SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5219-14T1

MONMOUTH COUNTY,

Appellant,

v.

BOARD OF REVIEW,
DEPARTMENT OF LABOR AND
WORKFORCE DEVELOPMENT,
and AUDREY K. DUNWOODY,

Respondents.

Submitted February 27, 2017 – Decided March 9, 2017

Before Judges Sabatino and Haas.

On appeal from the Board of Review, Department of Labor and Workforce Development, Docket No. 32895.

Gluck Walrath, LLP, attorneys for appellant (Andrew Bayer, of counsel and on the brief; C. Lynn Centonze, on the brief).

Christopher S. Porrino, Attorney General, attorney for respondent Board of Review and Workforce Development (Melissa H. Raksa, Assistant Attorney General, of counsel; Elizabeth A. Davies, Deputy Attorney General, on the brief).

Respondent Audrey K. Dunwoody has not filed a brief.

PER CURIAM

Appellant County of Monmouth ("the County") appeals from the June 12, 2015 final decision of the Board of Review, Department of Labor and Workforce Development ("Board"), affirming the Appeal Tribunal's October 20, 2014 determination that respondent Audrey Dunwoody was eligible for unemployment compensation benefits. After reviewing the record before us, and mindful of the prevailing legal standards, we reverse and remand for a new hearing before the Appeal Tribunal.

We derive the following facts from the record. Respondent worked as a certified nurse's aide in a County-operated nursing home. Approximately one month after she began work in March 2013, respondent claimed she injured her knee on the job and she filed a worker's compensation claim. Respondent continued to work until August 2013, when she informed her supervisor that she could no longer work due to her injury. Thereafter, respondent did not return to work.

In December 2013, the County asserted that it sent respondent a copy of a letter denying her worker's compensation claim, together with information on how to request a leave of absence. When respondent did not respond, the County initiated proceedings

to remove her from employment based on her abandonment of her position. However, respondent appeared at the departmental hearing in January 2014 and claimed that she had never received the information from the County. The County alleged that it then gave respondent another copy of the leave request form, but she failed to complete and return it with the required medical documentation supporting her claim that she could not work for the period between September 2013 and January 2014. On April 3, 2014, the County terminated respondent's employment for abandoning her job.

Respondent filed a claim for unemployment compensation benefits. On August 28, 2014, a Deputy Claims Examiner ("Deputy") found that respondent left work voluntarily without good cause attributable to the work, and denied her claim. Respondent filed an appeal to the Appeal Tribunal from this determination and the hearing examiner scheduled a telephone hearing for October 16, 2014.

The County had previously retained a private company to represent it in unemployment compensation matters. The representative from the company arranged for three witnesses from the County to testify at the Appeal Tribunal hearing in opposition to respondent's application for benefits. As instructed by the notice of hearing, the representative and the three witnesses

called the hearing examiner at the appointed time to participate in the hearing. At that time, however, they were told to hang up and wait for a call back from the hearing examiner.

Later that morning, the hearing examiner called the County's representative to begin setting up the conference call. However, when the examiner called the County's first witness, a different County employee answered the telephone and told the examiner that the witness was "in a meeting with the Department of Health." The representative asked the examiner to call the same telephone number and ask for the second witness. The examiner did so and was again mistakenly advised that this witness was also not available.

At that point, the County representative told the hearing examiner, "Sorry sir. I guess, we'll have to reopen it in the event that it's necessary." The examiner replied, "All right, thank you." The representative stated, "Have a good day"; the examiner replied, "You too"; and the representative said goodbye.

The hearing examiner then called respondent and conducted the telephone hearing without the County's representative or its three witnesses. The examiner told respondent that the representative and the three witnesses "did report for the hearing," but the witnesses were not available when he called them back. The examiner stated:

> So, the [County] was unable to participate at the time of the hearing. I don't . . . the representative disconnected proceeding at that point, and as this is a claimant appeal we are going to proceed with the hearing today, and as I don't have any request for postponement or . . . on . . . on this matter. [(alterations in original).]

At the hearing that followed, respondent asserted that she was unable to work because of a medical condition and that her doctor had told her she should stay off her leg and rest. Respondent also claimed that she never received any of the forms the County sent her because the County did not use her correct address.

On October 20, 2014, the Appeal Tribunal hearing examiner issued a decision reversing the Deputy's determination. Based upon respondent's uncontradicted testimony, the examiner found that respondent was absent from work due to "a medical condition" and that respondent "made a reasonable effort to preserve her employment, but was terminated nonetheless." Therefore, the examiner concluded that because respondent did not leave work voluntarily, she was eligible for unemployment benefits.

On October 24, 2014, the County's representative filed a timely appeal of the Appeal Tribunal's decision to the Board. In the letter requesting the appeal, the representative asked for "permission to present written argument (a brief) to the Board

. . . and also request[ed] that a copy of the transcript" of the Appeal Tribunal hearing. The representative asked the Board to "refrain from making a decision until we submit our written argument."

On appeal, the County alleges that it never heard back from the Board and, therefore, it never filed a brief in support of its appeal. However, the Board asserts that it sent a responsive letter to the County's representative on November 18, 2014, which included a recording of the Appeal Tribunal hearing on a compact disc. The letter, which was signed by a secretarial assistant, also stated that the County had to submit any "written argument" within fourteen days of the mailing date of the letter.

Notably, this letter was not on official Board letterhead. The County asserts that it never received this letter and could not locate a copy of it in its files after the Board attached it to its appellate brief as a result of the Board's successful motion to supplement the record on appeal.

Seven months later, the Board issued a one-page final decision, affirming the Appeal Tribunal's determination. The Board stated that "[s]ince [the County] was given a full and impartial hearing and a complete opportunity to offer any and all evidence, there is no valid ground for a further hearing." This appeal followed.

On appeal, the County asserts that the Appeal Tribunal erred by failing to adjourn the hearing when its witnesses could not be contacted, and that it should have reopened the hearing as requested by the County's representative. It also argues that there is no basis in the record to support the Board's finding that the County "was given a full and impartial hearing and a complete opportunity to offer any and all evidence[.]" Based upon the unique circumstances of this case, we agree with the County's contention.

We begin by recognizing that our review of an administrative agency decision is limited. Brady v. Bd. of Review, 152 N.J. 197, 210 (1997). "Unless . . . the agency's action was arbitrary, capricious, or unreasonable, the agency's ruling should not be disturbed." Ibid.

At the same time, however, the procedures used by the agency to arrive at its final decision must be fair to both parties. Garzon v. Bd. of Review, 370 N.J. Super. 1, 9 (App. Div. 2004) (observing due process "calls for those procedural protections that fairness demands"). Thus, N.J.A.C. 1:12-14.2(a) specifically requires that hearings before the Appeal Tribunal and Board of Review "shall be fair and impartial and shall be conducted in such manner as may be best suited to determine the parties' rights."

We are not satisfied that this standard was met in this case. Here, the County representative and three witnesses called in at the appointed time for the Appeal Tribunal hearing. However, the representative and the witnesses were told to hang up and wait for a call back from the hearing examiner. The examiner later re-connected with the representative but could not get back in touch with the witnesses after a County employee mistakenly told him that the witnesses were in a meeting.

At that point, the hearing examiner knew that the County had already indicated its strong interest in participating in the hearing by calling at the appointed time with all of its witnesses ready and available. The examiner was also aware that something unforeseen had happened that prevented him from re-connecting with the witnesses.[1] Thus, a more prudent course of action would have been to give the County representative some time to call the County and obtain an explanation for the misunderstanding. After all, the examiner did not even have respondent on the conference call at that point. However, the examiner did not make this offer to the representative.

[1] Indeed, when the County employee who answered the telephone told the hearing examiner that the first witness was in a meeting with the Department of Health, the examiner stated, "I wonder . . . if it was something that they got surprised with."

Moreover, when the County representative stated, "I guess, we'll have to reopen it in the event that it's necessary[,]" the hearing examiner did not ask if the representative was requesting an adjournment. The examiner also did not tell the representative that in the absence of such a request, he planned to call respondent and conduct the hearing without the County's witnesses as soon as the representative hung up.

The Board's regulations concerning the conduct of telephone hearings specifically contemplate that there will be instances when a party does not appear at a telephone hearing for reasons other than inadvertence or neglect. In this regard, N.J.A.C. 1:12-14.6(b) states that "[a]ny party who fails to appear at the scheduled telephone hearing shall meet the requirements of N.J.A.C. 1:12-18.4 before any reopening of the hearing shall be granted." N.J.A.C. 1:12-18.4(a)(2) provides that a request to reopen a hearing may be filed if "[t]he party did not appear at the Appeal Tribunal for good cause shown[.]"

Under the idiosyncratic facts of this case, we believe the County established good cause to warrant a reopening of the Appeal Tribunal hearing. As discussed above, the County's representative and witnesses called the Appeal Tribunal at the appointed time and were ready to proceed. They were instructed to hang up and wait for a call back from the hearing examiner. As the result of a

mistake by the employee who answered that call, the examiner was told the witnesses were not available. Under these uncommon circumstances, basic fairness requires that the County be given the opportunity to present its factual and legal arguments to the Appeal Tribunal at a new hearing at which respondent may also participate.[2]

Accordingly, we reverse the Board's June 12, 2015 decision and remand to the Appeal Tribunal for a new hearing. In doing so, we intimate no view on respondent's substantive claim for benefits or the County's arguments in opposition to that claim, as those matters will be the subject of our remand.

Reversed and remanded. We do not retain jurisdiction.

[2] We again note that the County contends on appeal that the Board never responded to its letter asking for permission to file a brief in support of its appeal of the Appeal Tribunal's decision granting unemployment benefits to respondent. The Board disputes this allegation. However, in light of our determination that a new hearing is required, we need not address this contention further.