

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEXTEL,
Appellant,
vs.
DEPARTMENT OF EMPLOYMENT,
TRAINING AND REHABILITATION,
EMPLOYMENT SECURITY DIVISION;
AND RONALD HALL,
Respondents.

No. 42246

FILED

MAR 03 2005

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richard*
CHIEF DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

Appeal from a district court order denying a petition for judicial review of an unemployment benefits award. Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellant Nextel discharged respondent Ronald Hall in March 2002. Hall filed a claim for unemployment benefits with respondent Employment Security Division (ESD), and ESD sent Nextel an Employer Notice of Claim Filed. Nextel completed and returned the notice, protesting the benefits claim and stating: "Claimant was discharged for violation of company policy. Documentation to follow."

In order to make a benefits determination, an ESD adjudicator contacted Nextel and Hall to investigate the circumstances of the discharge. During the adjudicator's interview, Hall reported that Nextel accused him of violating unspecified company policies regarding computer use. The adjudicator called Nextel the same day and left a message asking Nextel to provide the reason for Hall's discharge. Two days later, the adjudicator reached Beth Sheets at Nextel. According to the adjudicator's records, Sheets informed the adjudicator that Nextel had "no more information available at this time." The adjudicator determined that Hall was entitled to

unemployment benefits because Nextel had not disclosed any specific information indicating that Hall was guilty of work-related misconduct.

ESD issued a determination notice awarding Hall benefits. On the determination form sent to Nextel, ESD marked the box informing Nextel that it could file an appeal from the decision. ESD did not mark the box provided on the form stating that the employer had failed to provide facts and/or responded untimely and had the right to appeal only the finding that it had not supplied sufficient information. Nextel administratively appealed, stating that Hall was discharged because he had credited accounts without approval, credited accounts over his limit and entered another employee's password when crediting accounts.

Before the appeal hearing, the appeal tribunal advised Nextel that the scope of the hearing would be limited to whether Nextel had submitted a valid protest of claim under NRS 612.475(4). After the limited hearing, the appeal tribunal affirmed the benefits award, finding that Nextel had failed to timely provide adequate facts in response to the claim. Nextel appealed to the ESD Board of Review. The Board declined further review. The district court denied Nextel's subsequent petition for judicial review and affirmed the Board's decision.

Nextel now appeals the district court's order. We reverse and remand with instructions that the ESD appeal tribunal conduct a hearing on the merits.

"In reviewing an administrative board's decision, this court, like the district court, is limited to the record below and to the determination of whether the board acted arbitrarily or capriciously."¹ An administrative board acts arbitrarily and capriciously when it changes sharply from a

¹McCracken v. Fancy, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982).

previously held position without explanation,² or makes a decision without regard to the surrounding facts and circumstances.³ This court may review independently an administrative board's construction of a statute as a question of law.⁴

Nextel emphasizes that ESD sent Nextel a determination notice, which on its face notified Nextel of its right to appeal from the decision awarding benefits. Nextel asserts that the determination should be regarded as a conclusive finding that Nextel had met the statutory requirements and was entitled to a hearing on the merits.

NRS 612.475(5) provides that: "[a]ny employing unit which has filed a protest in accordance with the provisions of this section must be notified in writing of the determination . . . , and the notice must contain a statement setting forth the right of appeal." The determination form contains two boxes relevant to this matter. Box one states: "If you disagree with the above decision, you may file an appeal by the appeal date shown above." The second box advises:

You are receiving a courtesy copy of the non-monetary determination

Information on file indicates that you have responded in an untimely manner and/or have failed to provide required factual information. You have the right to appeal our decision that you have not complied with the provisions of NRS 612.475, but do not currently have the right to appeal the claimant's eligibility.

²Wisconsin Valley Imp. Co. v. F.E.R.C., 236 F.3d 738, 748 (D.C. Cir. 2001) (analyzing federal Administrative Procedure Act).

³State v. Ford, 755 P.2d 806, 808 (Wash. 1988).

⁴Barrick Goldstrike Mine v. Peterson, 116 Nev. 541, 545, 2 P.3d 850, 852 (2000).

ESD selected the first box, indicating that Nextel had the right to appeal. ESD did not check the box advising Nextel that it had failed to provide facts in accordance with NRS 612.475. ESD asserts that the non-monetary determination referred to in box two means that the employer completely failed to respond. ESD claims that Nextel was not in that category, because Nextel had responded to the notice of claim, and stated that it would provide documentation. ESD does not directly explain why the box stating that Nextel could appeal was checked, but only proffers that the other category, regarding non-monetary determinations, was inapplicable.

The unemployment benefits system aims to deliver aid promptly to people who involuntarily become unemployed. We acknowledge ESD's strong interest in having some facts from the employer in order to make an appropriate decision at the earliest opportunity. Once the ESD adjudicator makes an initial determination, the claimant begins receiving benefits. Reversing an initial determination involves the difficult task of attempting to recoup benefits already paid and reversing the resulting tax charge to an employer.

However, in this case, Nextel received the determination form advising Nextel of its right to appeal the award of benefits. After Nextel filed an appeal, the ESD appeal tribunal informed Nextel that the hearing would be limited to whether Nextel supplied sufficient information regarding Hall's discharge to satisfy the statutory requirements. ESD has not demonstrated that, after the employer has been advised of its right to appeal the benefits award, the tribunal has the authority to limit the scope of the hearing because the employer failed to provide information beyond bare notice that it

protests the claim.⁵ We must conclude, therefore, that the appeal tribunal acted arbitrarily in limiting the scope of the hearing.⁶

We are concerned that the tribunal's actions, after the determination notice issued by ESD, may infringe upon Nextel's procedural due process rights.⁷ Mindful of underlying judicial policies favoring a decision on the merits,⁸ we hold that, because ESD sent a determination to Nextel advising Nextel that it could appeal the benefits award, Nextel is entitled to a hearing on the merits by the ESD appeal tribunal.

⁵We note that we do not consider what comprises a sufficient initial response by the employer. NRS 612.475(3) requires that the employer set forth "any facts" affecting the employee's right to benefits. In Barnum v. Williams, we stated that the initial claim and protest merely put the parties on notice. 84 Nev. 37, 40, 436 P.2d 219, 221 (1968). Thus, Nextel's failure to provide more than a bare minimum of information to the adjudicator does not bar Nextel's right to appeal the adjudicator's decision on the merits. Also, Nextel's appeal statement satisfied Barnum. In subsequent cases, the ESD Board has found that vague employer statements satisfied the statutory requirements. See, e.g., In the Matter of Adams, Dec. No. V-00-B-00342 (May 23, 2000).

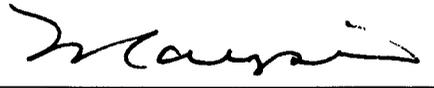
⁶See NRS 233B.135(3)(f).

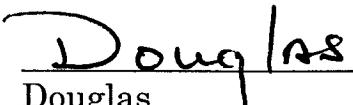
⁷U.S. Const. amend. XIV, § 1, 5.

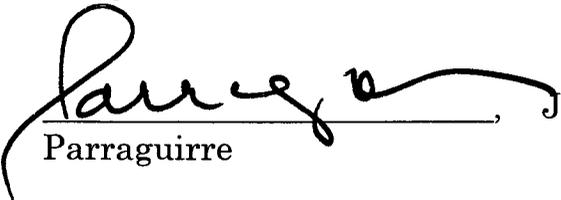
⁸Passarelli v. J-Mar Development, 102 Nev. 283, 285, 720 P.2d 1221, 1223 (1986).

Accordingly, we reverse the district court's order and remand this matter with instructions for the district court to remand to ESD for a hearing on the merits.

It is so ORDERED.


_____, J.
Maupin


_____, J.
Douglas


_____, J.
Parraguirre

cc: Hon. David Wall, District Judge
Fisher & Phillips LLP
Crowell Susich Owen & Tackes
Ronald Hall
Clark County Clerk