NO. 22783

IN THE INTERMEDIATE COURT OF APPEALS

OF THE STATE OF HAWAIʻI

ROBERT B. HOLDEN, Appellant-Appellee, v. KANALOA AT KONA, Appellee-Appellee, and HAWAIʻI DEPARTMENT OF LABOR AND INDUSTRIAL RELATIONS, UNEMPLOYMENT INSURANCE DIVISION, Appellee-Appellant, and EMPLOYMENT SECURITY APPEALS REFEREES' OFFICE, Appellee-Appellee

APPEAL FROM THE CIRCUIT COURT OF THE THIRD CIRCUIT
(Civ. No. 99-060K)

MEMORANDUM OPINION
(By: Watanabe, Acting C.J., Lim, and Foley, JJ.)

Appellee-Appellant Hawaiʻi Department of Labor and Industrial Relations, Unemployment Insurance Division (DLIR) appeals: (1) the "Findings of Fact, Conclusions of Law; Order," filed by the Circuit Court of the Third Circuit[1] (the circuit court) on July 14, 1999 (the July 14, 1999 Order); and (2) the "Final Judgment," filed by the circuit court on July 28, 1999 that reversed a DLIR appeals officer's January 4, 1999 decision (the DLIR appeals officer's decision) that, in turn, affirmed a DLIR Unemployment Insurance Division claims examiner's November 13, 1998 decision to deny unemployment insurance benefits to Appellant-Appellee Robert B. Holden (Claimant) on

[1/] Third Circuit Court Judge Ronald Ibarra presided in this case.

grounds that Claimant had been dismissed for misconduct for sleeping on the job.

We vacate the July 14, 1999 Order and the July 28, 1999 Final Judgment and remand for further proceedings consistent with this opinion.

BACKGROUND

The circuit court premised its Final Judgment reversing the DLIR appeals officer's decision on its July 14, 1999 Order, which contained the following findings of fact and conclusions of law:

FINDINGS OF FACT

> To the extent these Findings of Fact are Conclusions of Law they shall be considered as such.
>
> 1. Claimant began his employment with Kanaloa at Kona[2] as a security officer from October 1, 1997 to September 6, 1998. Claimant was terminated on September 6, 1998 because it was alleged that he was sleeping on the job.
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> 2. On November 13, 1998, the Unemployment Insurance Division Claims Examiner issued a Notice of Decision on Unemployment Insurance Claim finding that Claimant was discharged due to misconduct connected with work.
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> 3. On November 16, 1998, Claimant filed an Application for Reconsideration or Notice of Appeal.
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> 4. The case was called for hearing before the Appeals Officer on December 16, 1998. However, there was no audible recording of the hearing on the audio cassette tape, and therefore there is no transcript of the hearing before the Appeals Officer.
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> 5. On January 4, 1999, the Appeals Officer issued a decision affirming the Claims Examiner's decision.

[2/] Appellant-Appellee Robert B. Holden (Claimant) handwrote on a copy of a Notice of Decision on Unemployment Insurance Claim, mailed by a Department of Labor and Industrial Relations claims examiner to Claimant on November 13, 1998, that his "actual employer" is the "Association of Property Owners c/o Outriggers Hotels of Hawai'i." (Emphasis in original.)

> 6. On January 27, 1999, Claimant filed an Application for Reopening of Appeals Officer's Decision. The Application was denied on February 24, 1999.
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> 7. A Notice of Appeal was filed on March 24, 1999. All of the parties filed briefs in the appeals with the [c]ourt.
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> 8. On July 12, 1999, the [c]ourt heard oral arguments on the appeal.
>
> CONCLUSIONS OF LAW
>
> To the extent these Conclusions [o]f Law are Findings of Fact they shall be considered as such.
>
> 1. The [c]ourt has appellate jurisdiction in agency appeals pursuant to [Hawai‘i Revised Statutes (HRS) §] 91-14. The [c]ourt is restricted to a review of the agency record in reaching its decision[. HRS §] 91-14(f). The [c]ourt may affirm the decision of the agency or remand it with instructions for further proceedings, or may reverse or modify the decision. [HRS §] 91-14(g).
>
> 2. There is no record for the [c]ourt to review; therefore, there is no evidence to support the Appeal's [sic] Officer's decision. Pursuant to [HRS §] 91-14(g)(1), the decision without a record violates statutory provision [HRS §] 91-9(f).
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> IT IS HEREBY ORDERED, ADJUDGED AND DECREED:
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> That the Hawaii [Hawai‘i] Department of Labor and Industrial Relations, Unemployment Insurance Division's decision issued on January 4, 1999 is hereby reversed.

(Footnote added.)

In other words, the circuit court's Final Judgment was predicated purely upon its conclusion that the lack of a transcript of the proceedings before the DLIR appeals officer mandated reversal under HRS § 91-9(f). We hold that the circuit court erred in so concluding.

DISCUSSION

HRS § 91-9, which is part of the Hawai‘i Administrative Procedure Act, reads, in pertinent part, as follows:

> **Contested cases; notice; hearing; records**. . . .
>
> . . . .
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> (e) For the purpose of agency decisions, the record shall include:
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> (1) All pleadings, motions, intermediate rulings;
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> (2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;
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> (3) Offers of proof and rulings thereon;
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> (4) Proposed findings and exceptions;
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> (5) Report of the officer who presided at the hearing;
>
> (6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.
>
> (f) <u>It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review</u>.
>
> (g) No matters outside the record shall be considered by the agency in making its decision except as provided herein.

(Emphasis added.)

In this case, although a transcript of the proceedings before the DLIR appeals officer was requested for judicial review purposes, Elaine I. Fukuda, a transcriber, certified that she had listened to the audio cassette tape of the proceedings, "but found no audible recording of the hearing. Therefore, [she] could not transcribe the proceedings." The dispositive issue, therefore, is whether a reversal of the DLIR appeals officer's decision was mandated because a transcript of the proceedings before the DLIR appeals officer could not be made.

In State v. Bates, 84 Hawai‘i 211, 933 P.2d 48 (1997), the Hawai‘i Supreme Court (the supreme court) addressed a similar issue to the one presented by this appeal. In Bates, the defendant's trial had been videotaped and a transcript was made from the recording. However, due to "inaudible" portions of the videotape, a verbatim transcript of the entire trial was not available. Id. at 214, 933 P.2d at 51. The defendant argued on appeal that his appellate counsel could not engage in a meaningful review of the record, thus necessitating a new trial. Id. at 213, 933 P.2d at 50. The supreme court rejected this argument and articulated the following rule: "where the transcripts of a defendant's trial are incomplete because they omit portions of the trial proceedings, such omissions do not mandate reversal unless the defendant can demonstrate specific prejudice." Id. at 217, 933 P.2d at 54. The supreme court added that "a defendant has a duty to reconstruct, modify, or supplement the missing portions of the record, and a failure to make a reasonable attempt to do so precludes him or her from alleging reversible error." Id. (referring to State v. Puaoi, 78 Hawai‘i 185, 891 P.2d 272 (1995), which suggests that a defendant has a duty, pursuant to Hawai‘i Rules of Appellate Procedure Rule 10(c), to supplement the record on appeal where no transcript is available from the trial).

Unlike Bates, where the majority of the transcript was available, the record is clear in this case that there was no transcript of the DLIR appeals officer's decision available upon appeal to the circuit court. Nevertheless, Bates requires that Claimant make a showing of specific prejudice and demonstrate that the failure to record and preserve the administrative proceedings before the DLIR appeals officer visited a hardship on him and prejudiced his appeal. Bates at 216, 933 P.2d at 53 (citing a long line of federal cases, see United States v. Malady, 960 F.2d 57, 59 (8th Cir. 1992); United States v. Antoine, 906 F.2d 1379, 1381 (9th Cir.)); Annotation, Court Reporting - Omissions, 12 A.L.R. Fed. 584 (1972) (stating that "[i]t has been indicated in several cases that a party who seeks to obtain relief on the basis of a court reporter's omissions in recording must specify the particular way in which he [or she] has allegedly been prejudiced as a result of the omissions, and that the usual way of doing this is to refer to specific errors[.]") (footnote omitted).

Claimant did not do this. Claimant also made no effort to supplement the record when the transcript of the hearing before the DLIR appeals officer was determined to be unavailable.[3] Moreover, Claimant declined the DLIR's invitation

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[3/] Hawai‘i Rules of Appellate Procedure (HRAP) Rule 10(c) provides a procedure to remedy the situation where a transcript is unavailable:

(continued...)

to remand this case for a new hearing before the DLIR appeals officer to remedy the transcript unavailability situation.

Under the circumstances, we conclude that the circuit court clearly erred in reversing the DLIR appeals officer's decision solely because of the lack of a transcript. Consequently, we vacate the July 14, 1999 Order and the July 28, 1999 Final Judgment and remand this case to the circuit court for consideration of the merits of Claimant's appeal. If, on remand, the circuit court concludes that it is unable to consider the merits of Claimant's appeal without transcripts of the

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[3/](...continued)

> (c) **Statement of the Evidence of Proceedings When No Report Made or When Transcript Unavailable.** If the reporter refuses, becomes unable, or fails to transcribe all or any portion of the evidence or oral proceedings after proper request, the party may . . . (ii) prepare a statement of the evidence or proceedings from the best available means, including the party's recollection or uncertified transcripts or reporter's notes. The statement shall be served on the opposing party(ies), who may serve objections or propose amendments thereto within 10 days after service. Thereupon the statement and any objections or proposed amendments shall be submitted to the court or agency appealed from for settlement and approval and as settled and approved shall be included by the clerk of the court appealed from in the record on appeal.

(Emphasis added.) Although HRAP Rule 10(c) is not applicable to appeals at the circuit court level, we believe that the procedure outlined in HRAP Rule 10(c) can be utilized in appeals before the circuit court where a transcript of the proceedings before an administrative agency is unavailable.

proceedings before the DLIR appeals officer, the circuit court may remand the case to the DLIR Appeals Office for a new hearing.

DATED: Honolulu, Hawai‘i, July 20, 2001.

On the briefs:

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