2008

Nigohosian v. Workforce Appeals Board : Brief of Petitioner

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

ROBERT H. NIGOHOSIAN, Petitioner, vs. WORKFORCE APPEALS BOARD, DEPARTMENT OF WORKFORCE SERVICES, and SALT LAKE COMMUNITY COLLEGE Respondents,	Appeal No. 20080945 Agency Case No. 08-R-00498

BRIEF OF PETITIONER

PETITION FOR REVIEW
FROM FINAL DECISION OF THE WORKFORCE APPEALS BOARD

Suzann Pixton (2608)
Workforce Appeals Board
Department of Workforce Services
140 East 300 South
Salt Lake City, UT 84145-0244
Attorney for Respondents
Workforce Appeals Board and
Department Of Workforce Services

Joseph E. Hatch (1415)
5295 So. Commerce Drive
Suite 200
Murray, UT 84107
Attorney for Petitioner
Robert H. Nigohosian

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JURISDICTION OF THIS COURT

The Utah Court of Appeals has original jurisdiction over the filed Petition for Review pursuant to Utah Code Annotated §§35A-4-508(8)(a) and 78-2a-3(2)(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

The Petitioner presents the following issue for review: Did the Workforce Appeals Board abuse its discretion by refusing to consider the Recommendations of the Sitting Hearing Committee of the Employer, Salt Lake Community College, issued on September 12, 2008? Ekshteyn v. Department of Workforce Services, 45 P.3d 175 (Utah App. Court, 2002). Since this matter is an original proceeding before this Court, the issue is preserved on the first page of the Petition for Review dated November 14, 2008.

STATUTORY AND ADMINISTRATIVE RULE PROVISIONS

The following statutes and administrative rules are subject to interpretation by this Court with this Petition:

UTAH CODE ANN. § 35A-1-304(2) reads as follows:

On appeal, the Workforce Appeals Board may on the basis of the evidence previously submitted in the case, or upon the basis of any additional evidence it requires:
(a) affirm the decision of the administrative law judge;

(b) modify the decision of the administrative law judge; or

(c) reverse the findings, conclusions, and decision of the administrative law judge. [Emphasis added]

UTAH CODE ANN. § 35A-4-406(2)(a)-(c) reads as follows:

(a) Jurisdiction over benefits shall be continuous.

(b) Upon its own initiative or upon application of any party affected, the division [Division of Adjudication] may on the basis of change in conditions or because of a mistake as to facts, review a decision allowing or disallowing in whole or in part a claim for benefits.

(c) The review shall be conducted in accordance with rules adopted by the department and may result in a new decision that may award, terminate, continue, increase, or decrease benefits, or may result in referral of the claim to an appeal tribunal. [Emphasis Added]

UTAH ADMINISTRATIVE CODE R 994-508-401(2) AND (3), reads as follows:

(2) After a determination or decision has become final, the Department may, on its own initiative or upon the request of any interested party, review a determination or decision and issue a new decision or determination, if appropriate, if there has been a change of conditions or a mistake as to facts. The reconsideration must be made at, or with the approval of, the level where the last decision on the case was made or is

currently pending.

(a) A change in conditions may include a change in the law which would make reconsideration necessary in fairness to the parties who were adversely affected by the law change. A change in conditions may also include an unforeseeable change in the personal circumstances of the claimant or employer which would have made it reasonable not to file a timely appeal.

(b) A mistake as to facts is limited to material information which was the basis for the decision. A mistake as to facts may include information which is misunderstood or misinterpreted, but does not include an error in the application of the act or the rules provided the decision is made under the correct section of the act. A mistake as to facts can only be found if it was inadvertent. If the party alleging the mistake intentionally provided the wrong information or intentionally withheld information, the Department will not exercise jurisdiction under this paragraph.

(3) The Department is not required to take jurisdiction in all cases where there is a change in conditions or a mistake as to facts. The Department will weigh the administrative burden of making a redetermination against the requirements of fairness and the opportunities of the parties affected to file an appeal. The Department may decline to take jurisdiction if the redetermination would have little or no effect. [Emphasis Added]

STATEMENT OF THE CASE

The Petitioner is Robert H. Nigohosian (hereinafter "Mr. Nigohosian"). On June 8, 2008, Mr. Nigohosian was discharged from his employment with the Respondent Salt Lake Community College (hereinafter "S.L.C.C."). He

immediately filed for unemployment compensation with Respondent Department of Workforce Services. (R.1-4). On August 19, 2008, following an informal telephonic hearing, Administrative Law Judge Gary S. Gibbs (hereinafter "A.L.J.") of the Department of Workforce Services rendered his Findings of Fact and Conclusions of Law denying Mr. Nigohosian unemployment compensation. (R. 182-183).

Mr. Nighosian appealed the denial to the Respondent Workforce Appeals Board (hereinafter "Appeals Board"). (R. 186). On September 18, 2008, the Appeals Board affirmed the ALJ's denial of unemployment compensation. (R. 195-200).

On September 26, 2008, Mr. Nigohosian filed a Motion to Reconsider and to Reopen the Hearing with the Appeals Board. (R.205-211). The S.L.C.C. did not respond to this Motion. On October 16, 2008, without explanation, the Appeals Board denied Mr. Nigohosian's Motion (R. 213-215). This Petition for Review followed. (R. 216-217).

STATEMENT OF FACTS

Mr. Nigohosian went to work as an economics instructor at the S.L.C.C. on September 11, 1994. When his employment was terminated by the S.L.C.C. on June 4, 2008, Mr. Nigohosian was a tenured associate professor. (R. 5-21). As a part of his employment, Mr. Nigohosian participated in the "concurrent enrollment program", which allowed high school students to earn college credit. Mr. Nigohosian would counsel high school teachers, provide resource material, and visit the high school classes. To get paid for these services, Mr. Nigohosian had to fill out and file "Liaison Visit Report Form". (R. 32-39, 99). S.L.C.C. initially believed these forms were filed fraudulently in an effort by Mr. Nigohosian to be paid for services not rendered. Mr. Nigohosian believed he had filled out a confusing and ambiguous form correctly for the services he had rendered. After a precursory investigation, Mr. Nigohosian was fired by S.L.C.C. on June 4, 2008. (R. 183, 189-193).

Immediately following his firing, Mr. Nigohosian pursued the internal grievance process established by the S.L.C.C. to get his job back. In compliance with federal and state requirements, the grievance process culminates with a "due process hearing".

The all-day, due process hearing was held on September 14, 2009 before a panel of seven (7) S.L.C.C. professors. Most of the witnesses at the S.L.C.C. hearing were witnesses who testified before the A.L.J. at the telephonic hearing with the Department of Workforce Services. On September 17, 2008, the S.L.C.C. faculty panel made its recommendations. The recommendations include the find that Mr. Nigohosian's dismissal from S.L.C.C. seems "unconscionably over reactive". (R. 205-211).

The day after the S.L.C.C. faculty panel issued its recommendation. On September 18, 2008, Mr. Nigohosian filed, with the Appeals Board, a copy of the recommendation. (R. 201-209). However, that same day the Appeals Board issued its decision without considering the recommendation from the S.L.C.C. faculty panel. (R. 195-200). Therefore, on September 26, 2008, Mr. Nigohosian filed a Motion to reopen the hearing for purposes of supplementing the record with the S.L.C.C. faculty panel recommendations so the Appeals Board could be taken into account by the Appeals Board in any reconsideration of its initial decision of September 18, 2008 (R.205-211).

The S.L.C.C. did not file any response to Mr. Nigohosian's Motion. On October 16, 2008, with one sentence stating "The Claimant's [Nigohosian's]

request for reconsideration is denied", the Appeals Board rejected the Motion. (R. 2-3-215). As a result, Mr. Nigohosian filed this Petition for Review. (R. 216-217).

SUMMARY OF ARGUMENT

By statute and administrative rule, records in unemployment benefit cases should be liberally re-opened to include new relevant evidence. The recommendation from the S.L.C.C. faculty panel is such evidence. The Appeals Board abused its discretion by not including the recommendation in the record in this matter. This Court should remand this case to the Appeals Board with instructions to include the recommendation in the record so that the Appeals Board could properly reconsider this matter.

ARGUMENT

THE APPEALS BOARD ABUSED ITS DISCRETION BY REFUSING TO REOPEN THE RECORD TO INCLUDE THE FACULTY PANEL RECOMMENDATIONS.

Mr. Nigohosian's efforts to collect unemployment benefits are not unlike thousands of others. Mr. Nigohosian believed his employment was terminated without sufficient cause. The administration of S.L.C.C. believed they had

sufficient cause for the firing. However, unlike most employment situations in Utah, the employer, S.L.C.C., has a sophisticated process for an aggrieved employee to challenge his firing.

In the context of awarding unemployment benefits, the law as to whether or not an employee was fired for cause is very well established. The A.L.J. and the Appeals Board, in their two main decisions, state the law accurately. The law is also codified in Utah Administrative Code R 994-405-202. The critical portion of this rule is quoted as follows:

> (2) Knowledge.
>
> The claimant must have had knowledge of the conduct the employer expected. There does not need to be evidence of a deliberate intent to harm the employer; however, it must be shown the claimant should have been able to anticipate the negative effect of the conduct. Generally, knowledge may not be established unless the employer gave
> a clear explanation of the expected behavior or had a written policy, except in the case of a violation of a universal standard of conduct. A specific warning is one way to show the claimant had knowledge of the
> expected conduct. After a warning the claimant should have been given an opportunity to correct the objectionable conduct. If the employer had a progressive disciplinary procedure in place at the time of the separation, it generally must have been followed for knowledge to be established, except in the case of very severe infractions, including criminal actions.

The dispute between Mr. Nigohosian and the administration of S.L.C.C. center around Mr. Nigohosian's "knowledge" when he filled out and filed the two report forms. The administration argues that Mr. Nigohosian knew exactly what he was doing when he "inappropriately" filled out the forms. Mr. Nigohosian argues that he thought he was filling out the forms accurately for the services he was rendering in light of the ambiguity and confusion of the forms. This dispute is, of course, fact sensitive.

A critical and relevant fact in all such disputes is whether the employer believes the firing to be with or without sufficient cause. In the case at hand, a recommendation, from a panel created by the employer, finds that the firing of Mr. Nigohosian to be inappropriate. This recommendation came after a full day hearing, involving many witnesses and documents, involving three attorneys, and a panel of seven (7) employees of S.L.C.C. Unfortunately, the faculty panel came to their decision at the same time that the Appeals Board rendered its decision.

The law in unemployment benefit matters anticipates that changing or developed facts may need to be added to the record in order to render an appropriate and just decision. Utah Code Ann. §35A-1-304(2) reads as follows:

On appeal, the Workforce Appeals Board may on the basis of the

> evidence previously submitted in the case, or upon the basis of any additional evidence it requires:
>
> (a) affirm the decision of the administrative law judge;
> (b) modify the decision of the administrative law judge; or
> (c) reverse the findings, conclusions, and decision of the administrative law judge.

This statute specifically authorizes the Appeals Board to accept additional evidence such as the faculty panel recommendation. Additionally, the Department of Workforce Services is directed by statute to maintain continuing jurisdiction over the award of unemployment benefits. Utah Code Ann. §35A-4-406(2)(b) reads:

> Upon its own initiative or upon application of any party affected, the division may on the basis of change in conditions or because of a mistake as to facts, review a decision allowing or disallowing in whole or in part a claim for benefits.

This statute specifically states the reason for why new facts may need to be added to a record.

The Department of Workforce Services promulgated rules to implement the above statutory changes. Utah Administrative Code R 994-508-117(5) reads as follows:

> The ALJ may reopen a hearing on his or her own motion if it appears necessary to take continuing jurisdiction or if the failure to reopen would

be an affront to fairness.

Utah Administrative Code R 994-508-118(1) through (3) reads:

> (1) The request to reopen will be granted if the party was prevented from appearing at the hearing due to circumstances beyond the party's control.
>
> (2) The request may be granted upon such terms as are just for any of the following reasons: mistake, inadvertence, surprise, excusable neglect, or any other reason justifying relief from the operation of the decision. The determination of what sorts of neglect will be considered excusable is an equitable one, taking into account all of the relevant circumstances including:
>
> (a) the danger that the party not requesting reopening will be harmed by reopening.
>
> (b) the length of the delay caused by the party's failure to participate including the length of time to request a reopening;
>
> (c) the reason for the request including whether it was within the reasonable control of the party requesting reopening;
>
> (d) whether the party requesting reopening acted in good faith;
>
> (e) whether the party was represented at the time of the hearing. Attorneys and professional representatives are expected to have greater knowledge of Department procedures and rules and are therefore held to a higher standard; and
>
> (f) whether based on the evidence of record and the parties' arguments or statements, taking additional evidence might affect the outcome of the case.
>
> (3) Requests to reopen are remedial in nature and thus must be liberally construed in favor of providing parties with an opportunity to be heard and

present their case. Any doubt must be resolved in favor of granting reopening.

Although the two above rules apply specifically to hearings before the A.L.J., when the matter has been appealed to the Appeals Board, the Appeals Board has similar authority to reopen matters to supplement the record. Utah Administrative Code R994-508-401(2)(b) and (3) read as follows:

> (2) After a determination or decision has become final, the Department my, on its own initiative or upon the request of any interested party, review a determination or decision and issue a new decision or determination, if appropriate, if there has been a change of conditions or a mistake as to facts. The reconsideration must be made at, or with the approval of, the level where the last decision on the case was made or is currently pending.
>
> (a) A change in conditions may include a change in the law which would make reconsideration necessary in fairness to the parties who were adversely affected by the law change. A change in conditions may also include an unforeseeable change in the personal circumstances of the claimant or employer which would have made it reasonable not to file a timely appeal.
>
> (b) A mistake as to facts is limited to material information which was the basis for the decision. A mistake as to facts may include information which is misunderstood or misinterpreted, but does not include an error in the application of the act or the rules provided the decision is made under the correct section of the act. A mistake as to facts can only be found if it was inadvertent. If the party alleging the mistake intentionally provided the wrong information or intentionally withheld information, the Department will not exercise jurisdiction under this paragraph.

> (3) The Department is not required to take jurisdiction in all cases where there is a change in conditions or a mistake as to facts. The Department will weigh the administrative burden of making a redetermination against the requirements of fairness and the opportunities of the parties affected to file an appeal. The Department may decline to take jurisdiction if the redetermination would have little or no effect.

The S.L.C.C. faculty panel recommendations were not available when the A.L.J. conducted his hearing. The recommendation was available while the Appeals Board still had jurisdiction and prior the Board's decision becoming final.

Unfortunately, we do not know why the Appeals Board refused to reopen the record to consider the recommendation. The S.L.C.C., when given an opportunity to oppose Mr. Nigohosian's Motion, provided no response to the Motion. The Appeals Board provided no explanation as to its reasoning.

The refusal of the Appeals Board to add the recommendation to the record is reviewable by this Court under an abuse of discretion standard. In such cases, it means that the Court will grant to the Appeals Board "moderate deference and will uphold [the Board's] decision so long as it is within the realm of reasonableness and rationability." Arrow Legal Solutions Group P.C. vs. Department of Workforce Services, et. al., 180 P. 3d 830, 832 (Utah Crt. App, 2007). However, the Appeals Board made no findings of fact or conclusion of law as to why the

Board did not add the faculty panel recommendations to the record. It is the Board's obligation to do so. Adams v. Board of Review of Indus Comm 821 P. 2d 1 (Utah, 1991). Absent such articulation from the Appeals Board, this Court should remand this matter to the Board with instructions to add the recommendation to the record and reconsider the Board's decision.

CONCLUSION

Based upon the above, this Court should recommend this matter be remanded to the Appeals Board with instructions to the Appeal Board to reopen the record to include the S.L.C.C. faculty panel recommendation so an appropriate reconsideration can be held of the initial Appeals Board's decision.

DATED this ____ day of February, 2009.

_____
Joseph E. Hatch
Attorney for Robert H. Nigohosian

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of February, 2009, I served two copies of the foregoing Brief of Petitioner on the following by depositing a copy in the U. S. Mail, postage pre-paid, addressed to:

Suzan Pixton
Workforce Appeals Board
Department of Workforce Services
140 East 300 South
P.O. Box 45244
Salt Lake City, UT 84145-0244

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