

2004

# Lorenz Rindlisbacher v. Department of Workforce Services, Workforce Appeals Board : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS

LORENZ RINDLISBACHER,  
CLAIMANT/PETITIONER/APPELLANT

OPENING BRIEF  
OF  
PETITIONER RINDLISBACHER

VS.

Appellate Court Case #20040122-CA

DEPARTMENT OF WORKFORCE  
SERVICES, WORKFORCE APPEALS  
BOARD

RESPONDENT/APPELLEE

PETITION FOR REVIEW

of Case 03-B-1071

In the Department of Workforce Services,  
Workforce Appeals Board, State of Utah

by

Administrative Law Judge Norman Barnes

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FILED

UTAH APPELLATE COURTS

JUN 14 2004

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## JURISDICTION OF THE APPELLATE COURT

This Court has jurisdiction pursuant to *Utah Code Annotated* §78-2a-3(2)(a) as an appeal from the final order or decree resulting from formal adjudicative proceedings of the Department of Workforce Services, a state agency of the State of Utah.

## ISSUES PRESENTED FOR REVIEW

### A. FIRST ISSUE: AN INDIVIDUAL CAN ENGAGE IN SELF-EMPLOYMENT ACTIVITIES AND STILL RECEIVE UNEMPLOYMENT BENEFITS.

Whether in the adjudicative proceedings, the Department of Workforce Services erred in its determination that Petitioner Rindlisbacher was not unemployed as a matter of law (and therefore unentitled to benefits) due to Rindlisbacher's self employment activities which generated no income.

1. This is a question of law that is reviewed for correctness. *State v. Pena*, 869 P.2D 932, 939 (Utah 1994).
2. The issue was contained within the principal issue before the Workforce Appeals Board, *Record* 69, and was also the basis for Rindlisbacher's Motion for Summary Disposition.

### A. SECOND ISSUE: THE CLAIM OF FRAUD IS INAPPROPRIATELY IMPOSED ESPECIALLY WHEN THE REQUISITE KNOWLEDGE FOR INTENT TO DEFRAUD IS OBTAINED AFTER THE FACT.

The Department of Workforce Services erred in presuming a fraud penalty as a matter of law against Rindlisbacher for his failure to report self employment activities, when,

during such time the publications of the Department of Workforce Services imply that such activity need not be reported, especially when Rindlisbacher's knowledge, if any, was after the receipt of benefits.

1. The standard of appellate review with supporting authority. This is a question of law that is reviewed for correctness. *State v. Pena*, 869 P.2D 932, 939 (Utah 1994). Fraud may not be presumed whenever false information has been provided or material information omitted and benefits overpaid. The Department has the burden of proof, which is the responsibility to establish all the elements of fraud by a preponderance of evidence. R994-405-503, *Unemployment Insurance Rules*.
2. The issue was contained within the secondary issue before the Workforce Appeals Board, *Record* 69.

A. THIRD ISSUE: FRAILTIES OF THE ADMINISTRATIVE PROCESS.

Were Claimants constitutional rights, especially the right to call witnesses, impeded by the administrative process, especially where claimants under such procedures are generally indigent and risk the loss of property. After issuing its Denial of Reconsideration, did the Department of Workforce Services waive its claim for a penalty? Costs of appeal should be awarded Rindlisbacher.

1. The standard of appellate review with supporting authority. This is a question of law that is reviewed for correctness. *State v. Pena*, 869 P.2D



932, 939 (Utah 1994).

2. Claimant Rindlisbacher appeared pro-se throughout the proceedings. Such issue, attacking the process and the finder-of-fact was chilled during the proceedings .

CENTRALLY IMPORTANT OR DETERMINATIVE  
AUTHORITY OTHER THAN PRECEDENT

Department of Workforce Services, *Unemployment Insurance Claimant Guide*, page 10  
WORK/EARNINGS REPORTING

All work and earnings while claiming benefits must be reported for the week in which you work. This may or may not be the same week you are paid. This includes full or part-time work for any employer, military reserve or national guard unit, individual, charitable organization, or church. Earnings received from farming must also be included. You must also report earnings from self employment, commission sales and holiday, severance, or vacation pay; also, tips and the cash value of work performed in exchange for anything of value.

*Utah Code Annotated* 35A-4-204(1)

Definition of employment. 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.

*Utah Code Annotated* 35A-4-207(1)(a)

Unemployment. An individual is “unemployed” in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to the week are less than his weekly benefit amount.

Department of Workforce Services Rule 994-405-503(2)

Fraud may not be presumed whenever false information has been provided or material information omitted and benefits overpaid. The Department has the burden of proof, which is the responsibility to establish all the elements of fraud.

## STATEMENT OF THE CASE

- A. THE NATURE OF THE CASE This appeal is from a final decision of the Workforce Appeals Board of the Utah Department of Workforce Services.
- B. THE COURSE OF PROCEEDINGS The formal adjudicative proceedings of the Department of Workforce Services commenced on August 25, 2003 from the issuance of a Decision of Eligibility and Notice of Overpayment along with a Form 615-J Decision from the Department,
1. the appeal of which was determined by the Decision of the Administrative Law Judge on October 2, 2003,
  2. the appeal of which was determined by the Decision of the Workforce Appeals Board on December 11, 2003,
  3. the request for rehearing of which was denied on January 14, 2004.
  4. The Petition for Review (appeal) was filed February 12, 2004.
  5. Inasmuch as this involves a Petition for Review from formal adjudicative proceedings of a state agency, no motions were filed under *Utah Rules of Civil Procedure*, Rules 50(b), 52(b), or 59, *Utah Rules of Criminal Procedure* Rule 24,, or *Utah Code Annotated* § 77-13-6, although Rindlisbacher filed its Motion for Summary Disposition.
  6. Rindlisbacher's Motion for Summary Disposition was denied May 14, 2004, with a ruling on the issues deferred pending plenary presentation by

the parties.

C. DISPOSITION BELOW On August 25, 2003, The Utah Department of Workforce Services decided, “You are establishing or operating your own business. You are not unemployed within the meaning of the Act although you may be earning less than your weekly benefit amount. R21 On appeal, such has been confirmed and a fraud penalty imposed.

D. STATEMENT OF THE FACTS

1. Prior to filing a claim for unemployment insurance benefits, the claimant worked as a recruiter for Thera Peak Incorporated through April 7, 2003. R56
2. He was determined eligible and was paid unemployment insurance benefits for each of the weeks ended April 26, 2003 through August 9, 2003. R56-57.
3. The Claimant was unsuccessful in finding new work. R57.
4. He obtained a license (an assumed name certificate for self-employment) as Bacher & Company from the Department of Commerce on April 11, 2003. R 3, 57
5. He has generated no income from his business pursuits and spent less than full-time R57
6. The claimant received a copy of the Unemployment Insurance Claimant Guide at the time he filed his initial claim for unemployment insurance benefits which he was instructed to read. R57.
7. Regarding self-employment, it states, “All work and earnings while claiming

benefits must be reported . . . You must also report earnings from self-employment . . .” R57

8. The claimant filed telephonic claims (answering questions) for unemployment insurance benefits for the weeks ended April 12, 2003, through August 9, 2003. R57
9. He answered “no” to the question, “During the week, did you work?” R57-58
10. He did not consider his activities with Bacher and Company as employment and had no earnings from the company. R58
11. On August 20, 2003, the claimant completed a Benefit Payment Control Claimant Questionnaire form, which included questions regarding his self-employment activities. R58.
12. Such Questionnaire contained the first indication in the record that implied that one could not receive unemployment benefits if he was self-employed. R11
13. Rindlisbacher thereafter ceased to collect unemployment benefits. R56
14. On August 21, 2003, The Department sent Rindlisbacher a Notice of Issue, following on August 25, 2003 with a Decision of Eligibility which stated, “You are establishing or operating your own business. You are not unemployed within the meaning of the Act although you may be earning less than your weekly benefit amount.” R20, 21
15. The Department denied benefits retroactive to April 13, 2003 and continuing through August 7, 2004. Rindlisbacher had been receiving \$373.00 as his weekly benefit amount (totaling \$5,968.00), which

Rindlisbacher was asked to repay to the Department along with a penalty of \$5,968.00 (totaling \$11,936.00) plus a forfeiture of future benefits (52 weeks @\$373.00 equals \$19,396). R20, 21

16. From the document provided by the Department, it appeared that the only remedy available to Rindlisbacher was the administrative appeals process, without benefit of counsel, without benefit of a trial by jury, with the risk of a taking of his property, all arising from a telephonic hearing in which, if he fails to participate, will result in a default. R20, 21 (Throughout the process and the administrative appeals, Rindlisbacher dutifully following the instructions as to further appeal in each instance). Throughout, the Department's asserted position was that one could not receive unemployment benefits if he was self-employed, even if it was inaccurate and false.)

17. The Department effectively denied Rindlisbacher's right to have witnesses appear on his behalf. R 53-55

17. After Rindlisbacher's request for a rehearing was denied, Rindlisbacher received a Notice from the Department of Workforce Services that no longer included the penalty. Rindlisbacher's counsel contacted the Department by telephone to confirm that only the claimed overpayment, and not the penalty was being imposed. After reminding the Department that an appeal process had just been completed, and waiting on hold for a period of time, such confirmation was given and payment arrangements made. A confirming letter was sent to the Department. The Department issued its confirmation of the payment

arrangement. Thereafter, the Department reneged, stating that it had no statutory authority to compromise the claim and that Rindlisbacher's only recourse was by the Court of Appeals. R84-87

18. From the filing of the Petition to Review with the Court of Appeals, Rindlisbacher's attorney has spent 72.4 hours and incurred \$73.00 in costs up to the time of submission of this brief. The normal billing rate of such attorney is \$175.00 per hour. (Such attorney verifies the same by his signature hereon).

### SUMMARY OF ARGUMENTS

The Department's *Unemployment Insurance Claimant Guide* correctly indicates that one may be self-employed and still receive unemployment benefits so long as such self-employment activities do not generate income in excess of the weekly benefit amount. Such position contained in the Department Guide is supported by applicable statute, department rules, legal precedent, and policy. The Guide is given to a claimant (and was given to Rindlisbacher) as a reliable reference for appropriate conduct.

However, the Department claimed a contrary position with respect to self-employment. Their contrary position is that if a claimant is self-employed, he is ineligible for benefits. With Rindlisbacher, that contrary position was not revealed until he received an audit questionnaire, too late and after the receipt of his benefits.

The administrative law judge erred in ruling that although it generated no income, Rindlisbacher's self employment activity equates to a denial of benefits.

Even if such self employment activity resulted in a denial of benefits, the

administrative law judge further erred in finding an intention to defraud. The requisite intent was found on a failure to comply with an alleged reporting requirement. The “reporting requirement” proves to have been non-existent. Furthermore, even if true, Rindlisbacher’s knowledge of such “reporting requirement” was after the fact and too late. By Department rule, fraud may not be presumed. The judge apparently was misled by the faulty sequence of exhibits or other lack of identification to presume fraudulent intent. With proper sequence, the reasoning should have been: “Claimant’s self-employment activities were not reported in his weekly telephonic claims (nor were they asked to be reported), yet, upon later audit, Claimant responded that he had engaged in self-employment activities generating no income.” Presuming Fraud on such basis was incorrect.

Both issues might have been avoided by the addition or observance of basic due process, especially considering the nature of the proceedings. Administrative hearings on unemployment claims invariably pit an already distressed individual in jeopardy of losing what precious little assets remain against a governmental leviathan forced to make judgments against itself in order to provide relief. Attempts to invoke constitutional protections, such as the right to call witnesses, were thwarted, or at least impeded, by such process. Certainly, such was not envisioned by the framers of the Constitution, guaranteeing due process under the law.

## ARGUMENT

FIRST ISSUE: AN INDIVIDUAL CAN ENGAGE IN SELF-EMPLOYMENT ACTIVITIES AND STILL RECEIVE UNEMPLOYMENT BENEFITS.

Contrary to its own published standard, state statute, regulation, precedent and policy (each discussed below), the Department of Workforce Services erred in its determination that due to Petitioner Rindlisbacher being self-employed, though generating no income, he was therefore unentitled to benefits.

A. THE DEPARTMENT'S *UNEMPLOYMENT INSURANCE CLAIMANT GUIDE* DOES NOT PROHIBIT, BUT RATHER MAY ENCOURAGE SELF-EMPLOYMENT

As more fully set forth herein, and in adherence to relevant statute, regulations, and precedent, the Department's *Unemployment Insurance Claimant's Guide* (hereinafter sometimes referred to as "GUIDE") correctly indicates that one may be self-employed and still receive unemployment benefits so long as such self-employment activities do not generate income in excess of the weekly benefit amount. The Guide is given to a claimant (and was given to Rindlisbacher) as a reliable reference for appropriate conduct. The GUIDE conspicuously states on its front cover,

*-IMPORTANT-*

*To ensure your ongoing eligibility, use this guide  
as needed. You will be held accountable for the  
information contained within.*

The Department, by such notice, not only suggests, but directs the use of such guide in determining eligibility.



If, as the Department contends with Rindlisbacher, self-employment activities are prohibited in obtaining unemployment benefits, certainly the GUIDE would state as such. However, the only mention of self employment in such guide is, surprisingly, not contained in the section entitled *DENIAL OF BENEFITS*, pages 14 through 15, where six different reasons for denial of benefits is listed and where, if impermissible its mention would most likely be found. Its absence, in such section alone should be sufficient to overcome the Department's contention of self-employment prohibition. Furthermore, its absence in such section, supports Rindlisbacher's contention that self-employment is permitted.

Such is not the only suggestion that self employment is permissible. The section entitled, *WORK/EARNINGS REPORTING*, contains the following:

All work and earnings while claiming benefits must be reported . . . This includes full or part-time work for any employer, military reserve or national guard unit, individual, charitable organization, or church. Earnings received from farming must also be included. You must also report earnings from self employment . . .”

Interestingly, the sentence containing self-employment specifies only “earnings” (not work) from self-employment to be reported. Therefore, after reading such section of the GUIDE, and when asked the question, “During the week, did you work?” a claimant engaged in self-employment activities would properly respond, “no.” Such was the case with Rindlisbacher. The apparent reason earnings must be reported is to ensure that income from self-employment activities do not exceed the weekly benefit amount. Since

no earnings were generated, whether they exceeded the weekly benefit amount is not at issue.

The Department found that Rindlisbacher spent less than full time<sup>1</sup> in his self-employment activities, and that from such activities, Rindlisbacher generated no income. Based on the findings, according to the Guide, no reporting was required.

If, however, income was generated, such should have been reported. But, by requiring such reporting, the Guide clearly indicates that self-employment activities are indeed permitted, so long as earnings for that particular week do not equal or exceed the weekly benefit amount, *Guide*, page 11 (Earnings Allowance), which again is not at issue here..

Self Employment is nowhere prohibited in the *Guide*, rather, its inclusion in reporting requirements suggests it is permitted or encouraged. Such, alone, should be sufficient for the appeals court to reverse in favor of Rindlisbacher.

#### B. APPLICABLE STATE STATUTES DO NOT PROHIBIT, BUT RATHER MAY ENCOURAGE SELF-EMPLOYMENT

Section 35A-4-204 and Section 35A-4-207, Utah Code Annotated, contain specific definitions of “employment” and “unemployment” as follows:

35A-4-204(1) Definition of employment. 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,

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<sup>1</sup>Rule 994-207-102(1)(a) of The Unemployment Insurance Rules provides: “Full-time work will generally be considered to be 40 hours a week. The Administrative law judge found that Rindlisbacher devoted less than 40 hours per week to his self-employment activities.

including service in interstate commerce, and service as an officer of a corporation.

35A-4-207(1)(a) Unemployment. An individual is “unemployed” in any week during which he performs no services and with respect to which no wages are payable to him, or in any week of less than full-time work if the wages payable to him with respect to the week are less than his weekly benefit amount.

Even under such broad definitions, no prohibition of self-employment activities exists. There is no evidence, nor is there claimed to be evidence, that Rindlisbacher’s self-employment activities were as a corporation (no service as an officer of a corporation was given), nor were services performed under contract, nor for wages.

The absence of such prohibition implies its permission under the statute. Even if Rindlisbacher failed to rely on the Guide and had sought to review these statutes, he would not be alerted to the Department’s erroneous position that the self-employment activities are prohibited. Under either definition, the Department erred in ruling Rindlisbacher was “not unemployed” by virtue of his being “self employed.” No such prohibition exists. No statutory prohibition of self-employment exists in the Utah Employment Security Act.

#### C. DEPARTMENT RULES DO NOT PROHIBIT, BUT RATHER MAY ENCOURAGE SELF-EMPLOYMENT

The Department, under *Utah Code Annotated*, 35A-4-207(1)(b) is authorized to prescribe certain rules. The scope of its prescription does not include redefining unemployment to exclude the self-employed.

Despite the limited scope of such prescription, the Department has promulgated rules whereby the self-employed may be excluded from unemployment benefits.

Department Rule R994-207-104(1)(b)(i) *Unemployment Insurance Rules* states:

A claimant may earn up to 30% of his weekly benefit amount in total self-employment plus work for wages before a reduction is made in the unemployment insurance payment for that week. When the estimated income amount equals or exceeds the weekly benefit amount, the claimant is “not unemployed” and benefits will not be allowed.

However, there was no finding that the estimated income amount equaled or exceeded the weekly benefit amount. Rather, the finding was that Rindlisbacher generated *no* income from his self-employment. Application of the Department’s rule not only supports Rindlisbacher’s claim of continued eligibility, but clearly mandates *not even a reduction in benefits*. It further clearly sets forth the point in time when self employment would rise to the level of being “not unemployed.” That point of time, when the income amount equals or exceeds the benefit amount was never reached. No income was earned.

Application of the Department’s rule supports Rindlisbacher’s claim of continued eligibility. The position of the Department that self-employment activities are prohibited is totally inconsistent with their own rules.

#### D. RELEVANT PRECEDENT DOES NOT PROHIBIT, BUT RATHER MAY ENCOURAGE SELF-EMPLOYMENT

Despite a vigorous dissent (citing conflicting Idaho and Pennsylvania precedents

which held that one who is self-employed is not “unemployed”), the majority opinion of the Supreme Court of the State of Utah in *Johnson v. Board of Review*, 7 Utah 2d 113, 320 P.2d 315 (Utah 1958) held (page 317) that:

one receiving less than his “weekly benefit amount” should be considered eligible, whether employed by another or self-employed.

While *Johnson* is an older case (and also involved issues, not involved here, of calculating the weekly amount received from self-employment), it remains the controlling, applicable precedent in the State of Utah. Unlike the present case, where the Department found that Rindlisbacher received no income from his self-employment activities, the progeny of *Johnson* all had different distinguishing factual circumstances or issues<sup>2</sup>, yet each upheld and supported the ruling in *Johnson*. *A fortiori*, the principal should apply today to the instant case and the Petition granted.

#### E. POLICY

Extant among the GUIDE, statutes, regulations, and precedent, is a policy to encourage, rather than discourage, productive activities that limit or eliminate a claimant’s reliance on Worker’s Compensation. As with other activities, protections against abuse exist regarding self-employment activities by limiting and offsetting

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<sup>2</sup>In *Child v. Board of Review*, 8 Utah 2d 239, 332 P2d 930, the court would not permit an individual to “lay himself off and receive benefits.” *Cruz v. Department of Employment Security*, 22 Utah 2d 393, 453 P2d 894 involved unemployment of a striking employee. In *Kearl v. Department of Employment Security*, 676 P2d 385 (Utah 1983) compensation was received and the self-employment was a going business...However, all of these cases, and others, cite *Johnson* with authority, which remains despite subsequent amendments and changes (not applicable here) to the applicable statutory code provisions.

income to the weekly benefit amount. To prohibit self-employment activities as a possible means would be contrary to such policy.

SECOND ISSUE: THE CLAIM OF FRAUD IS INAPPROPRIATELY IMPOSED, ESPECIALLY WHEN THE REQUISITE KNOWLEDGE FOR INTENT TO DEFRAUD IS OBTAINED AFTER THE FACT.

The Department of Workforce Services erred in imposing a fraud penalty as a matter of law against Rindlisbacher for failure to report his self-employment activities while receiving benefits, when, during such time the publications and questionnaires of the Department of Workforce Services do not indicate that such activity need be reported. The questionnaire that first alerted him that such activity may have been prohibited and to which he appropriately responded was August 20, 2003—too late and after the receipt of benefits.

A. THE GUIDE RELIABLY INDICATES SELF-EMPLOYMENT ACTIVITIES WERE NOT REQUIRED TO BE REPORTED, ELIMINATING THE BASIS FOR FRAUD.

Even if such self employment activity resulted in a denial of benefits, the administrative law judge further erred in finding an intention to defraud. The requisite intent was founded on a failure to comply with an alleged reporting requirement. The “reporting requirement” proves to have been non-existent in this case.

Discussion on the first issue established the importance and applicability of the GUIDE. The Fraud penalty was imposed due to the failure of Rindlisbacher to report his self-employment activities. Another look at the GUIDE in conjunction with the

FINDINGS clearly indicate the reporting requirements were either non-existent or fulfilled. This reporting requirement is argued under Issue 1A, but again is briefly set forth herein.

The section of the GUIDE entitled, *WORK/EARNINGS REPORTING*, contains the following:

All work and earnings while claiming benefits must be reported . . . This includes full or part-time work for any employer, military reserve or national guard unit, individual, charitable organization, or church. Earnings received from farming must also be included. You must also report earnings from self employment . . .”

Note that the sentence containing self-employment specifies only “earnings” (not work) from self-employment to be reported. The Department found that Rindlisbacher’s self employment activities generated no income. Based on the findings, according to the Guide, no reporting was therefore required. Given the esteem of the GUIDE, and the instructions to claimant to rely thereon, no fraud penalty should be imposed absent its intentional violation.

#### B. THE PRESUMED FRAUD BASED ON THE FILING OF CLAIMS IS FAULTY.

Even if the self-employment activities were required to be reported, the Findings of Fact indicate that Rindlisbacher did not know of such requirement until faced with the completion of an audit questionnaire. By Department Rule, Fraud may not be presumed. The administrative law judge erred in finding an implied intention to defraud during the period Rindlisbacher filed for claims.

Fraud may not be presumed whenever false information has been provided or material information omitted and benefits overpaid. The Department has the burden of proof, which is the responsibility to establish all the elements of fraud by a preponderance of evidence. R994-405-503, *Unemployment Insurance Rules*.

The judge presumed fraud. Perhaps due to the faulty order of exhibits, the judge relied on a faulty sequence between the audit questionnaire and the filing for claims.

The court reasoned that Claimant completed the (audit) questionnaire regarding self-employment

“yet failed to report that same status when he filed his telephonic claims each week.”

The faulty reasoning implies that the completion of the audit questionnaire was evidence of Rindlisbacher’s knowledge of the filing requirement, yet, with that knowledge, he then proceeded to exclude self-employment activities from his reporting. In order to make the implication, the reasoning only makes sense if, as indicated in the courts statement, one followed the other, i.e.; if the audit questionnaire was completed before the filing of claims—which is not the case.

The audit questionnaire was prepared *after* all claims had been made. The judge apparently was misled by the faulty sequence of exhibits or other lack of identification of the audit questionnaire.

With the documents proper sequence, the resultant reasoning should have been:

“Claimant’s self-employment activities were not reported in his weekly telephonic claims (nor were they asked to be reported), yet, upon later audit, Claimant responded that he had engaged in self-employment activities generating no income.”



Since Fraud may not be presumed from a failure to report, the Judge's presumption of fraud fails. With such reasoning, certainly there is little, if any, basis to impose the fraud penalty.

### THIRD ISSUE: A CORRECT OUTCOME MAY HAVE RESULTED BY OBSERVANCE OF BASIC DUE PROCESS

From the document provided by The Department, it appeared that the only remedy available to Rindlisbacher was the administrative appeals process, without benefit of counsel, without benefit of a trial by jury, with the risk of a taking of his property, all arising from a telephonic hearing in which, if he fails to participate, will result in a default.

#### A. DURING THE ADMINISTRATIVE PROCEEDINGS, OBSERVATION OF DUE PROCESS CONSIDERATIONS, INCLUDING THE CALLING OF WITNESSES, WERE IMPEDED OR VIOLATED.

Especially in dealing with unemployed individuals lacking funds, though characterized as an administrative or civil proceeding, with the State as a prosecutor, the hearing has the same elements as a criminal proceeding, but without the trappings protecting individual rights. The administrative law judge would have been in a better position to make a fair determination by observance of basic due process, especially due to the nature of the proceedings. Administrative hearings on unemployment claims invariably pit an already distressed individual in jeopardy of losing what precious little assets remain against a governmental leviathan which makes its own rules, attempting to persuade it to make judgments against itself in order to provide relief.

Issues may have been avoided if claimant had had the assistance of counsel in the

administrative hearings and was afforded certain basic due process protections, but the cost (time and expense already expended exceed the Department's claim) he was unable to do so. Besides the failure to properly resolve the two main issues already discussed, certainly a difference in a presentation and understanding of the facts could have been made. For example, in this case, additional information that may have made a difference might have been obtained, perhaps the calling of an additional witness, which right was effectively denied, as follows (R53-55):

After responding to all of the questions of the Judge and the Attorney for the Department, and thinking that the proceeding was winding up, Rindlisbacher asked, "And what about any of the witnesses that I had?"

The judge then entered into a lengthy exchange, chilling Rindlisbacher's request. Far into the exchange, the Judge stated, "I don't have a lot of time today, but I don't want to deny you the right to have a witness. Now if she has something to say, I'm happy to call her."

"Please call her," Rindlisbacher repeated his desire, previously expressed several times.

The judge responded by a fearful, imposing, pronouncement, "I'm going to ask you to ask questions of her that would be relevant to the issues before me."

Appearing pro se, his future in the hands of the judge, with no legal background except watching a few Perry Mason programs or the like, where cries of "irrelevance" resound, Rindlisbacher's reaction was predictable, in acceding to the judge's obvious preference.

Even if a witness has no additional knowledge, the additional testimony could have been used to substantiate the facts, express the facts in a different manner so as to give them a more complete meaning, or, especially in a matter where fraud or intent is an

issue, act as a character witness. Rindlisbacher's right was clearly chilled by the exchange with the Judge.

The interchange covered three (R53-55) of the total 23 pages, fully 1/8 of the proceedings. Clearly, Rindlisbacher wanted to have his wife called as a witness, but was effectively denied such right.

Such an individual, as in this case, would have no choice but to trust the system without question and with little understanding of its impact. Such system, by its use of telephonic hearings and faceless claimants, fails to afford the administrative judge an opportunity to sympathize with a claimant who is already disadvantaged in the presentation of his case, no matter how worthy. Certainly, such was not envisioned by the framers of the Constitution, guaranteeing due process under the law.

#### **B. THE DEPARTMENT WAIVED PORTIONS OF ITS JUDGMENT AFTER THE ADMINISTRATIVE PROCEEDING.**

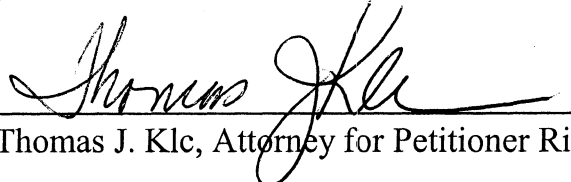
Despite request otherwise, the record produced by the Department of Workforce Services is deficient with regard to this matter, failing to include the specific items requested. Nevertheless, it has included the letter and response that outlines the claim. Such only further evidences the limitations of the Department of Workforce Services acting as its own adjudicator. After issuing its Denial of Reconsideration, the actions of the Department of Workforce Service in issuing a Notice of Fault Overpayment excluding the fraud penalty; its designated and authorized employee with knowledge of such proceedings confirming that no fraud penalty will be imposed; receipt of a written

confirmation of its understanding of the same; and it sending a written confirmation of such amount with payment arrangements excluding any fraud penalty; constitutes a waiver of such fraud penalty.

### CONCLUSION

The Department of Workforce Services determined that Rindlisbacher engaged in self-employment activities and therefore not entitled to Unemployment Insurance Benefits, requiring repayment of all benefits received, denial of future benefits, and imposition of a penalty for fraud. Inasmuch as by their own handbook, rules, regulations, and State Statute, self employment activities that generate income below the weekly benefit amount (or no income, as was found in this case) are not prohibited, the required repayment, denial of benefits, and fraud penalty should not have been imposed. Furthermore, since the knowledge and intent required for fraud cannot be presumed from an inaccurate or a non-filing, the imposition of the fraud penalty based on such a presumption, again, should not have been imposed. Deficiencies in the process, including the effective denial of the calling of a witness, lack of legal counsel, among other things, may have violated constitutional guarantees of due process. Rindlisbacher is seeking a revocation of the fraud penalty, a determination that prior benefits need not be repaid, and reinstatement of benefits that have not been received, along with his attorney's fees and costs.

Respectfully submitted,

  
Thomas J. Klc, Attorney for Petitioner Rindlisbacher

CERTIFICATE OF SERVICE

I, Thomas J. Kie hereby certify that on 6-14-2004 I  
[Date]  
served a copy of the attached OPENING BRIEF OF PETITIONER  
RINDLISBACHER  
[document]  
upon the [party] ~~[parties]~~ listed below by ~~mailing it by first~~  
~~class mail~~ [personal delivery].

TIFFANY VINCENT, ATTORNEY FOR  
RESPONDENT DEPARTMENT OF  
EMPLOYMENT SECURITY, WORKFORCE  
APPEALS BOARD  
140 EAST 300 SOUTH  
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Signature

6-14-2004  
Date