

DR-Lack of proper
notice of issues
FILED in dispute
APR 22 1993

CLERK OF COURT OF APPEALS
OF WISCONSIN

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

April 22, 1993

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals pursuant to s. 808.10 within 30 days hereof, pursuant to Rule 809.62(1).

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 92-0701

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

FRED E. MUELLER,

Plaintiff-Appellant,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,
AND WESLEY CRAWFORD,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane county: P. CHARLES JONES, Judge. *Reversed and cause remanded.*

Before Eich, C.J., Dykman and Sundby, JJ.

DYKMAN, J. This is an appeal from an order affirming a Labor and Industry Review Commission (LIRC) decision declaring Mueller ineligible for unemployment benefits. The issues are: (1) whether Mueller was denied due process

of law by the appeal tribunal's consideration of his wages for the fourth quarter of 1988, despite omission of the issue from the hearing notice; and (2) whether Mueller waived his right to appeal the inadequacy of the hearing notice.

We conclude that Mueller properly objected to the lack of notice at each stage in the administrative and judicial process and, thus, preserved his right to appeal the issue. We also conclude that Mueller was deprived of due process and prejudiced by the inadequate hearing notice. Therefore, we reverse and remand for a new hearing on Mueller's eligibility for unemployment benefits.

I. BACKGROUND

Mueller worked as the sole salesclerk at Mount Horeb Antiques, a retail business owned by Wesley Crawford, from its inception on October 1, 1988, through February 1, 1989. Several days later, the store closed its doors permanently. Mueller filed for unemployment benefits, claiming that he earned \$1,920.50 during the final quarter of 1988. Of this amount, \$1,420.50 was paid by check. The remaining \$500 was allegedly received in cash as commissions on two sales made late in 1988. Mueller also filed a claim for unpaid wages earned in January and February 1989.

After conducting an investigation, the Unemployment Compensation Division (UCD) of the Department of Industry, Labor and Human Relations (DILHR) issued an initial determination that Mueller worked as an employee, earned wages of \$2,500.50 for the base period of February 7, 1988, through February 4, 1989,¹ and was eligible for unemployment benefits.

Crawford appealed the initial determination and UCD scheduled a hearing before the appeal tribunal. UCD's notice of the hearing listed only one issue to be determined -- whether Mueller performed services at the store as an employee or an independent contractor. However, as the hearing began, Crawford stated that he also disputed the amount of Mueller's wages. When Mueller's representative questioned whether the hearing was restricted to the status issue, the administrative law judge (ALJ) responded that wages could be considered because the initial determination had specified the level of Mueller's earnings.

At the hearing, both parties testified as to items relevant to Mueller's status, including who set Mueller's hours, whether Mueller was authorized to sign checks drawn on the store's checking account, and whether Mueller advertised

¹ The \$2,500.50 figure consisted of \$1,920.50 for the fourth quarter of 1988 and \$580 for January and February 1989, which the Equal Rights Division of DILHR calculated and ordered Crawford to pay as a result of Mueller's wage claim.

separately in the local yellow pages directory. In addition, each testified and presented exhibits regarding the terms of Mueller's compensation.

Mueller claimed that he and Crawford agreed that he would be paid ten dollars per day plus commissions at a rate of ten percent of sales, with a guarantee that he would earn at least \$500 per month. He also stated that he was allowed to sell his own antiques without paying the standard twenty-five percent consignment fee charged to consignors with whom the store dealt. As proof of his fourth quarter wages, Mueller offered his 1988 federal tax return, the substitute "W-2" forms covering his employment at Mount Horeb Antiques,² and photocopies of six checks from the store which totaled \$1,420.35. The calculation of his wages on the substitute W-2 forms listed three checks totaling \$1,420.50, and \$500 in cash commissions for two "'off the books' sales of \$2,500.00 each."

In his testimony, Crawford claimed that he and Mueller were partners, and he denied agreeing to pay Mueller ten dollars per day. Nor did he waive the consignment fee on Mueller's items which were sold through the store. To the contrary, he claimed that he was still owed consignment fees in accordance with their partnership agreement. He also stated that while Mueller's commissions averaged ten percent of sales, the amount of commission on any one sale depended on the price

² As Crawford denied that Mueller was his employee, he refused to prepare a W-2 wage statement; hence Mueller filed substitute forms with his 1988 state and federal tax returns.

and whether the object sold was owned by Crawford or a consignor. Finally, Crawford testified that Mueller's commissions were paid by check only, and never in cash.

The appeal tribunal reversed the initial determination. The ALJ found that Mueller functioned as an employee rather than an independent contractor. However, the ALJ also found that Mueller's wages for the fourth quarter of 1988 were approximately \$1,420. Consequently, Mount Horeb Antiques was not an "employer" subject to the unemployment compensation provisions of ch. 108, Stats., and Mueller was ineligible for benefits. See sec. 108.02(13)(e)1., Stats.³ With respect to the alleged cash commissions, the ALJ stated that there was "no tangible evidence presented by either party to show the existence of the \$500 in cash payments."

Mueller appealed the decision to LIRC. LIRC affirmed and Mueller requested reconsideration. In his appeal, Mueller challenged the decision on the basis

³Section 108.02(13)(e), Stats., provides in relevant part:

Any other employing unit, except a government unit, shall become an employer as of the beginning of any calendar year if the employing unit:

1. Paid or incurred liability to pay wages for employment which totaled \$1,500 or more during any quarter in either that year or the preceding calendar year

that the hearing notice prevented him from having documents and witnesses available to verify that his wages exceeded \$1,500 in the final quarter of 1988. He also argued that the ALJ erred in calculating his total wages by failing to include waived consignment fees pursuant to sec. 108.02(26), Stats. (1987-88).⁴

In LIRC's final decision, it acknowledged Mueller's assertion of inadequate notice. However, because Mueller had previously been required to furnish wage information to UCD, LIRC concluded "it was reasonably clear to the parties that wages would be addressed at the hearing." LIRC also declined to consider bank statements submitted by Mueller which showed deposits made to his account after each \$250 cash commission was allegedly paid. The deposits exceeded \$250, and there was no indication whether they included currency. Finally, LIRC rejected the consignment fee argument. LIRC found that the information on "Schedule C" of Mueller's 1988 federal tax return was not credible evidence to prove nearly \$400 in

⁴ Section 108.02(26), Stats. (1987-88), read in relevant part:

"Wages" means every form of remuneration payable for a given period ... to an individual for personal services, including salaries, commissions, vacation pay, dismissal wages, bonuses, tips and the reasonable ... value of board, rent, housing, lodging, payments in kind, and any other similar advantage received from the individual's employing unit or directly with respect to work for it.

additional wages, and noted that whether Crawford had in fact agreed to waive the fees was in dispute.⁵

Mueller sought judicial review of LIRC's decision. The trial court affirmed, holding that the findings of fact supported LIRC's order. The trial court did not address the due process issue raised by Mueller's complaint. Mueller now appeals from the trial court's order.

II. SCOPE AND STANDARD OF REVIEW

We review LIRC's decision, and the scope of our review is identical to that of the circuit court. *DILHR v. LIRC*, 155 Wis.2d 256, 262, 456 N.W.2d 162, 164 (Ct. App. 1990). We will not set aside an order or award unless LIRC acted in excess of its powers, the order or award was procured by fraud, or the findings of fact do not support the order or award. Section 102.23(1)(e), Stats. Conducting a hearing in disregard of procedural safeguards is an instance in which an agency acts in excess of its powers. *Weibel v. Clark*, 87 Wis.2d 696, 704, 275 N.W.2d 686, 690 (1979), *cert. denied*, 444 U.S. 834 (1979).

⁵ Sole proprietors file Schedule C to show how the amount of profit or loss from their businesses was derived. Mueller reported \$1,554 in sales of his own items through Mount Horeb Antiques on Schedule C. By applying the standard twenty-five percent consignment rate to this amount, Mueller estimated the perquisite to be worth \$389.

III. WAIVER

LIRC argues that Mueller's due process claim is waived because he is raising the issue for the first time on appeal. This contention is not supported by the record.

Mueller's representative questioned the propriety of considering Mueller's wages at the hearing immediately after Crawford asserted that the wages were in dispute. This action brought the potential error to the ALJ's attention and afforded sufficient opportunity to avoid prejudice to Mueller. We hold that it was also sufficient to preserve the issue for appeal. Furthermore, it is clear from the materials submitted to LIRC and LIRC's response in both its original and final memorandum opinions that Mueller raised the objection to the hearing notice at that stage as well.

Finally, in his complaint filed in circuit court, Mueller alleged "[i]mproper proceedings which were prejudicial to the plaintiff" among other errors committed by the appeal tribunal and LIRC. "Pleadings are to be liberally construed with a view towards substantial justice to the parties." *Kemp v. Miller*, 154 Wis.2d 538, 559, 453 N.W.2d 872, 880 (1990); sec. 802.02(6), Stats. In light of the administrative record, we conclude that the allegation is properly construed as a claim that Mueller was deprived of due process as a result of the hearing notice.

IV. DUE PROCESS

A. *Lack of Notice*

Any quasi-judicial administrative action must afford a party the following due process rights: (1) the right to seasonably know the charges; (2) the right to meet the charges by competent evidence; and (3) the right to be heard by counsel. *Weibel*, 87 Wis.2d at 701, 275 N.W.2d at 688-89. Mueller asserts that the hearing notice deprived him of the first of these rights.

LIRC concedes that the hearing notice excluded the issue of Mueller's wages. However, it challenges the assertion of lack of seasonable notice. As LIRC noted in its memorandum opinion, the initial determination addressed Mueller's wages and, therefore, it was "reasonably clear" to the parties that an inquiry into his wages would be made at the hearing. We reject this argument.

Crawford had sufficient opportunity to review the initial determination and decide whether to appeal. As a result, he appealed, and a notice was sent to the parties which listed one, and only one, issue to be determined. Contrary to LIRC's position, we hold that it was reasonable for Mueller to assume that his wages were undisputed, and to read the notice literally and conclude that the wage issue would not

be tried by the ALJ. We believe that it would be unsound policy to require parties who prevail in initial determinations to be prepared to defend those rulings in all respects, despite hearing notices to the contrary.

RCU
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hearing

LIRC cites the fact that Mueller brought several financial documents to the hearing as proof that he did not lack notice of the wage issue. We are not convinced by this argument as many of these documents, such as the federal tax return and the substitute W-2 forms, were also pertinent to the issue of Mueller's status as employee or independent contractor.

B. Prejudice

We must disregard the inadequate hearing notice unless Mueller has demonstrated that he was prejudiced by it. *See Weibel*, 87 Wis.2d at 704, 275 N.W.2d at 690; sec. 102.23(2), Stats. We conclude that Mueller has made such a showing and, therefore, LIRC's order must be reversed.

In order to prevail on his unemployment claim, Mueller needed to demonstrate that the store incurred wages of at least \$1,500 during the last quarter of 1988. *See* sec. 108.02(13)(e), Stats. It is uncontroverted that Mueller received checks totaling \$1,420, which LIRC classified as wages. Thus, had Mueller proved other remuneration of approximately \$80, LIRC would have declared him eligible for benefits.

Mueller offered proof of a perquisite, waived consignment fees, amounting to \$389. Because Crawford testified that sales of Mueller's personal inventory were even higher than Mueller reported on Schedule C, LIRC's holding on these additional wages essentially depended on whether Crawford had agreed to waive

the consignment fee. LIRC did not find Mueller's testimony credible enough to rule in his favor on this factual issue. The prejudice resulting from the hearing notice is apparent in this credibility determination. Had Mueller been properly notified that wages would be considered at the hearing, he could have arranged to subpoena witnesses who, he claimed, would testify as to the consignment waiver and, thus, bolster his credibility.

In his appeal to LIRC, Mueller stated that he could produce witnesses to testify that he was paid cash for his commissions on two sales toward the end of 1988. In this appeal, Mueller only claims that "[w]ith proper notice[,] he could have developed this issue." As this case must be remanded to reconsider the consignment issue, we conclude that Mueller should also have an opportunity to prove that the cash payments actually occurred. Therefore, on remand, the issue of Mueller's total wages for the fourth quarter of 1988 should be tried *de novo*.

By the Court.--Order reversed and cause remanded.

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