

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALFONSO VILLALOBOS,  
Appellant,  
vs.  
STATE OF NEVADA EMPLOYMENT  
SECURITY DEPARTMENT,  
Respondent.

No. 54195

**FILED**

JUL 31 2012

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY *Tracie K. Lindeman*  
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in an unemployment benefits action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Appellant Alfonso Villalobos was employed by Mentoring of America, LLC, as a sales representative. Villalobos was scheduled to work at Mentoring of America on July 22, 2008, but failed to report or call in due to the fact that he was incarcerated. Subsequent to this incident, his employment with Mentoring of America ended.

Villalobos applied to respondent, State of Nevada Employment Security Department (ESD), for unemployment benefits. ESD denied Villalobos unemployment benefits because it concluded that he had been terminated for misconduct and that he was not available to work during his period of incarceration.<sup>1</sup> See NRS 612.385; NRS 612.375(1)(c).

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<sup>1</sup>Villalobos was also denied benefits because he had been overpaid and because he was disqualified from receiving benefits for failing to report his correct earnings from Mentoring of America. In addition, Villalobos filed a claim for Emergency Unemployment Compensation that was denied because he did not meet the eligibility requirements. His appeal from that decision was not timely.

Villalobos appealed this determination to the ESD appeals referee. Mentoring of America failed to attend the hearing. During the hearing, contradictory evidence was presented indicating that, at separate times, representatives of Mentoring of America stated both that Villalobos quit because he indicated that he could not perform the job and that Villalobos was discharged because he failed to show up for work. Likewise, Villalobos provided conflicting evidence, indicating both that he was fired from his job because he was incarcerated for unknowingly using counterfeit money and that he voluntarily left employment due to a morally unhealthy work environment. Villalobos also provided that if he was going to miss a scheduled day of work, then he was required to call Mentoring of America and provide notification prior to the start of his shift.

The referee found that Villalobos was scheduled to work but failed to report or call his employer because he was incarcerated. As a result, the referee concluded that Villalobos was ineligible for benefits as he had been discharged from his employment for misconduct. The referee further found that Villalobos was ineligible for benefits due to the fact that he was not available for work during his period of incarceration. Villalobos appealed the decision to the ESD Board of Review, which

declined further review pursuant to NRS 612.515(1).<sup>2</sup> Villalobos then petitioned for judicial review. The district court denied the petition.<sup>3</sup>

On appeal, Villalobos contends that the referee did not have authority to affirm the denial of his unemployment benefits when Mentoring of America did not attend or present evidence at the hearing, and that substantial evidence did not support the referee's determination that he was discharged for misconduct. We affirm the district court's denial of the petition for judicial review because the denial of unemployment benefits was supported by substantial evidence.

#### Standard of review

We "review[ ] an administrative decision in the same manner as the district court." State, DMV v. Taylor-Caldwell, 126 Nev. \_\_\_, \_\_\_, 229 P.3d 471, 472 (2010). While questions of law are reviewed de novo, "the Board's fact-based legal conclusions with regard to whether a person is entitled to unemployment compensation are entitled to deference." Clark County Sch. Dist. v. Bundley, 122 Nev. 1440, 1445, 148 P.3d 750, 754 (2006). "Unless the [Board] should act arbitrarily, unreasonably or capriciously beyond administrative boundaries the courts must give credence to the findings of the [Board]." City of North Las Vegas v. State, EMRB, 127 Nev. \_\_\_, \_\_\_, 261 P.3d 1071, 1076 (2011) (quotations omitted). This court must uphold the administrative decision if supported

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<sup>2</sup>NRS 612.515(1) states: "An appeal to the Board of Review by any party must be allowed as a matter of right if the [appeals referee's] decision reversed or modified the Administrator's determination. In all other cases, further review must be at the discretion of the Board of Review."

<sup>3</sup>The parties are familiar with the facts, and we do not recount them further except as necessary to our disposition.

by substantial evidence. Leeson v. Basic Refractories, 101 Nev. 384, 385-86, 705 P.2d 137, 138 (1985); see also NRS 612.530(4). Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. Bundley, 122 Nev. at 1445, 148 P.3d at 754.

The denial of Villalobos's unemployment benefits

Villalobos contends that because Mentoring of America did not appear at the hearing and failed to provide details of any company policy or standard that was violated or any facts concerning his termination, it could not have established by substantial evidence that he was terminated for misconduct. Villalobos also argues that the appeals referee failed to act as an impartial arbiter and instead made leaps of logic that could have only been properly established by Mentoring of America putting on evidence and testimony. We conclude that Villalobos's testimony and admissions provide an adequate basis for the denial of unemployment benefits.

Under NRS 612.385, a person is ineligible for unemployment benefits if he or she is discharged from his or her employment for "misconduct connected with the person's work." Misconduct "occurs when an employee deliberately and unjustifiably violates or disregards [his or] her employer's reasonable policy or standard, or otherwise acts in such a careless or negligent manner as to 'show a substantial disregard of the employer's interests or the employee's duties and obligations to [his or her] employer.'" Bundley, 122 Nev. at 1445-46, 148 P.3d at 754-55 (footnote omitted) (quoting Kolnik v. State, Emp. Sec. Dep't, 112 Nev. 11, 15, 908 P.2d 726, 729 (1996)); see also Kraft v. Nev. Emp. Sec. Dep't, 102 Nev. 191, 194, 717 P.2d 583, 585 (1986).

In making this determination, NRS 612.500(1) directs the appeals referee to ensure that the parties receive "[a] reasonable opportunity

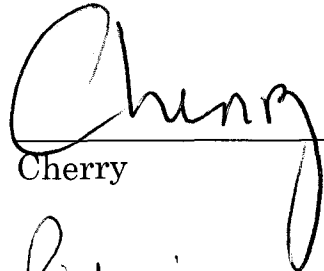
for a fair hearing.” For this to occur, NRS 612.500(2) provides that the referee or appeal tribunal “shall inquire into and develop all facts bearing on the issues and shall receive and consider evidence without regard to statutory and common-law rules.” These provisions reveal that the referee has a paramount role in drawing out the relevant facts during the hearing.

While Villalobos argues that the referee moved past this duty and undertook Mentoring of America’s role in this case, we conclude that the referee did not advance past her responsibility to act as an active and impartial participant to that of an advocate. The hearing officer properly considered all relevant evidence before deciding that Villalobos was ineligible for benefits. Here, Villalobos admitted that he was scheduled to work but failed to report or call Mentoring of America after being told that he needed to call before each shift. He also admitted that he was not available to come into work because of incarceration. We conclude that substantial evidence supports the determination that Villalobos was terminated for failing to report his absence in accordance with his

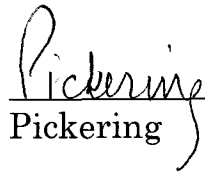
employer's policy and that he was not available for work. Therefore, we affirm the district court's denial of the petition for judicial review.

Accordingly, we

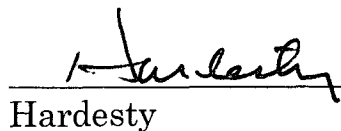
ORDER the judgment of the district court AFFIRMED.<sup>4</sup>

 \_\_\_\_\_, C. J.

Cherry

 \_\_\_\_\_, J.

Pickering

 \_\_\_\_\_, J.

Hardesty

cc: Hon. Mark R. Denton, District Judge  
Jones Vargas/Las Vegas  
State of Nevada/DETR  
Eighth District Court Clerk

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<sup>4</sup>We note that respondent raises open issues regarding whether the burden shifting analysis in Clark County Sch. Dist. v. Bundley, 122 Nev. 1440, 148 P.3d 750 (2006), fails to comport with the mandates of NRS 612.500 or violates 20 C.F.R. § 602, App. A § 6013(A) (2011). However, because substantial evidence supports the denial of unemployment benefits, we decline to address those issues here.