thus, we further conclude that the Appeals Board acted rationally and reasonably in refusing to adopt a Texas statute which generally categorizes landmen as independent contractors. [3]

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¶ 19 For similar reasons, we also reject Petro-Hunt's argument that the Appeals Board erred by not adopting " long established Utah precedent" recognizing that individuals engaged in certain " independently established trades were *not* ' employees' of the companies they contracted with." First, the case to which Petro-Hunt refers fails to support the proposition that persons engaged in certain professions automatically qualify as independent contractors. In fact, in *North American Builders, Inc. v. Unemployment Compensation Division,* 22 Utah 2d 338, 453 P.2d 142 (1969), the Utah Supreme Court examined the specific facts of the case, including the administrative code factors discussed above, to determine whether the individual was an employee or an independent contractor. *Seeid.* at 143-45. The court made no generalizations about certain professions and we decline to adopt that practice here.

III. The Appeals Board's Independent Contractor Conclusion

¶ 20 Finally, Petro-Hunt challenges the Appeals Board's conclusion that Elliot was an employee because, as Petro-Hunt asserts, Elliot was customarily engaged in an independently established trade and Petro-Hunt " did not have the right of or exercise direction or control over Elliot's services." As previously stated, we will uphold the Appeals Board's decision that Elliot was an employee and not an independent contractor as long as we determine that the decision was reasonable and rational. *SeeTasters Ltd. v. Department of Employment Sec.,* 863 P.2d 12, 19 (Utah

Ct.App.1993). To determine if the Appeals Board's decision is reasonable and rational, we apply the substantial evidence test, which requires us to examine " all of the evidence supporting the Board's findings and [determine whether,] despite the supporting facts and all reasonable inferences that can be drawn therefrom, the findings are not supported by substantial evidence given the record as a whole." *Id.* Granting what the supreme court has referred to as " maximum deference," we will uphold the basic facts the Appeals Board relied on in reaching its ultimate conclusion " if there is evidence of any substance that can reasonably be regarded as supporting the determination made." *Allen & Assocs. v. Board of Review,* 732 P.2d 508, 508-09 (Utah 1987) (per curiam).

¶ 21 In examining the Appeals Board's conclusion, we begin with the proposition that Utah law presumes that individuals performing services for wages are employees " unless it is shown to the satisfaction of the division that: (a) the individual is customarily engaged in an independently established trade ...; *and* (b) the individual has been and will continue to be free from control or direction." Utah Code Ann. § 35A-4-204(3)(a)-(b) (emphasis added). To assist a tribunal with making a determination on both of these requirements, the administrative code lists several factors that tribunals should consider. *See* Utah Admin. Code R994-204-303(1)(b). The rules make clear, however, that " [t]he factors ... are intended only as aids in the analysis of the facts of each case." *See id.* R. R994-204-303.

¶ 22 In this case, the Appeals Board analyzed first whether Elliot was " customarily engaged in an independently established trade." Utah Code Ann. § 35A-4-204(3) (Supp.2008). After concluding that inquiry in the negative, the Appeals Board declined to examine whether Elliot was free from control or direction. The Appeals Board reasoned that because the statute's requirements for a finding of independent contractor status are conjunctive, a determination that the first requirement was not met negates the obligation to analyze the second requirement. On appeal, Petro-Hunt challenges the Appeals Board's ultimate conclusion that Elliot was an employee, not an independent contractor, as well as the Appeals Board's decision not to examine the second independent contractor requirement, i.e., whether Elliot was free from control or direction.

¶ 23 While Petro-Hunt takes issue with the Board's conclusion under each factor, it does not identify any disregarded evidence, but rather, " relies only upon its view of the evidence before the administrative tribunals." *Allen & Assocs.,* 732 P.2d at 508. Thus, we explore each factor the Appeals Board addressed to determine if the conclusion that

Elliot was a Petro-Hunt employee is, in fact, supported by the evidence to the extent that the Appeals Board's ultimate conclusion is reasonable and rational.

A. The Factors

¶ 24 Under the first factor, " Separate Place of Business," Utah Admin. Code R994-204-303(1)(b)(i), the Appeals Board examined whether Elliot " has a place of business separate from that of the employer." *Id.* Based on the evidence presented, the Appeals Board ruled that the evidence weighed in favor of employment. In reaching this finding, the Appeals Board relied on Elliot's testimony in which she indicated that she performed all of her Petro-Hunt responsibilities in the company's office during normal business hours, she worked forty to sixty hours a week, and she did not maintain a separate place of business. Petro-Hunt argues that the Appeals Board should have concluded differently under this factor because the only evidence before it was Elliot's self-serving testimony and Petro-Hunt did not have an opportunity to discover if Elliot was lying. This argument, however, is unavailing because Petro-Hunt cross-examined Elliot and had an opportunity to present its own evidence on this issue. Without any evidence to indicate otherwise, we uphold the Appeals Board's conclusion that Elliot did not maintain a separate place of business.

¶ 25 Under the second factor, " Tools and Equipment," *id.* R. R994-204-303(1)(b)(ii), the Appeals Board declined to rule in favor of one party or the other. It concluded that the evidence was " neutral" because both parties had provided a similar amount of equipment, i.e., Elliot provided a laptop and software while Petro-Hunt provided items such as a copier, fax, and printer. Petro-Hunt disputes the Appeals Board's conclusion under this factor, asserting that computers and software are expensive and thus, the evidence under this factor " weighed heavily in favor of independent contractor status." We decline, however, to disturb the Appeals Board's determination, especially considering the fact that it is undisputed that both parties provided some office equipment.

¶ 26 The third factor, " Other Clients," *id.* R. R994-204-303(1)(b)(iii), addresses whether " [t]he worker regularly performs services of the same nature for other customers or clients and is not required to work exclusively for one employer." *Id.* Under this factor, the Appeals Board admittedly stated that " the facts on this issue are unclear," but ultimately determined that the evidence weighed in favor of employment. The Appeals Board relied on Elliot's testimony that she " did not have any other clients besides Petro-Hunt" as well as the fact that Elliot's contract contained a " non-compete clause, which she believed prevented her from performing similar services to any other client for a period of 12 months." The Appeals Board was also persuaded by Elliot's testimony indicating that her two

previous employers issued her W-2 tax forms instead of 1099 forms.

¶ 27 Petro-Hunt attacks the Appeals Board's conclusion under this factor on the basis that " Elliot admitted to performing landman services for three other brokerage companies, including [Hingeline, Bowman, and Baseline]," and while working for Petro-Hunt, " Elliot was not required to work full time and was permitted to work as much or as little as she wished." However, neither of these two arguments are compelling because Elliot testified that she worked for Hingeline and Bowman prior to working for Petro-Hunt and afterwards, she worked for Baseline. The Appeals Board found Elliot's testimony was credible, and Petro-Hunt provides no contradictory evidence to cast doubt on her assertions. Moreover, regarding Elliot's hourly work requirements, the Appeals Board is required to base its determination on the circumstances as they existed at the time of employment, not on those that could have existed given the terms of the contract. *SeeMcGuire v. Department of Employment Sec.*, 768 P.2d 985, 989 (Utah Ct.App.1989). The only evidence presented on this issue indicates that, regardless of the terms of her contract, Elliot worked between forty and sixty hours a week, during normal business hours, inside the company's Ephraim, Utah office. Again, Petro-Hunt fails to present any evidence to contradict Elliot's testimony. Because we conclude that the Appeals

Board's finding under this factor is supported by the evidence, we will not disturb its determination that this factor weighed in favor of employment.

¶ 28 The fourth factor calls into question whether " [t]he worker can realize a profit or risks a loss from expenses and debts incurred through an independently established business activity." Utah Admin. Code R994-204-303(1)(b)(iv). Here, the Appeals Board determined that " [Elliot] had very little overhead" ; she worked in an office that Petro-Hunt had leased; she was reimbursed for travel; other than a computer, she was provided with all necessary office equipment; and all the money she received was pure profit with no accompanying risk of loss. Based on this evidence, the Appeals Board determined that the facts under this factor weighed in favor of employment. On appeal, Petro-Hunt tersely asserts that the Appeals Board " ignored evidence of how Ms. Elliot was paid and the underlying legal agreement between [the two parties]," which allowed Elliot to " have hired helpers, control[ ] her costs and take[ ] on additional work." However, even if Petro-Hunt's allegations were true, it fails to establish how these facts undermine the Appeals Board's conclusion that at the time Elliot was employed by Petro-Hunt, she had no risk of loss nor could she realize a profit.

¶ 29 Under the fifth factor, " Advertising," *id.* R. R994-204-303(1)(b)(v), Petro-Hunt asserts only that the Appeals Board " erroneously focused its attention on what Ms. Elliot chose not to do rather than on the legal rights she had in her business relationship with Petro-Hunt." Notwithstanding Elliot's potential right to advertise her services, " the appropriate inquiry" examines the facts as they existed at the time of employment, not what could have been. *SeeMcGuire,* 768 P.2d at 988. Thus, we conclude that Petro-Hunt's argument under this factor is unavailing.

¶ 30 Because Petro-Hunt concedes that the sixth factor is inapplicable in this case, the only factor left to address is the seventh, which examines business records and tax forms. *See* Utah Admin. Code R994-204-303(1)(b)(vii). Here, the Appeals Board took note of the fact that Petro-Hunt paid Elliot as an independent contractor, issuing her a 1099 tax form. It further noted that this factor " generally weighs in favor of independent contractor status, though it is not determinative by itself." Petro-Hunt argues that the Appeals Board's finding under this factor was wrong, and it should have been able to conduct discovery of Elliot's tax forms. However, given that Elliot admitted to filing a 1099 in relation to her employment with Petro-Hunt, and her testimony that she was unable to locate the forms in question, there is no indication that such discovery would have provided any benefit to Petro-Hunt, especially given the Appeals Board's determination that this factor weighed in favor of independent contractor status.

¶ 31 After examining each factor individually, the Appeals Board determined that " [a]t the time the services were rendered, [Elliot] was not engaged in an independently established trade or profession." Based on this conclusion, the Appeals Board declined to analyze the additional independent contractor requirement, that " the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's contract of hire and in fact." Utah Code Ann. § 35A-4-204(3)(b) (Supp.2008). Petro-Hunt argues that this was reversible error. We, however, disagree. To establish that an individual is an independent contractor, Petro-Hunt must show both that Elliot was engaged in an independently established trade *and* that she was free from control or direction over her services. *Seeid.* § 35A-4-204(3)(a)-(b). Because the Appeals Board concluded that Petro-Hunt failed to establish that Elliot was engaged in an independently established trade, and we see no error in that conclusion, we agree with the Appeals Board that it was not required to analyze whether Elliot was free from control or direction.

CONCLUSION

¶ 32 We conclude that the Appeals Board's discovery ruling does not present a constitutional question, but rather, a procedural

question, reviewed for abuse of discretion. Further, we see no error in the Appeals Board's conclusion that Petro-Hunt failed to establish that formal discovery procedures were necessary. We also conclude that the Appeals Board did not err in failing to adopt a Texas statute addressing independent landmen or Utah precedent categorizing certain types of workers as independent contractors. And finally, we affirm the Appeals Board's ultimate conclusion that Elliot was a Petro-Hunt employee, not an independent contractor, on the basis that the Appeals Board's decision is reasonable and rational.

¶ 33 I CONCUR: JUDITH M. BILLINGS, Judge.

¶ 34 I CONCUR EXCEPT AS TO SECTION I, IN WHICH I CONCUR ONLY IN THE RESULT: RUSSELL W. BENCH, Judge.

Notes:

[1] Petro-Hunt refers to Elliot as a landman, while Elliot refers to herself as a land administrator. Because the Appeals Board focused on the substance of her work and not her title, this distinction is likely irrelevant. Nonetheless, Elliot testified that there is a distinction between the two because landmen go out into the field while land administrators work in an office.

[2] We do not mean to imply that there is a constitutional right to discovery where administrative agencies have formally adopted the Utah Rules of Civil Procedure. We are merely acknowledging Petro-Hunt's misconception to clarify the origin of the right to discovery in administrative proceedings.

[3] We also note that even if the Appeals Board were to adopt the Texas law to which Petro-Hunt refers, that law is not particularly helpful to Petro-Hunt's case. For example, the Texas statute states that individuals are to be classified as independent landmen, exempt from unemployment insurance taxes, where three conditions are met, one of which requires the individual to be " engaged primarily in negotiating for the acquisition or divestiture of mineral rights or negotiating business agreements that provide for the exploration for or development of minerals." Tex. Lab.Code Ann. § 201.077 (Vernon 1995). Under the facts presented in this case, there is no evidence in the record indicating that Elliot was engaged in the practice of negotiating for mineral rights or negotiating for the exploration or development of minerals. To the contrary, the evidence presented indicates that Elliot was involved in recording information related to mineral rights into her computer, compiling reports, answering phones, and sending and receiving emails.

35A-4-204 Definition of employment.

(1) Subject to the other provisions of this section, "employment" means any service performed for wages or under any contract of hire, whether written or oral, express or implied, including service in interstate commerce, and service as an officer of a corporation.

(2) "Employment" includes an individual's entire service performed within or both within and without this state if one of Subsections (2)(a) through (k) is satisfied.

(a) The service is localized in this state. Service is localized within this state if:

(i) the service is performed entirely within the state; or

(ii) the service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state, for example, is temporary or transitory in nature or consists of isolated transactions.

(b)

(i) The service is not localized in any state but some of the service is performed in this state and the individual's base of operations, or, if there is no base of operations, the place from which the service is directed or controlled, is in this state; or

(ii) the individual's base of operations or place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

(c)

(i)

(A) The service is performed entirely outside this state and is not localized in any state;

(B) the worker is one of a class of employees who are required to travel outside this state in performance of their duties; and

(C)

(I) the base of operations is in this state; or

(II) if there is no base of operations, the place from which the service is directed or controlled is in this state.

(ii) Services covered by an election under Subsection 35A-4-310(3), and services covered by an arrangement under Section 35A-4-106 between the division and the agency charged with the administration of any other state or federal unemployment compensation law, under which all services performed by an individual for an employing unit are considered to be performed entirely within this state, are considered to be employment if the division has approved an election of the employing unit for whom the services are performed, under which the entire service of the individual during the period covered by the election is considered to be insured work.

(d)

(i) The service is performed in the employ of the state, a county, city, town, school district, or other political subdivision of the state, or in the employ of an Indian tribe or tribal unit or an instrumentality of any one or more of the foregoing which is wholly owned by the state or one of its political subdivisions or Indian tribes or tribal units if:

(A) the service is excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(7);

(B) the service is not excluded from employment by Section 35A-4-205; and

(C) as to any county, city, town, school district, or political subdivision of this state, or an instrumentality of the same or Indian tribes or tribal units, that service is either:

(I) required to be treated as covered employment as a condition of eligibility of employers in this state for Federal Unemployment Tax Act employer tax credit;

(II) required to be treated as covered employment by any other requirement of the Federal Unemployment Tax Act, as amended; or

(III) not required to be treated as covered employment by any requirement of the Federal Unemployment Tax Act, but coverage of the service is elected by a majority of the members of the governing body of the political subdivision or instrumentality or tribal unit in accordance with Section 35A-4-310.

(ii) Benefits paid on the basis of service performed in the employ of this state shall be financed by payments to the division instead of contributions in the manner and amounts prescribed by Subsections 35A-4-311(2)(a) and (4).

(iii) Benefits paid on the basis of service performed in the employ of any other governmental entity or tribal unit described in this Subsection (2) shall be financed by payments to the division in the manner and amount prescribed by the applicable provisions of Section 35A-4-311.

(e) The service is performed by an individual in the employ of a religious, charitable, educational, or other organization, but only if:

(i) the service is excluded from employment as defined in the Federal Unemployment Tax Act, 26 U.S.C. 3306(c)(8), solely by reason of Section 3306(c)(8) of that act; and

(ii) the organization had four or more individuals in employment for some portion of a day in each of 20 different weeks, whether or not the weeks were consecutive, within either the current or preceding calendar year, regardless of whether they were employed at the same moment of time.

(f)

(i) The service is performed outside the United States, except in Canada, in the employ of an American employer, other than service that is considered employment under the provisions of this Subsection (2) or the parallel provisions of another state's law if:

(A) the employer's principal place of business in the United States is located in this state;

(B) the employer has no place of business in the United States but is:

(I) an individual who is a resident of this state;

(II) a corporation that is organized under the laws of this state; or

(III) a partnership or trust in which the number of partners or trustees who are residents of this state is greater than the number who are residents of any one other state; or

(C) none of the criteria of Subsections (2)(f)(i)(A) and (B) is met but:

(I) the employer has elected coverage in this state; or

(II) the employer fails to elect coverage in any state and the individual has filed a claim for benefits based on that service under the law of this state.

(ii) "American employer" for purposes of this Subsection (2) means a person who is:

(A) an individual who is a resident of the United States;

(B) a partnership if 2/3 or more of the partners are residents of the United States;

(C) a trust if all of the trustees are residents of the United States;

(D) a corporation organized under the laws of the United States or of any state;

(E) a limited liability company organized under the laws of the United States or of a state;

(F) a limited liability partnership organized under the laws of the United States or of any state; or

(G) a joint venture if 2/3 or more of the members are individuals, partnerships, corporations, limited liability companies, or limited liability partnerships that qualify as American employers.

(g) The service is performed:

(i) by an officer or member of the crew of an American vessel on or in connection with the vessel; and

(ii) the operating office from which the operations of the vessel, operating on navigable waters within, or within and without, the United States, is ordinarily and regularly supervised, managed, directed, and controlled within this state.

(h) A tax with respect to the service in this state is required to be paid under any federal law imposing a tax against which credit may be taken for contributions required to be paid into a state unemployment fund or that, as a condition for full tax credit against the tax imposed by the Federal Unemployment Tax Act, is required to be covered under this chapter.

(i)

(i) Notwithstanding Subsection 35A-4-205(1)(p), the service is performed:

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages other than milk, or laundry or dry cleaning services, for the driver's principal; or

(B) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged on a full-time basis in the solicitation on behalf of and the transmission to the salesman's principal, except for sideline sales activities on behalf of some other person, of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(ii) The term "employment" as used in this Subsection (2) includes services described in Subsection (2)(i)(i) performed only if:

(A) the contract of service contemplates that substantially all of the services are to be performed personally by the individual;

(B) the individual does not have a substantial investment in facilities used in connection with the performance of the services other than in facilities for transportation; and

(C) the services are not in the nature of a single transaction that is not part of a continuing relationship with the person for whom the services are performed.

(j) The service is performed by an individual in agricultural labor as defined in Section 35A-4-206.

(k) The service is domestic service performed in a private home, local college club, or local chapter of a college fraternity or sorority performed for a person who paid cash remuneration of $1,000 or more during any calendar quarter in either the current calendar year or the preceding calendar year to individuals employed in the domestic service.

(3) Services performed by an individual for wages or under any contract of hire, written or oral, express or implied, are considered to be employment subject to this chapter, unless it is shown to the satisfaction of the division that:

(a) the individual is customarily engaged in an independently established trade, occupation, profession, or business of the same nature as that involved in the contract of hire for services; and

(b) the individual has been and will continue to be free from control or direction over the means of performance of those services, both under the individual's contract of hire and in fact.

(4) If an employer, consistent with a prior declaratory ruling or other formal determination by the division, has treated an individual as independently established and it is later determined that the individual is in fact an employee, the department may by rule provide for waiver of the employer's retroactive liability for contributions with respect to wages paid to the individual prior to the date of the division's later determination, except to the extent the individual has filed a claim for benefits.

Utah Administrative Code (Current through March 1, 2017)
R994. Workforce Services, Unemployment Insurance
R994-204. Covered Employment

R994-204-303. Factors for Determining Independent Contractor Status

Services will be excluded under Section 35A-4-204 **if the service meets the requirements of this rule. Special scrutiny of the facts is required to assure that the form of a service relationship does not obscure its substance, that is, whether the worker is independently established in a like trade, occupation, profession or business and is free from control and direction. The factors listed in Subsections** R994-204-303(1)(b) **and** R994-204-303(2)(b) **of this section are intended only as aids in the analysis of the facts of each case. The degree of importance of each factor varies depending on the service and the factual context in which it is performed. Additionally, some factors do not apply to certain services and, therefore, should not be considered.**

(1) Independently Established.

(a) An individual will be considered customarily engaged in an independently established trade, occupation, profession, or business if the individual is, at the time the service is performed, regularly engaged in a trade, occupation, profession, or business of the same nature as the service performed, and the trade, occupation, profession, or business is established independently of the alleged employer. In other words, an independently established trade, occupation, profession, or business is created and exists apart from a relationship with a particular employer and does not depend on a relationship with any one employer for its continued existence.

(b) The following factors, if applicable, will determine whether a worker is customarily engaged in an independently established trade or business:

(i) Separate Place of Business. The worker has a place of business separate from that of the employer.

(ii) Tools and Equipment. The worker has a substantial investment in the tools, equipment, or facilities customarily required to perform the services. However, "tools of the trade" used by certain trades or crafts do not necessarily demonstrate independence.

(iii) Other Clients. The worker regularly performs services of the same nature for other customers or clients and is not required to work exclusively for one employer.

(iv) Profit or Loss. The worker can realize a profit or risks a loss from expenses and debts incurred through an independently established business activity.

(v) Advertising. The worker advertises services in telephone directories, newspapers, magazines, the Internet, or by other methods clearly demonstrating an effort to generate business.

(vi) Licenses. The worker has obtained any required and customary business, trade, or professional licenses.

(vii) Business Records and Tax Forms. The worker maintains records or documents that validate expenses, business asset valuation or income earned so he or she may file self-employment and other business tax forms with the Internal Revenue Service and other agencies.

(c) If an employer proves to the satisfaction of the Department that the worker is customarily engaged in an independently established trade, occupation, profession or business of the same nature as the service in question, there will be a rebuttable presumption that the employer did not have the right of or exercise direction or control over the service.

(2) Control and Direction.

(a) When an employer retains the right to control and direct the performance of a service, or actually exercises control and direction over the worker who performs the service, not only as to the result to be accomplished by the work but also as to the manner and means by which that result is to be accomplished, the worker is an employee of the employer for the purposes of the Act.

(b) The following factors, if applicable, will be used as aids in determining whether an employer has the right of or exercises control and direction over the service of a worker:

(i) Instructions. A worker who is required to comply with other persons' instructions

about how the service is to be performed is ordinarily an employee. This factor is present if the employer for whom the service is performed has the right to require compliance with the instructions.

(ii) Training. Training a worker by requiring or expecting an experienced person to work with the worker, by corresponding with the worker, by requiring the worker to attend meetings, or by using other methods, indicates that the employer for whom the service is performed expects the service to be performed in a particular method or manner.

(iii) Pace or Sequence. A requirement that the service must be provided at a pace or ordered sequence of duties imposed by the employer indicates control or direction. The coordinating and scheduling of the services of more than one worker does not indicate control and direction.

(iv) Work on Employer's Premises. A requirement that the service be performed on the employer's premises indicates that the employer for whom the service is performed has retained a right to supervise and oversee the manner in which the service is performed, especially if the service could be performed elsewhere.

(v) Personal Service. A requirement that the service must be performed personally and may not be assigned to others indicates the right to control or direct the manner in which the work is performed.

(vi) Continuous Relationship. A continuous service relationship between the worker and the employer indicates that an employer-employee relationship exists. A continuous relationship may exist where work is performed regularly or at frequently recurring although irregular intervals. A continuous relationship does not exist where the worker is contracted to complete specifically identified projects, even though the service relationship may extend over a significant period of time.

(vii) Set Hours of Work. The establishment of set hours or a specific number of hours of work by the employer indicates control.

(viii) Method of Payment. Payment by the hour, week, or month points to an employer-employee relationship, provided that this method of payment is not just a convenient way of paying progress billings as part of a fixed price agreed upon as the cost of a job. Control may also exist when the employer determines the method of payment.