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Due Process in Unemployment Insurance Adjudication: Overview of the Unemployment Insurance System

Frank J. Barbaro

DUE PROCESS IN UNEMPLOYMENT INSURANCE ADJUDICATION

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/excerpts/
Hon. Frank J. Barbaro,
Chairman

OVERVIEW OF THE UNEMPLOYMENT INSURANCE SYSTEM

In New York, the Unemployment Insurance Division of the Department of Labor exercises control over the numerous local unemployment insurance offices which serve each area of the State, while the autonomous Unemployment Insurance Appeal Board regulates the administrative appellate process.

A person who is out of work may file a claim for benefits at the local office servicing the area where he lives. He is also required to register for work at the New York State Employment Service, where, ideally, he will be referred to a suitable job or assisted in his own search for work. The claimant will be assigned a reporting schedule for both the unemployment insurance office and the employment service.

If, at any time during a claim, potentially disqualifying information comes to the attention of Department of Labor personnel, the claimant will be interviewed by a claims examiner in the local unemployment insurance office. A statement will be taken from the claimant, the matter will be investigated, and a ruling on the claimant's eligibility will then be issued by the examiner.

Any party (claimant or chargeable employer) who is dissatisfied with the determination may request a hearing before an administrative law judge, under the auspices of the Appeal Board. A hearing request must be made within thirty days of the initial determination, unless the party was prevented from so doing by physical or mental incapacity. At the hearing, all testimony is taken under oath, and the proceeding is recorded by a stenographer or on a cassette. The parties are entitled to examine and cross-examine witnesses, to be represented by counsel, and to avail themselves of administrative subpoenas for the production of witnesses and evidence. The administrative law judge will issue a written decision in each case, and copies are sent to the respective parties.

Any party who is adversely affected by the decision, and also appeared at the hearing, may appeal the decision to the Appeal Board. The Industrial Commissioner may appeal whether

or not he was represented at the hearing. All appeals must be taken within twenty days of the decision, and there is no statutory provision excusing a delay due to mental or physical incapacity, as is the case of hearing requests.

The Appeal Board is composed of five members appointed by the Governor for staggered six year terms; no more than three members may be from the same political party. The Board, usually in panels of two members, generally decides the appeals based upon the record developed at the hearing; there is no right to a further personal appearance before the Board and requests for additional hearings are purely discretionary.

The Appellate Division of State Supreme Court, Third Judicial Department, located in Albany, has exclusive jurisdiction over court review of Appeal Board decisions. Review may be obtained by filing a notice of appeal with the Appeal Board within thirty days of its ruling. In view of the fact that most of the appellants are claimants, and many appear pro se, a simplified procedure has been established, and the need for expensive printing of briefs and the record has been eliminated. Review, however, is limited to questions of law, and the facts, as found by the Appeal Board, will be accepted by the Court if supported by substantial evidence.

It is within this framework that the Labor Committee has undertaken its examination of due process issues...

Right to Counsel

A basic tenet of American jurisprudence is that a person has the right to be represented by counsel; this principle is as applicable to administrative hearings as it is to judicial proceedings. The significance of obtaining counsel in unemployment insurance matters should not be underestimated. Most employers consider this type of advice essential, although they do not always engage the services of a duly-admitted attorney. A March, 1980, nation-wide study by the Personnel Policies Forum of the Bureau of National Affairs shows that 76% of all employers have at least one employee who is experienced in unemployment insurance matters, and 24% of all employers retain outside unemployment insurance advice. Some employers use both in-house and outside experts. Conversely, an August, 1979, study by the National Commission on Unemployment Compensation indicates that only about 7% of all claimants are represented at hearings, while only 9% of all employers have outside counsel present at these proceedings according to this study. The National Commission did not consider trained company personnel as the equivalent of "representation", although in practice, that is the experts' function.

The presence of representation has a very pronounced effect upon the parties' chances of prevailing in unemployment proceedings. The National Commission study showed that in

those cases where employers were represented and claimants were not, the employers were successful 70% of the time. In contrast, when both parties were represented, employers were successful in about half of the cases.

The reasons for the disparity in the employment of counsel are primarily economic. Employers have the wherewithal to pay for such services and are entitled to deduct these costs from their taxes. The opposite is generally true of claimants. Because of their recent employment, most claimants exceed the low economic threshhold which would make them eligible for free legal services, and even those indigent enough to qualify for these services may not receive them because unemployment insurance cases are not accorded a high priority in light of the legal services' heavy case load and limited budgets. Paradoxically, most claimants are also unable to afford private counsel, and in those instances where the claimant has the ability to pay, section 538 of the New York State Labor Law sets a ceiling on the fee payable to an attorney of 10% of the benefits allowed. Thus it is uneconomical for most lawyers to accept unemployment insurance matters on a fee basis, and many will do so only when the proceeding is collateral to a civil lawsuit, discrimination complaint, or similar action against the employer.

Assuming the availability of counsel, parties may have representation at all phases of the hearing and appeal processes as a matter of right. However, there is no formal policy with respect to a claimant having an attorney present at local office interviews. Such requests by claimants are rare, and there have been no reported objections by local office management in the few instances brought to the committee's attention.

The major source of claimant assistance at the local office level was the experimental "Claimant Representation Program" conducted in six local unemployment insurance offices over a period of about a year-and-a-half. Experienced Department personnel were exclusively assigned to handle administrative problems that claimants face in the local offices, such as inaccurate summaries of interviews and inability of claimants to articulate their positions. Testimony at the hearing indicated that the Department was cooperative in establishing this experimental program, although there was some discontent on the part of some local office supervisors over the fact that "outsiders" were looking over their shoulders. Unfortunately, this program has been discontinued. However, it seems clear that basic fairness mandates the incorporation of this service in department operations. ...

Non-English-Speaking Claimants

In many areas of the State, a significant number of claimants are more conversant in languages other than English. As a result of a federal lawsuit against the Department

(Pabon v. Ross), a consent decree was entered which essentially established a bill of rights for Spanish-speaking claimants governing local office operations. It requires that all local office publications, forms, notices, determinations, and other communications with Hispanic claimants be in Spanish if they do not fully comprehend English. While this does answer some of the communications problems, it does not address the issue of oral communication in the local offices. The Department has attempted to staff each of its local offices with sufficient Spanish-speaking personnel and has established a separate set of civil service examinations for Spanish-speaking clerks and interviewers. However, observation indicates that this is inadequate to deal with the problem. In many instances, translation of local office interviews is done by other claimants or friends or relatives who purport to speak both languages. In these cases the interviewer has no way of ascertaining the proficiency of the interpreter or whether or not the translator is injecting information on his own to be "helpful". Consequently, the claimant becomes bound by "his" original statement and at a hearing, if he is disqualified, his veracity is questioned when his testimony, as translated by a competent Department interpreter, differs from the statement prepared by the local office. ...

/Further, the Committee concluded that:/

Parties should be adequately apprised of their rights and obligations at all stages of unemployment proceedings, and this protection should be extended to non-English-speaking persons as well. Recognizing that it may not be possible to translate all determinations and all appeal rulings into the multitude of languages found among members of the work force of New York State, nevertheless, a basic advisory that the document is important and should be translated immediately should be part of each such decision. Massachusetts has such a notice in several languages imprinted on its local office forms...

Local Office Interviews

One of the key factors in determining a claimant's eligibility or ineligibility for benefits is the desk interview conducted by local office claims examiners. Generally, these interviews are conducted whenever potentially disqualifying information is brought to the attention of the local office or when claimants are randomly selected for periodic interviews about their efforts to find employment.

Although the Department asks that claims interviewers do so, it is not a common practice to tell the claimant why he or she is being interviewed. This is because many examiners fear that the claimant will not be truthful or will react in a hostile manner, and these fears are not totally without justification.

During the interview, the examiner is supposed to ask the claimant those questions which are necessary to resolve the issue at hand; he then prepares a summary of the interview in his own words and in his own handwriting, and presents it to the claimant for approval and verification of its accuracy. If the claimant assents, he is asked to sign it at the bottom and is provided with a copy. If the summary is illegible, it is often read to the claimant; some offices have provisions for typing these statements.

If the claimant finds any part of the statement to be in error, he may make additions or corrections but most claimants do not do so, partly out of ignorance and partly out of fear of losing benefits. A major problem with this process is that where the examiner omits crucial information from the statement, either by neglecting to ask the questions, or having asked the questions, failing to incorporate the responses in the statement, a distorted picture of the case appears. It is the unusual claimant who will notice that such information is missing before he is disqualified and the crucial data is brought forth at a hearing.

Due process requires, and Department procedure mandates, that parties are entitled to rebut any adverse information prior to the issuance of a ruling on eligibility. In practice, when this is not done, the omission will usually be picked up in a pre-hearing review and the case will not be processed for a hearing until the determination is re-evaluated after the requisite confrontation. This obviously causes undue delay in the determination of benefit rights, and the Department is urged to eliminate this delay by strictly monitoring the protection of parties' rights of confrontation and rebuttal in local office operations.

One of the more serious problems regarding the due process afforded parties in local office operations is the specificity with which the reasons for the determination are set forth. It has long been the policy of the Department, and it has endeavored to train its staff, that the determination should be specific enough so that the claimant knows exactly why benefits are being denied and the employer knows the reasons for the claimant's eligibility. Lack of specificity makes it difficult for parties to contest the rulings, and the Department is urged to increase its efforts to assure that this problem is eliminated.

Finally, it has been contended that the previously-mentioned random selection of claimants for intensive interviews are, in reality, merely "fishing expeditions" used to disqualify claimants. To the extent that this may be so, the Committee urges the abolition of the practice.

Procedural Right at Hearings

The adequacy of the protection of claimants' procedural rights in unemployment proceedings was the subject of a federal

lawsuit, Pugh v. Ross. A consent judgement was entered in 1977 which essentially provided the following;

1) claimants who request a hearing are to be sent a notice outlining their

(a) right to counsel,
(b) right to examine and cross-examine witnesses,
(c) right to inspect the case file prior to the hearing,
(d) right to confront all adverse information and witnesses,
(e) right to have witnesses and documents subpoenaed on his behalf,
(f) right to make a concluding statement at the end of the hearing in which matters not previously raised may be heard and previous issues clarified.

2) "Official notice" may be taken only in situations in which judicial notice may be taken in court proceedings.

3) The Administrative Law Judges may not rely upon evidence not properly introduced into the record.

4) Clarification of appeal rights is to appear in all decisions.

5) The claimants' general information booklet is to be updated to provide the information contained in the consent decree.

6) Training for departmental staff is to include the contents of the consent decree.

7) The hearing officer i s to assist the parties, especially those not represented by counsel, in asking questions of witnesses so as to elicit the complete factual setting.

The notices and ministerial aspects of this consent decree have been implemented by the Department, but there is still some dispute over whether the provisions regarding the enforcement of these substantive rights are being properly adhered to. This is the subject of several other pending legal actions against the Appeal Board and the Industrial Commissioner.

One of the more salient problems in this regard is the lack of enforcement of subpoenas issued by the Board. Testimony at the hearing indicated that the Board's practice is to weigh non-compliance as a factor in determining credibility, but this is totally ineffective with respect to subpoenas issued against persons who are not parties to the proceedings.

Decisions of the Administrative Law Judges

The Appeal Board is charged with the responsibility to oversee the eighty or so Administrative Law Judges (ALJ's) who preside over first-level administrative appeals. The ALJ's take testimony under oath, observe the parties' demeanors, and make determinations of facts and law in disputed cases. On appeal, the ALJ's decisions are frequently reversed by the Board, often based upon "credibility." Rarely will a further hearing be held before the Board before credibility reversals are issued, and it is not the Board's usual practice to articulate why the ALJ's credibility findings are being disregarded. This raises two issues. Firstly, what evidentiary weight is to be accorded by the Board to ALJ decisions, and, secondly, does it deny parties due process to permit credibility reversals without a further hearing.

With respect to the first issue, it is the Appeal Board Chairman's position that once an ALJ decision is appealed to the Board, it becomes an evidentiary nullity; it is now within the province of the Board to conduct a de novo review of the entire record. This position, it is argued, is supported by the statutory language in Labor Law section 620 which provides that a referee's (ALJ's) decision is also the decision of the Appeal Board unless an appeal is taken therefrom. However, the section does not address the issue of what substantive weight should be accorded to the lower decision by the Board in its review; it merely indicates that in the absence of an appeal, the ALJ's decision is to be treated as if it emanated from the Board, and in the event of an appeal, it should not be so treated. In other tribunals, the hearing officer's findings are upheld if not "without substantial basis in the record," "arbitrary and capricious," "unsupported by substantial evidence" or other similar standards. A cross-section of the testimony, including that of a hearing officer who conducts these proceedings, suggests that such a higher standard, rather than mere disagreement, be required before an ALJ's decision is reversed.

Concerning the issue of credibility reversals, this is one of the issues raised in a lawsuit entitled Moore v. Ross. Judge Carter of the United States District Court for the Southern District of New York dismissed the action, noting that such reversals are not inherently a denial of due process, but they do contain a "heightened risk of error" (slip op. at 14). The Committee is of the view that this increased risk warrants either a new evidentiary hearing or an articulated reason for overruling an ALJ's credibility finding.

Relationship between the Appeal Board and the Industrial Commissioner

Whenever an adjudicatory body is administratively connected to the body whose decisions it must review, the relationship between the two agencies must be suspect. It

is thus necessary to examine whether, in the unemployment insurance system, the prosecutorial and adjudicatory functions have remained distinct.

The Industrial Commissioner is, by statute, a party to each hearing or appeal, whether or not he actively participates. Also by statute, the ALJ's and the Appeal Board are to be autonomous of the Commissioner and his Unemployment Insurance Division in order to preserve their neutrality in the adjudication of cases. ...

Stare Decisis (Adherence to Precedent)

In order to maintain consistency in the application of legal principles by the numerous local offices throughout the state, the Unemployment Insurance Division publishes a topical index of significant Appeal Board and Court decisions which is updated periodically. However, it only contains those decisions which the Commissioner wishes to adopt as policy or which have been mandated as general principles of law by the Appeal Board or the Courts. Thus, the index may not include decisions which the Department believes should be limited to the particular facts of the case involved. The Appeal Board currently publishes no index of its own, although a number of staff attorneys maintain their own individual files of decisions that may have precedential value. Additionally, many of the court decisions of the Appellate Division of State Supreme Court, Third Judicial Department, are not reported in the official law reports as are the other types of cases decided by that court.

In view of this situation, it is clear that it is very difficult for the Board to maintain consistency in its decisions. While the Committee is cognizant of the great latitude afforded the Board in its decision-making process, as enunciated in the Matter of Dresher 286 A.D. 591 (1955), the growth in power and operation of administrative agencies, as well as the appreciation of basic fairness, has led the courts of this State to require that administrative decisions, like common law concepts, be consistent with respect to like cases within the same jurisdiction (Assoc. for Psychoanalysis, Inc. v. Simon 232 N.Y.S. 2d 658 (1961), reversed on other grounds, 250 N.Y.S. 2d 253).

The lack of consistency due to unavailability of precedent decisions is serious enough, but the problem is aggravated when, as pointed out during the hearing, precedent is disregarded even when it is cited by parties in their briefs. While not questioning the Board's power to overrule prior case law, the Committee believes that such changes in perspective should be articulated, for unlike court decisions which are written for lawyers, Board decisions also provide guidance and precedent for the many lay persons involved in the unemployment insurance system, many of whom may not be

facile enough to extract the subtle nuances inherent in an unarticulated distinction which is being drawn between two seemingly similar cases.

Time Lapse Standards

One of the most serious impediments to fair consideration of unemployment claims is the pressure exerted by the federal government to have 60% of all hearings concluded within thirty days of the date on which they were requested. In practice, this means that if a case is adjourned for any reason, it probably will not be able to be concluded within the permissible time period. Consequently, the Appeal Board is reluctant to grant continuances, even when due process so requires. The cases are often closed and the parties seeking adjournments must then make applications to reopen the matters.

This problem stems from several lawsuits which were brought a few years ago when parties often had to wait up to six months for a hearing. Since that time, the procedures have been streamlined and cases can now be ready for calendaring for hearing within a few days. However, because of notice requirements, cases must be scheduled two to three weeks in advance, thus militating against an adjourned case being concluded within thirty days.

The Rules of the Appeal Board require that hearing notices be sent at least five days prior to the hearing. When the state of the postal system, the intervention of weekend and holidays are considered, it is clear that, as a practical matter, many hearings are held with very little notice. This is one major cause of adjournment requests, for witnesses may not be available, evidence cannot be marshalled, and parties or their representatives may be otherwise engaged.

Another serious problem which stems from the thirty-day mandate is that, according to testimony from representatives of both claimants and employers, the hearings are held in a rushed atmosphere. The ALJ's are pre-occupied with closing cases; their supervisors interrupt proceedings to advise the ALJ's that other cases are waiting. One witness referred to an unemployment insurance hearing as containing "all the due process you can fit into twenty minutes." and the Committee Chairman, while representing a constituent, pro bono, personally was confronted with the twenty-minute rule.[1]

1. In response to the problem of rushed hearings raised by the Committee and its witnesses, the Appeal Board Chairman issued a memorandum to all ALJ's instructing them to complete any hearing if all parties are present, irrespective of any time limits. This should minimize unnecessary adjournments and hopefully will encourage ALJ's to take what reasonable time is necessary to afford all parties a full and fair hearing.

The amount of time initially allotted for a hearing is often further diminished by the "housekeeping" required of the ALJ's prior to the hearing. They have not previously seen the case files and thus must familiarize themselves with the facts during the time set aside for the actual hearing and often they also must contend with monitoring the operation of a cassette recorder used to record a verbatim account of the hearing.

Parenthetically, it should be noted that the tapes are frequently inaudible and this often results in cases having to be remanded for a further hearing because the transcript is not available for appellate review.

Related to this issue of time pressure at the ALJ level is the issue of time spent by Appeal Board members in reviewing pending matters. According to a report issued by the Department of Labor's Management Analysis and Improvement Office in 1976, each member of a five-person Board would have to review about 32 cases per day to handle the case load, thereby affording each member only about 12 minutes to review and analyze each case. Although the Committee is cognizant of the fact that each case is also reviewed by the Board's legal staff, the ultimate statutory obligation to decide these matters rests with the Board members and twelve minutes seems a totally inadequate amount of time in which to discharge this statutory duty.

Statistical Data

New York Compared to Other States

Over the past several years, New York claimants who have appealed to the Appeal Board have not fared well at all compared to their counterparts in other jurisdictions. From 1975 through 1978 (the latest year for which figures are available), the success rate of New York claimants has been among the five lowest of the fifty-two jurisdictions which supply these statistics to the United States Department of Labor. Conversely, except for 1975, employers have enjoyed a success rate well above the national average. The disparity is even more pronounced when only states similar to New York in case load are considered. Of the next ten highest volume states, only one had a lower claimant success rate in 1975 and 1976 and none did so in the next two years. By contrast, in only one state did employers prevail at a greater rate than those in New York in 1977 and 1978, and in 1975 and 1976, only two states reported higher employer success rates than New York's. (Appendix F)

APPENDIX F

SELECTED STATES FOR COMPARISON*

	CLAIMANT APPEALS			EMPLOYER APPEALS		
	TOTAL NO. OF APPEALS	NUMBER OF WINS	PERCENT WINS	TOTAL NO. OF APPEALS	NUMBER OF WINS	PERCENT WINS
1975						
New York	12,240	457	3.7	2,289	584	25.5
California	5,655	776	13.7	2,654	399	15.0
Florida	4,230	748	17.7	2,329	313	13.4
Illinois	5,078	1,364	26.9	2,081	979	47.0
Louisiana	2,963	207	7.0	1,140	39	3.4
Massachusetts	3,380	578	17.1	648	63	9.7
New Jersey	3,409	264	7.7	359	80	22.3
Ohio	4,241	187	4.4	1,212	107	8.8
Pennsylvania	9,959	1,179	11.8	2,800	436	15.6
Texas	1,612	342	21.2	1,089	126	11.6
Wisconsin	2,428	441	18.2	1,019	29	2.8
1977						
New York	15,134	544	3.6	2,454	898	36.6
California	5,775	679	11.8	2,715	426	15.7
Florida	3,376	780	23.1	1,433	295	20.6
Illinois	3,964	944	23.8	1,605	727	45.3
Louisiana	3,093	323	10.4	1,102	27	2.5
Massachusetts	6,734	895	13.3	1,152	246	21.4
New Jersey	3,870	205	5.3	429	30	7.0
Ohio	3,313	157	4.7	1,153	136	11.8
Pennsylvania	9,157	1,064	11.6	2,140	320	15.0
Texas	2,038	347	17.0	1,356	177	13.1
Wisconsin	1,881	151	8.0	642	76	11.8

*Selected because the number of appeals were the highest after New York.