1983

Gordon A. Gray v. The Industrial Commission of Utah, Department Of Employment Security : Brief of Respondent

IN THE SUPREME
OF THE STATE

GORDON A. GRAY,

Appellant,

vs.

BOARD OF REVIEW OF T
COMMISSION OF UTAH,
EMPLOYMENT SECURITY,

Respondent.

Appeal

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IN THE SUPREME COURT
OF THE STATE OF UTAH

GORDON A. GRAY,

Appellant,

vs. Case No. 19005

BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION OF UTAH, DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

RESPONDENT'S BRIEF

STATEMENT OF NATURE OF THE CASE

This is an action before the Supreme Court of the State of Utah pursuant to Section 35-4-10(i), Utah Code Annotated 1953, as amended, seeking judicial review of a decision of the Board of Review of the Industrial Commission of Utah, which denied unemployment benefits to the Appellant, Gordon A. Gray, pursuant to Section 35-4-4(c), Utah Code Annotated 1953, as amended (Pocket Supplement, 1981), on the grounds that during certain weeks for which he claimed benefits he failed to demonstrate a "good faith" active effort to seek employment as required for eligibility. This disqualification established an overpayment liability in the amount of $498, pursuant to Section 35-4-6(d), Utah Code Annotated 1953, as amended (Pocket Supplement, 1981).

DISPOSITION BELOW

Appellant was denied unemployment benefits by a Department Representative pursuant to Section 35-4-4(c), Utah Code Annotated 1953, as amended (Pocket Supplement, 1981), effective August 29, 1982 and continuing, on the grounds he did not make an active search for work as required for eligibility. This decision established an overpayment liability in the amount of $498. Plaintiff appealed to an Appeal Referee who modified the decision of the Department Representative to deny benefits from August 29, 1982 through October 30, 1982, with the exception of the weeks ended October 9 and 16, 1982, which were allowed, and affirmed the overpayment liability in the amount of $498, by decision dated November 9, 1982, Case No. 82-A-4423. In an Amended Decision dated November 17, 1982, the Appeal Referee affirmed her prior decision dated November 9, 1982, with the exception of the termination date of the denial which was amended to end October 23, 1982, with benefits allowed effective October 24, 1982 and a modification of the overpayment from $498 to $664. The Appellant appealed to the Board of Review of the Industrial Commission of Utah, which by decision, issued January 21, 1983, in Case No. 82-A-4423, 82-BR-534, affirmed the decision of the Appeal Referee with respect to the denial of benefits for the period August 29, 1982 through October 23, 1982, with the exception of the calendar week ended September 25, 1982 which was allowed by the Board of Review. The Board of Review modified the decision of the Appeal Referee to deny benefits to the claimant for the calendar week ended October 9, 1982. The overpayment

imposed by the Appeal Referee in the amount of $664 was reduced by the Board of Review to $498 for the calendar weeks ended September 4, September 11 and September 18, 1982, which overpayment has been offset by subsequent valid claims filed by the claimant.

RELIEF SOUGHT ON REVIEW

Appellant seeks a finding of the Court that the Appellant did in fact make a diligent job search effort that demonstrated his continuing attachment to the labor market and such actions fully complied with requirements of Utah law; that the Appellant be reimbursed of all benefits denied him; and that the Department be enjoined from terminating his claim again for any reason other than exhaustion of benefits without first providing Appellant with the due process of law. Respondent seeks affirmance of the decision of the Board of Review.

STATEMENT OF FACTS

Respondent substantially agrees with preliminary statement and statement of facts set forth in Appellant's Brief, except in the following particulars, to wit:

In his preliminary statement at Page 4 of his Brief, Appellant states the Appeal Referee "required that the overpayment of $498.00 be offset by withholding 50% of Appellant's weekly benefit amount." However, the Appeal

Referee only recommended "that the Department consider exercising discre... and permit offset of not more than 50% of the claimant's weekly ben... amount." (R.0047)

Each unemployment insurance claimant is given an Unemployment Insura... Claimant Guide (Referred to as the Handbook hereafter) (R.0167-0182) a... the time they apply for benefits. (R.0103) Although, at the time of h... hearing with the Appeals Referee, Appellant didn't "recognize" the Handbo... (R.0092), he certified he had received one when he filed his initial clai... for benefits on June 4, 1982. (R.0166) At the same time, the Appellant wa... given a Form 601-D (R.0165) which he signed at the bottom, certifying he ha... read it and understood that failure to comply with its provisions would... result in a denial of benefits. (R.0091) Further, the standard procedur... of the claims interviewer, who interviewed the Appellant when he filed his... claim, is to advise claimants to make two to three new in-person contacts... each week and keep "record in the back of the Handbook. At the top of the... page in the back of the Handbook where claimants are to record their weekly... job search efforts, the claims interviewer writes "two to three per week"... and then has the claimant circle the printed words "in person." (R.0106-... 0107) When Appellant first applied for unemployment benefits, he admits he... was instructed "to make 2 job contacts a week on the job search." (R.0053... and 0093) When he reopened his claim he was again instructed to keep his... contacts active. (R.0055)

In August, 1982, the Appellant attended a veterans workshop at the Job Service to receive instruction and assistance in regard to his search for work. (R.0111,0115,0118-0119)

Mr. Samuel Smith, the Job Service Interviewer and Disabled Veterans Outreach Placement Specialist (R.0112) who conducts the veterans workshops (R.0114) testified that to find work a welder with the Appellant's experience needs to "knock on doors because the only people who are actually getting jobs are in the right place at the right time." He further testified that making telephone contacts is not an effective way for someone like Appellant to find work because "the way the labor market is you call and they automatically are going to say no if they have a position open because they have 20 people knock on the doors." This advice was given at the Appellant's workshops. (R.0122)

The Appellant received and read the claim cards, Form 603, (R.0183) as he filled them out. (R.0097) After Appellant had been disqualified he made up from memory the list of his job contacts found in the Record at R.0145-0153 and marked as Exhibit 9. (R.0071)

Although denied benefits for the six weeks in question, such a denial does not reduce the total amount of the Appellant's entitlement. It merely delays the receipt of the benefits to later weeks in which the claimant establishes his eligibility. (R.0010 and Addendum A) It should be noted that after the six week suspension of benefits, the claimant did receive, and has continued to receive unemployment benefits to the present time.

ARGUMENT

POINT I

THAT IN REVIEWING DETERMINATIONS OF THE INDUSTRIAL COMMISSION UNDER THE UTAH EMPLOYMENT SECURITY ACT THE COURT WILL AFFIRM THE COMMISSION'S FINDINGS IF SUCH ARE SUSTAINED BY SUBSTANTIAL EVIDENCE.

This Court has consistently held that where the findings of the Commission and the Board of Review are supported by evidence, they will not be disturbed. Martinez v. Board of Review, 477 P. 2d 587 (Utah, 1970). In the case of Members of Iron Workers Union of Provo v. Industrial Commission, 139 P. 2d 208, 211 (Utah, 1943), this Court held:

> If there is substantial competent evidence to sustain the findings and decision of the Industrial Commission, this court may not set aside the decision even though on a review of the record we might well have reached a different result.

With specific reference to the question of availability, this Court has stated:

> It is our duty to examine the record and to affirm the decision unless we can say as a matter of law that the conclusion on the question of "available for work" was wrong because only the opposite conclusion could be drawn from the facts. Gocke v. Wiesley, 420 P. 2d 44,46 (Utah, 1966); citing Salt Lake County v. Industrial Commission, 120 P. 2d 321 (Utah, 1940).

POINT II

THE INTERPRETATION OF SECTION 35-4-4(c), U.C.A. 1953, UTILIZED BY THE INDUSTRIAL COMMISSION FOR UNEMPLOYMENT COMPENSATION ELIGIBILITY IS CONSISTENT WITH THE LAW AND IS REASONABLE.

The Appellant contends that the commission has applied in a rigid and inflexible manner the so-called 2-3 new in-person contact rule." That requirement is, however, only an interpretive guideline that is considered viable in most occupations and areas, but is not applied rigidly or inflexibly in all cases, nor has it been adopted as a formal general rule of adjudication.

Section 35-4-4(c) requires, by direct statutory language, that a claimant for unemployment insurance make an active and good faith effort to secure employment each week that he files for benefits. The burden is upon the claimant to prove he has met the requirements and conditions for benefit payments, including of course the requirement that he has made the expected work search effort. Rule A71-07-2:1.b, General Rules of Adjudication, Miscellaneous. Although the Utah Employment Security Act does not require that a claimant be engaged in a search for work for any given number of hours each day or week to prove he is engaged in an active good faith search, this Court has held that a claimant must be unequivocally exposed to the labor market and must show more than a passive willingness to gain employment. Denby v. Board of Review, 567 P. 2d 626 (Utah, 1977); Gocke, supra. Thus, the question of whether or not a claimant has engaged in a good faith active search for work is a mixed question of law and fact.

With Utah unemployment compensation claims as high as 35,000 during a particular week, and in recognition of the difficulty involved in the prompt adjudication and payment week by week of benefits, the Legislature gave to the Industrial Commission regulatory powers specifying that claims must be filed in accordance with rules and regulations adopted by the Commission.

Rule A71-07-2:2.c.(7), General Rules of Adjudication, supra, provides:

> Inasmuch as each claimant is advised of his rights and responsibilities at the beginning of his claim series and since he certifies to eligibility requirements when continuing his claims, he should have sufficient knowledge to put him on notice that certain subjects might be important factors relative to a claim for benefits. The claimant is then under obligation to make proper inquiry and failure to do so constitutes fault.

When Appellant initially filed for benefits, he was given the Unemployment Insurance Claimant Guide and certified to the following statement on his initial claim form:

> I understand that I must personally seek work and be able and available to accept full-time work. I have received the Unemployment Insurance Claimant Guide explaining my rights and responsibilities. (R.0166)

The Unemployment Insurance Guide provides:

> Make an active effort to look for work. An active effort means that you should contact several employers in person each week who would hire people in your occupational field. (R.0176, Emphasis added)

"Several" obviously means more than one.

Appellant also signed and received a copy of the "Responsibilities While Claiming Benefits" form which provides:

> Seek work - I must make an active effort to look for full time work each week and will follow up on any job leads I am given by Job Service. An active effort, in part, means I will personally contact employers who would hire people in my occupation. Failure to do so may be considered as evidence that I do not have a genuine desire to find immediate employment. (R.0165, Emphasis added)

Mr. Samuel Smith, a Department Representative, with over seven years' experience as a Placement-Interviewer, who testified to his familiarity with the labor market for welders, and who has taught job search workshops for the Department, (R.0112-0114) testified to the need and reason for requiring in-person contacts as follows:

> Referee: I think that calls for an evaluation of this particular claimant. Let's rephrase the question and ask what should a welder do with Mr. Gray's experience be doing to try to find work?
>
> Smith: He would be considered a journeyman. The best thing he can do would be just knock on doors. Because the only people who are actually getting jobs are in the right place at the right time.
>
> Referee: Is making telephone contacts a good way for someone like Mr. Gray to obtain employment?
>
> Smith: Presently, no. Because 90 percent, unless you have got a contact. But right now the way the labor market is you call and they automatically are going to say no if they have a position open because they have 20 people knock on the doors.
>
> Referee: Do you advise the people in your workshops, do you tell them this?
>
> Smith: Yes.
>
> Referee: Do you tell them what you just told me?

Smith: Yes.

Referee: So you tell them to go out and knock on doors and to take their resume and to fill it out with the appplication and staple it on the front of the application?

Smith: Right. (R.0122)

This Court affirmed that the Department has the authority to make interpretations of the Employment Security Act in areas of mixed questions of fact and law. In the case of Salt Lake City Corporation v. Board of Review of the Industrial Commission of Utah and Marian Lynch, 657 P. 2d 1312, (Utah, 1982), this Court stated:

> In administrative law cases, our scope of review of an agency's decisions as to legal questions and questions of mixed law and fact is generally broader than our scope of review of questions of fact. On most questions of statutory construction, with some exceptions, our review is plenary with no deference accorded the administrative determination. That standard is particularly applicable with respect to constitutional law issues. However, where the language of a statute indicates a legislative intention to commit broad discretion to an agency to effectuate the purposes of the legislative scheme, we will not substitute our judgment for that of the agency as long as the commission's interpretation has "warrant in the record" and a "reasonable basis in the law." Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 153-54 (1946); National labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 131 (1944). Furthermore, where agency decisions deal with technical questions which call for the exercise of expertise, born either of a technical background and training or long experience in dealing with numerous, similar problems, we also accord deference to an agency interpretation because of the necessity to recognize discretion commensurate with the nature of the issue, as defined by the general purposes of the Act, although the latitude accorded may vary with the nature of the issue. SEC v. Chenery Corp., 332 U.S. 194 (1946), provides an example. The statutory language required that before the

> Commission could give approval to a plan of reorganization of a utility holding company, the Commission was required to determine among other things that the plan was "fair and equitable." 332 U.S. at 204. The standard of review under such legal criteria was based on deference to the "informed discretion" of the Commission and permitted reversal of the Commission's ruling only upon a plain abuse of its discretion. Id. at 208. [657 P. 2d, at 1316.]

The minimal requirement placed upon claimants to contact 2-3 potential employers each week in person is reasonable and is supported by case law from other jurisdictions. For example, in Carr v. Administrator, Unemployment Compensation Act, 223 A. 2d 313 (Conn., 1966), the Commission was held to have acted reasonably in finding that the claimant had not made a reasonable effort to look for work when he contacted only one or two places a week. See also Jones v. Administrator, Unemployment Compensation Act, 228 A. 2d 807 (Conn., 1966); Redd v. Texas Employment Commission, 431 S.W. 2d 16 (Tx., 1968). And in Steinberg v. Fusari, 364 F. Supp. 922 (Conn., 1973), cited on pages 22 and 24 of Appellant's Brief, the United Stated District Court for the District of Connecticut stated, contrary to the assertions of the Appellant, as follows:

> [I]f a stated number of employers must be visited, a claimant's acknowledgement that he had seen fewer than the required number would eliminate the factual controversy and provide an adequate basis for denial of benefits.

Considering the purpose of the work search requirement, the testimony of an experienced Department Placement Interviewer that most jobs are obtained by job seekers through personal contact, and the requirement of Denby v. Industrial Commission, supra, that a claimant must be unequivically exposed to

the labor market, the requirement of 2-3 in-person contacts each week is reasonable and consistent with the generalized work-search requirement contained in the Act.

POINT III

THE BOARD OF REVIEW OF THE INDUSTRIAL COMMISSION DID NOT ERR IN DETERMINING THAT PLAINTIFF FAILED TO MEET THE WORK SEARCH REQUIREMENTS FOR ELIGIBILITY AND THUS WAS NOT AVAILABLE FOR WORK, AND THIS DETERMINATION IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Appellant has misperceived the 2-3 new in-person contact requirement. Contrary to Appellant's assertion that the requirement is applied rigidly and inflexibly, it is utilized as a guideline by Department Representatives in determining eligibility. In the instant case the claimant was given written instructions, as set forth in Point II herein, concerning the requirement to make an active and good faith effort to find work by personally contacting employers.

Consistent with the written instructions given to the Appellant, the Appellant admitted that he was initially told by a Department Representative " . . . to make two job contacts a week on the job search." (R.0054) Commenting on the instructions given to claimants by the Department Representative who handled the Appellant's claim, Roger Slagowski, the claimant's supervisor testified:

> Slagowski: She said "I advise the claimant to make two to three new in-person contacts each week and keep records in the back of the Claimant Handbook" and she said "at the top inside of the book of the Claimant Handbook, where it shows work-search record,

I write two to three per week" and down on the form it has the type of contacts . . . she has them circled in-person.

Referee: So she, in addition to what the Claimant Guide says, writes on that form "make two to three contacts a week" and circles in-person?

Slagowski: That is correct. (R.0106)

Appellant's Attorney stipulated to this testimony by Mr. Slagowski. (R.0104)

When the claimant reopened his claim for benefits in August, he was again instructed to keep his contacts active. (R.0055) Finally, the claimant attended a Job Search Work Shop in August, at which he was instructed to contact employers in person because telephoning was not productive. (R.0122) Despite the written instructions received by the claimant and, presumably, standard oral instructions by the claims interviewer (R.0106), and despite the instruction given at the workshop (R.0123), Appellant claimed he had not been instructed to make two to three new in-person contacts each week. (R.0163,0100,0086)

It seems unlikely that the claims interviewer would have changed her standard instructions to claimants when interviewing the Appellant as he suggests. (R.0086) Further, Appellant acknowledged that nothing prevented him from complying with the instruction to make in-person contacts. (R.0131) The claimant could read and write. (R.0097,0145-0152) He can't claim that he was hurried in the claim filing process or that he was not provided the opportunity to read and understand what he was filing as he was given the necessary papers on Friday and did not actually file his benefit claim until the following Monday. (R.0094)

Appellant's apparent failure to read the documents or to follow the verbal instructions given to him does not excuse him from making the required work search. It is because of this serious responsibility that claimants are required to sign certifications that they have received and have been instructed to read these documents. Claimants are also told there is the possibility of a denial of benefits and penalties for failing to comply with instructions from the Department. (R.0163,0165,0166,0176,0183)

The record shows that the Appellant made only one new in-person contact between August 29, 1982 and September 4, 1982 (R.0063), only one new in-person contact during the two weeks between September 5, 1982 and September 18, 1982, (R.0074) and no in-person contacts for the three weeks in October for which he was denied benefits, (R.0144,0150,0151,0153) even though he signed a statement on September 27, 1982, which stated in part, "I now know I must make two to three new in-person contacts each week or benefits could be denied." (R.0163) This fact situation appears almost analogous to the situation in Marvin L. Hurd v. Board of Review, 638 P. 2d 544 (Utah, 1981), wherein this Court held that a claimant, who had contacted only three businesses for the purpose of finding work during a 30 day period, was not entitled to unemployment compensation because his efforts showed only "a passive search for work" even though he alleged in his appeal to the Board of Review that he had made "numerous telephone calls pursuant to want ad listings." 638 P. 2d at 545.

Just as the Appellant was instructed to make at least two in-person contacts with potential employers, Appellant was also instructed when he initially reopened his claim to keep an accurate record of his job contacts. (R.0162,0165,0176) Pursuant to a letter from the Appeal Referee to Appellant's Attorney, dated October 19, 1982 (R.0154), Appellant provided a list of all employers he had allegedly contacted after he reopened his claim for benefits on August 19, 1982. (R.0144-0153) However, this list which was admittedly begun after September 29, 1982 (R.0071) was made only to the best of Appellant's recollection (R.0071,0110); conflicts with other papers he filed (R.0162); and conflicts with his own testimony. For example, Appellant lists that he filed applications with Ashby Metals, Mark Steel, and Allen Steel between September 4, 1982 and September 25, 1982. (R.0145-0146) The record shows, however, that applications with Ashby Metals and Mark Steel were submitted in June, 1982 (R.0060,0062) and the application with Allen "is about nine years old." (R.0065) Likewise, Appellant's list claims he made in-person contacts at eight businesses after reopening his claim. (R.0144) However, his testimony indicates that at least four of those businesses were only contacted by telephone. (R.0062,0065,0058)

Such sporatic employer contacts, the failure to maintain an accurate record, and particularly the failure to pursue in-person contacts after such explicit instructions, are inconsistent with an unequivocal exposure to the labor market and justify the denial of benefits in this case.

Appellant relies on Gocke, supra as support for his contention that his work search was adequate. See pages 15 and 16 of Appellant's Brief. However,

Gocke is distinguishable in that the claimant therein was not advised as the extent of work search she should be making. The claimant in Gocke relied on the "Handbook for Claimants" which, when read literally, "doesn't require any affirmative action by a claimant other than registration." Id., at 4b. In the present case, however, there can be no doubt that Appellant was advised as to the extent of work search he should be making and there can be no doubt that he knew, or should have known, what constituted an active effort to secure employment.

In applying the 2-3 new in-person contact requirement as a guideline in considering the claimant's eligibility for benefits, the Board of Review looked at the totality of the claimant's efforts to find work, as evidenced by the following statement from the decision of the Board of Review:

> In modifying the decision of the Appeal Referee to deny benefits for the calendar week ended October 9, 1982 and to allow benefits for the calendar week ended September 25, 1982, the Board of Review notes that for the calender week ended September 25, 1982 the claimant had made one in-person employer contact, supplemented by telephone contacts. However, during the calendar week ended October 9, 1982, all employer contacts were made by telephone. As indicated in the Unemployment Insurance Claimant Guide, telephone calls may be an effective way to develop leads to employes who have jobs in a claimant's occupational field. However, telephone calls alone are insufficient to demonstrate a "good faith" "active effort to secure employment." (R.0012-0013, Emphasis added)

Thus, although the claimant made only one in-person contact for the week ended September 25, 1982, that contact was supplemented by telephone contacts. In contrast, the claimant's efforts to find work in prior weeks were limited to one in-person contact per week, or even less. Also in contrast,

the claimant's employer contacts during the calendar week ended October 9, 1982 were all made by telephone. The Board of Review specifically held that telephone calls alone are insufficient to demonstrate a good faith active effort to secure employment. Again, the reason for this latter conclusion is the necessity of each claimant to be inequivocally exposed to the labor market. A claimant who does not have applications on file with those employers who are willing to accept applications, or who have not made personal contact with employers, is far less likely to be called for work by an employer who develops a job opening.

In summary, the requirement of 2-3 in-person contacts is not an inflexible rule, but rather, is a guideline for evaluating a claimant's work search efforts. The necessity for one who claims the benefits of the unemployment insurance program to expose himself to the labor market by a combination of in-person contacts and other work search efforts is obvious, and the Department's requirements of such efforts and the maintenance of a record to evidence such efforts are reasonable requirements consistent with the intent and purposes of the Utah Employment Security Act.

POINT IV

THE PROCEDURE BY WHICH THE COMMISSION TERMINATED UNEMPLOYMENT BENEFITS TO CLAIMANT GRAY DID NOT VIOLATE DUE PROCESS.

Appellant contends in his Brief at Point IV that he was denied unemployment benefits without prior notice and without opportunity for a Goldberg v. Kelly type of hearing before termination of benefits. In support of this

contention claimant cites the cases of Steinburg v. Fusari, supra, and California Department of Human Resources Development v. Java, 402 U.S. 121 (1971). Appellant explains the Fusari case as holding that the "seated interview" system did not provide sufficient procedural due process protections for unemployment insurance claimants. A cursory review of the District Court Opinion would lead one to that conclusion. The District Court held that the Connecticut procedures for determining unemployment insurance eligibility violated due process as follows:

> . . . because (a) a property interest has been denied (b) at an inadequate hearing (c) that is not reviewable de novo until an unreasonable length of time. 364 F. Supp., at 937-938.

The Connecticut legislature thereafter amended the review provisions of its unemployment insurance law. The U. S. Supreme Court remanded the case to the District Court to determine whether the new provisions improved the time factor sufficiently to make the entire process legally sufficient, stating:

> Prompt and adequate administrative review provides an opportunity for consideration and correction of errors made in initial eligibility determinations. 95 S.Ct., at 540.

Thus a careful reading of the opinion of the Supreme Court in the Fusari case clearly shows that the Court was primarily concerned with the length of delay in obtaining proper review of a denial of benefits. This concern was subsequently specifically recognized by the Supreme Court in the case of Matthews v. Eldridge, 96 S.Ct. 893 (1976), citing Fusari at 906. Eldridge,

a disability insurance case, involved the precise issue to which Appellant speaks in Point IV of his Brief, that is, whether an individual claiming government benefits under an entitlement program may be denied such benefits without a Goldberg v. Kelly type hearing.

In analyzing the issue presented, the Eldridge court set forth the factors to be considered in determining the amount of due process required in such cases, as follows:

> Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. [Citations omitted] More precisely our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or a substitute procedural safeguard; and finally, the government's interests, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citing Goldberg v. Kelly]

The Court then proceeded to analyze the individual interest involved in the Eldridge case, stating:

> Only in Goldberg has the court held that due process requires an evidentiary hearing prior to a temporary deprivation. It was emphasized there that welfare assistance is given to persons on the very margin of subsistence; "the crucial factor in this context - a factor not present in the case of . . . virtually anyone else whose governmental entitlements are ended - is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. 397 U.S., at 264, 90 S.C. at 1018 (Emphasis in original)." Eligibility for disability benefits,

> in contrast, is not based upon financial need. Indeed, it is wholly unrelated to the worker's income or support from many other sources, such as earnings of other family members, workmen's compensation awards, court claims awards, savings, private insurance, public or private pensions, veterans' benefits, food stamps, public assistance, or the "many other important programs both public and private, which contain provisions for disability payments affecting a substantial portion of the work force. . . ." [Footnotes and Citations omitted. 96 S.Ct., at 905]

After considering the other two factors previously referred to, the court concluded that an evidentiary hearing is not required prior to the termination of disability benefits.

The holding that pre-termination evidentiary hearings are not required was extended to unemployment insurance cases by Graves v. Meystrik, 425 F.S. 40 (E.D. Mo.), affirmed 431 U.S. 910, 97 S.Ct. 2164, 53 L.Ed. 2d 220 (1977). See also Torres v. New York State Department of Labor, 333 F.S. 431 (S.D.N.Y., 1971), affirmed 405 U.S. 949, 92 S.Ct. 1185, 31 L.Ed. 2d 228 (1972).

Appellant's reliance on California Department of Human Resources Development v. Java, supra, is likewise misplaced. The Java case involved a procedure whereby an employer could sit back and await an initial determination of a claimant's eligibility for unemployment benefits. If the determination found the claimant eligible, the employer could then appeal, thus causing the termination of the claimant's benefits pending the outcome of the employer's appeal. Such appeals took a median of seven to ten weeks to resolve. The U.S. Supreme Court held in Java that the suspension of unemployment benefits for such a lengthy period, after an initial determination of eligibility

violated due process. In the instant case the termination of Appellent's benefits was not initiated by an appeal of another party, but rather was based on the claimant's own statements in an eligibility review. (R.0162-0163). The eligibility review is an administrative device by which benefit claimants are periodically asked to prove their eligibility consistent with Rule A71-07-2:1.e.(1), General Rules of Adjudication, supra. Appellent was notified of the eligibility review and appeared as requested by the local office. (R.0161-0163) Thereafter Appellant received a notice of denial of benefits which he appealed in a timely manner to an Appeal Referee. (R.0160-0157-0158) Appellant was given a notice of the appeal hearing setting forth the time, date, place and issues to be covered. (R.0155) As required by Section 35-4-10, U.C.A. 1953, Appellant was given a full evidentiary hearing and a decision was issued to him within six weeks from the date he was denied benefits (R.0148,0160) and only four weeks from the date of his appeal to the Referee. (R.0156) This procedure afforded Appellant the full due process of law required by Eldridge.

POINT V

RECOVERING APPELLANT'S OVERPAYMENT BY DEDUCTING 100% OF APPELLANT'S UNEMPLOYMENT BENEFIT CHECK WAS NOT EXCESSIVE AND IS EXPRESSLY REQUIRED BY THE UTAH EMPLOYMENT SECURITY ACT.

Appellant claims the Department abused its discretion in ordering 100% of his weekly benefits withheld in order to recoup the overpayment. Plaintiff's Brief, Page 20. Plaintiff cites Section 70B-5-105, Utah Code Annotated 1953, for the proposition that "generally one's wages cannot be garnished

in exceeds of 25% of weekly disposable earnings or to an extent that it wi drop the debtors wages below minimum wage." Plaintiff's Brief, Page However, Section 70B-5-105 is not applicable to recoupment of unemployme benefits as it only applies to "rights arising from consumer credit sales, consumer lease, and consumer loans. . . ." Section 70B-5-112, Utah Code Annotated 1953.

The applicable statute in this instance is Section 35-4-6(d) of the Utah Employment Security Act which provides in pertinent part:

> If any person, by reason of his own fault, has received any sum as benefits under this act to which under a re-determination or decision pursuant to this section, he has been found not entitled, he shall be liable to repay such sum, and or shall, in the discretion of the commission, be liable to have such sum deducted from any future benefits payable to him. (Emphasis added)

At first blush the above language from the code would appear to give the commission discretion as to whether or not to recoup an overpayment by deduction from future benefits and, therefore, to support Appellant's contention that less than a 100% deduction would be permissable; however, it should be noted that there is no discretion as to whether the claimant shall repay the overpayment. The above Section 35-4-6(d) of the Act goes on to say:

> In any case in which under this subsection a claimant is liable to repay to the commission any sum for the fund, such sum shall be collectible in the same manner as provided for contributions due under this act.

Thus the commission's discretion appears to be limited to allowing the overpayment to be deducted from future benefits as opposed to requiring a

repayment in cash. Having exercised that discretion, the Respondent has considered that it must recoup the overpayment from "any future benefits payable to the claimant." (Emphasis added)

It should be noted in this regard that where a claimant has received benefits to which he was not entitled, a 100% recoupment leaves him in no worse a position than he would have been in had he not received the overpayment in the first place. In fact, since no interest is added, the claimant has had free use of money to which he was not entitled until it is in fact recouped.

CONCLUSION

The Respondent has established 2-3 new in-person employer contacts as a minimum interpretive guideline by which to consider whether a claimant has "acted in good faith in an active effort to security employment" as required by Section 35-4-4(c) of the Utah Employment Security Act. The work search of claimants who fail to meet the minimum guideline are closely scrutinized to determine whether under all the circumstances of the particular claimant it can be concluded he/she has "acted in good faith in an active effort to secure employment." This method of monitoring the work search efforts of claimants is both reasonable and consistent with the intent and purpose of the Utah Employment Security Act.

Even though he was given an Unemployment Insurance Claimant Guide when he applied for benefits, which gives instructions in simple, layman's language and has space wherein claimants are instructed to record their

contacts, this claimant made a written record of his contacts only after he was initially denied benefits. Even though he was instructed that telephoning was not an effective means of finding employment in his occupation, he persisted in using the telephone as his principle method of searching for work. Therefore, the Appellant failed in meeting his burden of showing an active, good faith effort to secure employment during the six weeks for which he was denied benefits.

Upon receiving Appellant's appeal from the termination of his benefits, based on information he gave at an eligibility review, the commission gave the Appellant a timely, full evidentiary hearing, after notice, at which he was represented by counsel. This procedure afforded Appellant the full due process of law.

Rather than requiring the Appellant to repay his overpayment in cash, the Respondent allowed Appellant to repay his overpayment by deduction from future benefits as expressly provided in the Utah Employment Security Act. This method of recoupment left the Appellant in no worse position than he would have been had he not received the overpayment in the first place.

Respondent submits that the decision of the Board of Review is supported by substantial competent evidence; is consistent with the intent and purposes of the Utah Employment Security Act; and should, therefore, be affirmed by this Court.

Respectfully submitted this 3rd day of June, 1983.

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By_____
Lorin R. Blauer
Legal Counsel

CERTIFICATE OF MAILING

I do hereby certify that I mailed two copies of the foregoing Respondent's Brief to JOHN L. BLACK, JR., UTAH LEGAL SERVICES, INC., 637 East Fourth South, Salt Lake City, Utah 84102, this 3rd day of June, 1983.

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