

No. 36939-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DWAYNE LENCA,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Respondent.

ORIGINAL

FILED
COURT OF APPEALS
DIVISION II
08 JAN 24 PM 1:32
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANT

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PM-23-08

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A. INTRODUCTION

Mr. Lenca quit his job and the ESD granted him unemployment benefits because he had “good cause” to quit when his “usual compensation” was reduced by 25%. CP Comm. Rec. 16-18, 36, 65.¹ The employer appealed to the Office of Administrative Hearings (OAH) and Mr. Lenca appeared on his own behalf for the hearing. CP Comm. Rec. 49.

At the beginning of the hearing, Mr. Lenca stated that he had called the OAH to tell the agency that he had a job interview that conflicted in time with the time set for the hearing. CP Comm. Rec. 7. Mr. Lenca restated to the ALJ presiding at the hearing that he had a job interview beginning within 20 minutes of the beginning of the hearing. CP Comm. Rec. 7. The ALJ responded: “Okay, well, we’ll proceed as quickly as possible. And then when you’re ready to go I’ll let you make that decision; okay?” CP Comm. Rec. 7. Subsequently, Mr. Lenca had to leave the hearing for his job interview prior to the employer’s testimony. CP Comm. Rec. 20.

¹ Thurston County Superior Court has transmitted the Administrative Record, aka Certified Appeals Board Record, aka Commissioner’s Record in this matter as a single, stand-alone document; that Record is separately paginated so references in this brief to that record will appear as “CP Comm. Rec.,” meaning “Clerk’s Papers Commissioner’s Record.” All other references to the Clerk’s Papers will be in standard citation format, “CP,” with reference to the page number as it appears on the Superior Court Clerk’s Papers Index.

The ALJ thereafter reversed the ESD's initial decision and denied benefits. CP Comm. Rec. 53. Mr. Lenca appealed – *pro se* - to the ESD's Commissioner's Office and with his appeal letter he submitted pay stubs demonstrating a 25% loss of wages. CP Comm. Rec. 62-66.

The Commissioner,² however, denied the appeal and refused to consider the pay stubs, stating that “[a]bsent evidence that the record below was incomplete *for reasons within the control of the Office of Administrative Hearings, no additional evidence will be taken.*” CP Comm. Rec. 68.

B. ASSIGNMENTS OF ERROR

1. The Commissioner erred in denying Mr. Lenca unemployment benefits, specifically in concluding that the record was incomplete through no fault of the OAH. CP Comm. Rec. 68.
2. The Commissioner erred in failing to consider the additional evidence that Mr. Lenca submitted with his appeal. CP Comm. Rec. 68.
3. The Commissioner erred in adopting the Administrative Law Judge's Finding of Fact 9. CP Comm. Rec. 50.

² Though technically a “Review Judge” of the Commissioner's Review Office reviews appeals from OAH decisions, for simplicity the review judge is referred to in this brief as “the Commissioner.”

4. Mr. Lenca is entitled to fees and costs at both the administrative and judicial review levels when the Commissioner's Order is reversed.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Commissioner, who can order under RCW 50.32.080 that new evidence be taken, err in affirming the ALJ's decision and in refusing to consider pay stubs that showed a 25% reduction in Mr. Lenca's "usual compensation" when the ALJ had proceeded with the benefits hearing knowing that Mr. Lenca had notified the Office of Administrative Hearings of a time conflict prior to the hearing and knowing that Mr. Lenca, a *pro se* claimant, could not be present at the entire hearing due to a conflicting job interview? (Issue Pertaining to Appellant's Assignments of Error 1, 2, & 3).

2. Upon this court's reversal of the Commissioner's Order in this case, should attorney fees and costs be awarded to counsel for Ms. King for work on this case at both the administrative and judicial review levels so long as the fees and costs are reasonable? (Issue Pertaining to Appellant's Assignment of Error 4).

C. STATEMENT OF THE CASE

1. Substantive Facts: Job Separation.

- a. **Mr. Lenca initially earned \$600 per week plus 11% commission.**

Mr. Lenca worked in a sales position as a customer service route manager for Schwans Home Service, Inc. CP Comm. Rec. 49 (Finding of Fact "FF" 1). He was initially paid a guaranteed \$600 per week plus an 11% commission. CP Comm. Rec. 49 (FF 1 & 2).

- b. **Mr. Lenca quit when his employer reduced his wages by 25% or more.**

Mr. Lenca testified that although he had originally been "guaranteed \$600 a week," the pay structure then changed. Comm. Rec. 16. He explained that the structure went from a guaranteed income to a "step down commission," meaning the guaranteed amount was gradually reduced each week. He said he had accepted this structure with the understanding that "if it wasn't working out that we would go back and look at it and evaluate it at that time." CP Comm. Rec. 17. When asked what happened thereafter, Mr. Lenca stated the following:

Mr. Lenca: Uh, it wasn't working out because my checks were 350, \$400. And I explained that the commission wasn't working out (unintelligible) revert back to the guarantee.

CP Comm. Rec. 18.

Mr. Lenca talked to his managers about the inadequate pay but learned that there was not an option to return to the \$600 weekly guarantee. He subsequently gave his two week's notice.

CP Comm. Rec. 18. Mr. Lenca stated why:

Mr. Lenca: Because the income was drastically reduced when it went from guaranteed to a commission.

CP Comm. Rec. 15-16.

2. Procedural Facts

- a. The ESD granted unemployment benefits to Mr. Lenca, finding he had quit with "good cause" when his wages were reduced by 25%.**

The ESD initially granted Mr. Lenca unemployment benefits because he had "good cause" to quit under the Employment Security Act when his "usual compensation" was reduced by 25%.

CP Comm. Rec. 16-18, 36, 65.

- b. When Mr. Lenca, a *pro se* claimant, told both the OAH and the ALJ prior to his unemployment benefits hearing that he would have to leave the hearing for a job interview, the ALJ chose to go forward with the hearing despite Mr. Lenca's absence.**

The employer appealed the ESD's initial decision and an Administrative Law Judge (ALJ) of the Office of Administrative

Hearings (OAH) held a benefits hearing in the case on November 16, 2006. CP Comm. Rec. 49.

Mr. Lenca represented himself at the hearing and at the beginning of the hearing he stated to the ALJ that he had called the OAH to tell them that he had a job interview that conflicted in time with the time set for the hearing:

Mr. Lenca: ... I did want to make a statement, and I don't know if the information was passed on when I spoke with someone earlier, I explained that I was on my way to a job interview and so I called (unintelligible) a cell number --

ALJ: Okay.

Mr. Lenca: -- or my (unintelligible), so --

ALJ: I'm sorry, you just cut out. You said that you called in with a cell number, and then I think you were about to say my interview, but I didn't hear what you said after that.

Mr. Lenca: Uh, yes; my interview starts in about 20 minutes, so I didn't know if that was going to be an issue or --

CP Comm. Rec. 7.

Despite this information, the ALJ chose to go ahead with the hearing:

ALJ: Okay, well, we'll proceed as quickly as possible. And then when you're ready to go I'll let you make that decision; okay?

Mr. Lenca: All right, thank you.

CP Comm. Rec. 7

Subsequently, at the start of the employer's case Mr. Lenca had to leave the hearing for his job interview. Comm. Rec. 20.

This colloquy occurred:

Mr. Lenca: Your Honor, I have to go, I have my interview coming up here. ***So what should I do from here?***

ALJ: Well, Mr. Lenca, the hearing will continue. You will miss out on an opportunity to ask Mr. Parlee [the employer's only witness] questions. Are you comfortable with that?

Mr. Lenca: ***Can I respond in writing or via e-mail?***

ALJ: Uh, no, because you won't have the opportunity to hear what Mr. Parlee is stating.

Mr. Lenca: Okay. So I'd have to appeal if I disagree.

ALJ: Correct.

Mr. Lenca: All right, that's fine, then. Thank you for your time.

CP Comm. Rec. 20 (emphasis added).

The ALJ then took testimony, in Mr. Lenca's absence, from the employer's witness, Mr. Parlee. Comm. Rec. 21. Based on that testimony the ALJ made a finding of fact that "Mr. Parlee has

established that at the time claimant [Mr. Lenca] left his job he was still making \$600.00 a week." CP Comm. Rec. 50 (FF 9).³

- c. **The Commissioner denied Mr. Lenca's *pro se* appeal of the ALJ's denial of benefits and the Commissioner refused to consider Mr. Lenca's evidence showing a 25% loss of wages.**

When the ALJ subsequently denied benefits and assessed an overpayment, Mr. Lenca appealed to the ESD's Commissioner's Office. With his appeal letter he submitted pay stubs demonstrating a 25% loss of wages and that he had not been earning \$600 per week toward the end of his job, but instead \$384 one week and \$235 in his final week. CP Comm. Rec. 62-63, 65.

The Commissioner, however, denied the appeal and refused to consider the pay stubs, stating that "[a]bsent evidence that the record below was incomplete *for reasons within the control of the Office of Administrative Hearings, no additional evidence will be taken.*" CP Comm. Rec. 68.

On judicial review the Thurston County Superior Court denied the appeal and this appeal timely followed. CP 14, 15.

³ The Commissioner adopted all of the ALJ's finding and conclusions and Mr. Lenca specifically assigns error to this Finding of Fact 9, CP Comm. Rec. 50.

D. ARGUMENT

1. BECAUSE THE RECORD IN THIS CASE WAS INDEED “INCOMPLETE” - BUT FOR REASONS WITHIN THE CONTROL OF THE OAH - THE COMMISSIONER’S ORDER DENYING MR. LENCA’S APPEAL SHOULD BE REVERSED.

Mr. Lenca did not receive a fair hearing as mandated under the Employment Security Act when the ALJ had the power to continue or postpone the hearing and should have done so to afford Mr. Lenca – a *pro se* claimant - the opportunity to participate in the entire hearing and submit pay stubs demonstrating that he had suffered a greater than 25% loss of income. The Commissioner’s subsequent failure to consider those pay stubs “[a]bsent evidence that the record below was incomplete for reasons within the control of the Office of Administrative Hearings” was therefore an error of law and the Commissioner’s refusal to reverse the ALJ’s decision failed to follow the ESD’s own past decisions.

Mr. Lenca was entitled to a full and fair hearing, one that he could attend from beginning to end:

* * *

In any proceeding involving an appeal relating to benefit determinations or benefit claims, the appeal tribunal, ***after affording the parties reasonable opportunity for fair hearing***, shall render its decision . . .

RCW 50.32.040.

ESD regulations in fact grant the ALJ the power to postpone or continue hearings on the ALJ's own initiative:

Any party to a hearing may request a postponement of a hearing at any time prior to the actual convening of the hearing. The granting or denial of the request will be at the discretion of the presiding administrative law judge.

*The presiding administrative law judge may in the exercise of sound discretion **grant a continuance of a hearing at any time at the request of any interested party or on his or her own motion.***

WAC 192-04-120 (emphasis added).

When it is apparent to the appeal tribunal that a party should be granted a continuance or a postponement of the hearing, failing to provide such a continuance violates the "fair hearing" provisions of RCW 50.32.040. *In re Noble*, Comm. Dec. 2d No. 412 (1977).

In *Noble*, the claimant was represented by an attorney. The attorney told the ALJ prior to the hearing that the attorney had been unable to locate the revised section of the statute that was under consideration in the hearing and that he wished to see the revised section prior to the end of the hearing. The appeal examiner replied "ok." During the hearing, the attorney raised the issue again by a motion to dismiss, arguing that he and his client were without

reasonable notice of the applicable statute. At the close of the hearing, the appeal examiner stated that a written decision would be forthcoming in two or three weeks and that he would provide copies of the applicable statute at that time.

The Commissioner in *Noble* found the failure of the appeal examiner to either provide the statute *or postpone the hearing* until the attorney could obtain a copy of the new statute violated the “fair hearing” provisions of RCW 50.32.040:

The phrase “affording the parties a reasonable opportunity for a fair hearing” describes an arrangement or procedure whereby a party is informed of the law under which an alteration of his enjoyment of rights is to be considered; and in which the party is at liberty *to present evidence in his behalf, and to cross-examine those who present evidence against him*. Beyond that, however, *the phrase implies an affirmative duty on the part of the Appeal Tribunal to so conduct the hearing or proceeding that each party may make a knowledgeable and thorough presentation of its case, consistent with its ability to do so.*

In re Noble, Comm. Dec. 2d No. 412 (1977) (emphasis added), page 4 of attached opinion.

The Commissioner in *Noble* found further that even though the attorney’s claim to be unable to locate the current statute put a “strain upon plausibility”

[I]t did have the legal effect of putting the appeal examiner on notice that petitioner was not then in a position to make a knowledgeable presentation of his case. Under the

circumstances the most reasonable thing for the appeal examiner to have done was to furnish the petitioner with the text of the statute, *or postpone the hearing so that the attorney could have time to obtain it elsewhere. ...*

Id. (emphasis added).

Finally, the failure to give a postponement when one was plainly called for violated the claimant's right to a fair hearing:

[T]he conclusion is inescapable that the failure of the appeal examiner to furnish the text of the statute *or postpone the hearing was an effective denial of a reasonable opportunity for a fair hearing within the intendment of RCW 50.32.040.*

Id. (emphasis added).

For the same reasons as in *Noble*, Mr. Lenca's right to a fair hearing was violated. In Mr. Lenca's case the record that the Commissioner found to be "incomplete" was incomplete precisely because of the error of the ALJ in not granting Mr. Lenca a continuance or a postponement – as mandated by *Noble*. The postponement was necessary so that Mr. Lenca could attend both his job interview – which is, after all, what unemployment benefits are designed to assist in, becoming re-employed – and attend the entire benefits hearing to be able to cross-examine and submit evidence.

The exchanges between Mr. Lenca and the ALJ plainly implicated the "fair hearing" and continuance provisions of the

Employment Security Act cited above. Mr. Lenca represented himself at the hearing and at the beginning of the hearing he stated to the ALJ that he had called the OAH to tell them that he had a job interview that conflicted in time with the time set for the hearing:

Mr. Lenca: ... I did want to make a statement, and I don't know if the information was passed on when I spoke with someone earlier, I explained that I was on my way to a job interview and so I called (unintelligible) a cell number –

ALJ: Okay.

Mr. Lenca: -- or my (unintelligible), so –

ALJ: I'm sorry, you just cut out. You said that you called in with a cell number, and then I think you were about to say my interview, but I didn't hear what you said after that.

Mr. Lenca: Uh, yes; my interview starts in about 20 minutes, so I didn't know if that was going to be an issue or --

CP Comm. Rec. 7.

Despite this information, the ALJ chose to go ahead with the hearing:

ALJ: Okay, well, we'll proceed as quickly as possible. And then when you're ready to go I'll let you make that decision; okay?

Mr. Lenca: All right, thank you.

CP Comm. Rec. 7

Subsequently, Mr. Lenca had to leave the hearing at the start of the employer's case for his job interview. Comm. Rec. 20.

This colloquy occurred:

Mr. Lenca: Your Honor, I have to go, I have my interview coming up here. ***So what should I do from here?***

ALJ: Well, Mr. Lenca, the hearing will continue. You will miss out on an opportunity to ask Mr. Parlee [the employer's only witness] questions. Are you comfortable with that?

Mr. Lenca: ***Can I respond in writing or via e-mail?***

ALJ: Uh, no, because you won't have the opportunity to hear what Mr. Parlee is stating.

Mr. Lenca: Okay. So I'd have to appeal if I disagree.

ALJ: Correct.

Mr. Lenca: All right, that's fine, then. Thank you for your time.

CP Comm. Rec. 20.

The ALJ then took testimony, in Mr. Lenca's absence, from the employer's witness, Mr. Parlee. CP Comm. Rec. 21.

Proceeding with the hearing violated Mr. Lenca's right to a fair hearing under the ESA.

Just as in *Noble*, the colloquy above should have had "the legal effect of putting the appeal examiner on notice that petitioner

was not then in a position to make a knowledgeable presentation of his case” and that “under the circumstances the most reasonable thing for the appeal examiner to have done was to ... postpone the hearing ...” Therefore, just as in *Noble*, failing to “postpone the hearing was an effective denial of a reasonable opportunity for a fair hearing” within the meaning of RCW 50.32.040.

When Mr. Lenca subsequently appealed the denial of benefits and submitted pay stubs that demonstrated his greater than 25% reduction in his usual compensation, the Commissioner should therefore have reversed the ALJ for the ALJ's failure to grant Mr. Lenca a full hearing. The Commissioner's refusal to consider those pay stubs because the record was closed was also error because the record was incomplete for reasons that were indeed within the control of the OAH: the ALJ was on notice that Mr. Lenca had called the agency about his concerns regarding his conflicting job interview and furthermore, even without the call, the ALJ could have granted a postponement so that Mr. Lenca would have been assured a full and fair hearing.

Merely because Mr. Lenca, who represented himself in this proceeding, did not know to utter the magic words “continuance” or “postponement” does not mean that the statute, the regulations,

and past commissioner's decisions mandating such a postponement could be ignored by either the ALJ or the Commissioner.

Furthermore, the Employment Security Act provides that the Commissioner has the power to order that additional evidence be taken:

After having acquired jurisdiction for review, the commissioner shall review the proceedings in question. Prior to rendering his decision, the commissioner may order the taking of additional evidence by an appeal tribunal to be made a part of the record in the case. ***Upon the basis of evidence submitted to the appeal tribunal and such additional evidence as the commissioner may order to be taken, the commissioner shall render his decision*** in writing affirming, modifying, or setting aside the decision of the appeal tribunal. ***Alternatively, the commissioner may order further proceedings to be held before the appeal tribunal,*** upon completion of which the appeal tribunal shall issue a decision in writing affirming, modifying, or setting aside its previous decision.

RCW 50.32.080 (emphasis added).

Therefore, the Commissioner's Order here should be reversed for two reasons, one, it misinterprets and misapplies the "fair hearing" provisions of the Employment Security Act as well as the statute concerning additional evidence, and two, it fails to follow the agency's own past decisions – *In re Noble* - reversing benefits

determinations that were made when a continuance should have been granted to fulfill the fair hearing requirements of the statute.

The ESD decision here is reviewed under the Administrative Procedure Act and will be reversed on judicial review if any one of several grounds is satisfied. RCW 34.05.570. First, specifically in Mr. Lenca's case, "the agency has erroneously interpreted or applied the law." RCW 34.05.570(3)(d).

Issues of law are the responsibility of the judicial branch. *Tapper v. Employment Security*, 66 Wn. App. 448, 451, 832 P.2d 449 (1992), *rev'd on other grounds*, 122 Wn.2d 397, 858 P.2d 494 (1993). Therefore, when reviewing legal questions the court is allowed to substitute its judgment for that of the administrative agency. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 324-325, 646 P.2d 113 (1982) *cert. denied*, 459 U.S. 1106 (1983). Pure questions of law are reviewed *de novo*. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317, 646 P.2d 113 (1982). In resolving a mixed question of law and fact, the court first establishes the relevant facts, determines the applicable law, and applies it to the facts. *Tapper*, 122 Wn.2d at 403. While deference is granted to the agency's factual findings, the agency's application

of the law is reviewed *de novo*. *Dermond v. Employment Security Department*, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997).

Second, the Commissioner's Decision should be reversed because it fails to follow the agency's own rules, grounds for reversal under the Administrative Procedure Act, RCW 34.05.570(3)(h). Under this subsection, a reviewing court may overturn a final agency decision on the basis that "the order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for the inconsistency." *Id.* This provides the reviewing court with the power to review certain "rules" that an agency may follow to determine whether those rules have a rational basis.

The Commissioner is authorized to issue two kinds of "rules." First, there are the administrative rules which must be promulgated pursuant to the APA. Secondly, there are "precedential Commissioner's Decisions," authorized by RCW 50.32.095, permitting the Commissioner to designate certain adjudicative decisions as "precedential." These precedential decisions have been frequently referred to by courts in interpreting decisions of ESD. See *Vergeyle v. Employment Security*, 28 Wn.

App. 399, 403, 623 P.2d 736 (1981) [citing *In re Wedvik*, Comm.Dec. 1107 (1974)]. Courts impose a duty of consistency toward similarly situated persons and have held that "administrative agencies may not treat similar situations in dissimilar ways." *Vergeyle*, 28 Wn. App. 403 [citing *Jones v. Califano*, 576 F.2d 12 (2nd Cir. 1978)]. Pursuant to RCW 34.05.570(3)(h), a decision of the Commissioner which is inconsistent with either precedential Commissioner's Decisions *or* administrative rules *and* fails to articulate a reason for this departure from Department rule should be overturned on the basis that the decision inconsistent with a rule of the agency.

Therefore, the Commissioner's Order in Mr. Lenca's case should be reversed because it misinterpreted and misapplied RCW 50.32.040 – the fair hearing provisions of the Act – RCW 50.32.080 – the taking of additional evidence provisions of the Act - and the Commissioner's Order failed to follow the agency's own past decision in *In re Noble*.

2. ATTORNEY FEES AND COSTS IN THIS CASE ARE MANDATED BY STATUTE WHEN A COMMISSIONER'S ORDER IS REVERSED ON JUDICIAL REVIEW.

A claimant who succeeds in convincing a court to reverse a Commissioner's Order is allowed reasonable attorney fees and costs as mandated by statute:

It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits to charge or receive any fee therein in excess of ***a reasonable fee to be fixed by the superior court in respect to the services performed in connection with the appeal taken thereto and to be fixed by the supreme court or the court of appeals in the event of appellate review, and if the decision of the commissioner shall be reversed*** or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund. ***In the allowance of fees the court shall give consideration to the provisions of this title in respect to fees pertaining to proceedings involving an individual's application for initial determination, claim for waiting period credit, or claim for benefits.*** In other respects the practice in civil cases shall apply.

RCW 50.32.160 (emphasis added). The fees and costs contemplated in this statute are stated in mandatory terms: "such fee and the costs *shall* be payable out of the unemployment compensation administration fund." *Id.*

Therefore, pursuant to this statute and RAP 18.1, appellant requests attorney fees and costs be awarded upon reversal of the Commissioner's Order in this case.

E. CONCLUSION

For the reasons stated above, Dwayne D. Lenca respectfully requests that this court reverse the Commissioner's Order in this case because he was denied a full and fair hearing and was denied the opportunity to cross examine adverse witnesses and present evidence on his behalf in violation of the ESA and past agency decisions.

Petitioner also requests that reasonable attorney fees be awarded in an amount to be determined upon filing of a cost bill subsequent to this order and under authority of RCW 50.32.160 that mandates attorney fees and costs be awarded upon reversal or modification of a Commissioner's Order.

Dated this 23rd Day of January 2008.

Respectfully submitted,



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Noble CD 412 (2nd Series)

Benefit Appeal Procedures -- Appeal Tribunal denied claimant fair hearing, particularly in refusal to provide claimant's representative with copy of the appropriate statute

**BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON**

Review No. 30084

<i>In re</i>)	Case No. 412 (2nd Series)
)	Docket No. 7-17677
RALPH NOBLE)	
)	ORDER REMANDING CAUSE FOR HEARING AND DECISION
Petitioner)	

RALPH NOBLE, by and through TOM P. CONOM, Attorney, at Law, duly petitioned the Commissioner for a review of a Decision of an Appeal Tribunal entered in this matter on the 20th day of December, 1977. The petition contains numerous averments of error, most of which are without merit, but in consideration of all of which the undersigned has concluded that treatment of certain portions OF averments numbered 3 and 6 will be dispositive of the matter; the gravamen of these two averments read as follows:

"3. The appeal examiner failed to rule on the issue timely raised by Claimant/Appellant's attorney that (a) claimant never received notice of the statute he is being penalized under, and in fact Claimant/Appellant received a positive misstatement of the law in the notice of Determination and in the Notice of Redetermination concerning his rights and obligations. Counsel was not even furnished a copy of the pertinent statute despite his request at the hearing . . .

"6. The appeal examiner . . . refused to give the Claimant/Appellant and his counsel notice of the appropriate revised statutes. . . ."

The undersigned has carefully reviewed the entire record, thereby being fully advised in the premises, and enters the following.

FINDINGS OF FACT

I.

Petitioner was informed by a Determination Notice issued October 4, 1977, and by a Redetermination Notice issued November 15, 1977, (Form EMS 5341, REV 10-75) that he was disqualified from benefits under the provisions of RCW 50.20.050(1). On

the reverse of that form is written RCW 50.20.050 as it existed at the time the form was printed in 1975. The undersigned takes official notice of the fact that the statute was substantially amended effective July 3, 1977. RCW 50.20.050(1) is a citation derived from the amendment.

II.

Preliminary to the hearing, petitioner's attorney explained to the appeal examiner that the Redetermination Notice was not sufficient "notice" of the revised section of statute under which petitioner was disqualified from benefits; that he, the attorney, had made a reasonable but unsuccessful effort to obtain a copy of the revised section of statute, including a call to the Washington Code Reviser; and that he, the attorney wished to see a copy of the revised section of statute before the end of the hearing. The appeal examiner replied "O.K." During the hearing, the attorney reiterated, by way of motion to dismiss, that due to circumstances beyond his control he and his client were without reasonable notice of the applicable statute.

III.

At the close of the hearing, the appeal examiner made the following comment: "The written decision will be issued in approximately two to three weeks. At that time I will provide copies of the applicable statute. . ."

From the foregoing Findings of Fact, the undersigned frames the following.

ISSUES

Was petitioner afforded See footnote a reasonable opportunity for a fair hearing within the intendment of RCW 50.32.040? If he was not, what is the appropriate remedy?

From the issues as framed, the undersigned draws the following.

CONCLUSIONS

The above cited section of statute provides, in pertinent part: "In any proceeding involving an appeal relating to benefit determinations or benefit claims, the appeal tribunal, after

affording the parties a reasonable opportunity for fair hearing, shall render its decision . . ." The phrase "affording the parties a reasonable opportunity for a fair hearing" describes an arrangement or procedure whereby a party is informed of the law under which an alteration of his enjoyment of rights is to be considered; and in which the party is at liberty to present evidence in his behalf, and to cross-examine those who present evidence against him. Beyond that, however, the phrase implies an affirmative duty on the part of the Appeal Tribunal to so conduct the hearing or proceeding that each party may make a knowledgeable and thorough presentation of its case, consistent with its ability to do so.

In the instant case, the applicable statute was correctly cited on the notices that were issued to petitioner. The department is under no particular obligation to furnish the text of the applicable statute to claimants, but it is under an obligation to avoid confusing them. See *In re Leslie Comm.Dec. 1127* (1974). The notices sent to petitioner had the capability of causing confusion. There is no evidence of record to show that by the exercise of reasonable prudence the petitioner's attorney could not have obtained the text of the amended statute from the local Job Service Center of the department. The attorney's statement that he was unable to obtain the text of the amendment is therefore a strain upon plausibility; nevertheless, it did have the legal effect of putting the appeal examiner on notice that petitioner was not then in a position to make a knowledgeable presentation of his case. Under the circumstances the most reasonable thing for the appeal examiner to have done was to furnish the petitioner with the text of the statute, or postpone the hearing so that the attorney could have time to obtain it elsewhere. This the appeal examiner failed to do. It goes without saying that the appeal examiner is not to be intrusive in the relationship between attorney and claimant, nor is he obliged to compensate in any way for the improvidence or lack of resourcefulness of the claimant's chosen representative. However, in view of the circumstances that furnishing the text of the statute was so small and easy a thing on the appeal examiner's part, and so fundamental to a knowledgeable presentation of petitioner's case, the conclusion is inescapable that the failure of the appeal examiner to furnish the text of the statute or postpone the hearing was an effective denial of a reasonable opportunity for a fair hearing, within the intendment of RCW 50.32.040. The undersigned has so concluded.

The application of an appropriate remedy for the denial of a fair hearing will depend upon the nature of the case, the cost and inconvenience of another hearing, the practicality of reaching an equitable solution without another hearing, and other matters. The nature of the case is that under RCW 50.20.050(1) petitioner has the burden of establishing by a preponderance of the evidence that he had good cause for quitting a certain job. Inasmuch as the interested employer has provided evidence in the matter, the most practical and equitable remedy would be to afford petitioner an opportunity to make a knowledgeable presentation of his evidence and rebuttal of the interested employer's evidence, following which a decision should be issued. Now therefore,

IT IS HEREBY ORDERED that the record and files herein shall be REMANDED to the Appeal Tribunal for the purpose of rescheduling this matter for hearing. When the record is complete, the Appeal Tribunal shall publish its decision on the merits of petitioner's claim, and further rights of appeal to the Commissioner shall be granted to any interested party aggrieved by such decision.

DATED at Olympia, Washington, MAY 22 1978

ROBERT E. JACKSON

Commissioner's Delegate
Employment Security Department

Footnote: The third word of this sentence should be *afforded*.

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