IN THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR KENT COUNTY

MELISSA ECKEARD	:	
	:	C.A. No: 12A-02-001 (RBY)
Appellant,	:	
	:	
v.	:	
	:	
NPC INTERNATIONAL, INC.	:	
	:	
Appellee.	:	

Submitted: August 16, 2012 Decided: October 17, 2012

Upon Consideration of Appellant's Appeal from the Unemployment Insurance Appeal Board REVERSED AND REMANDED

ORDER

Melissa Eckeard, Pro Se.

NPC International, Inc., P.O. Box 226776, Dallas, Texas, 75222, Appellee.

Young, J.

SUMMARY

Melissa Eckeard ("Claimant") was the claimant below and the appellant in the case at hand. She is a former employee of Pizza Hut ("Employer"), owned by NPC International, Inc. ("NPC"). In January 2010, the restaurant cut back Claimant's hours significantly. As a result, she began receiving unemployment benefits. The Division of Unemployment ("Division") discovered a discrepancy in her wage reporting. Ms. Eckeard was eventually disqualified from receiving benefits for one year, due to fraud. Claimant requested an appeal. A telephone appeal hearing was held. The Referee affirmed the decision to disqualify Claimant from receiving benefits. Ms. Eckeard appealed the Appeals Referee's decision to the Unemployment Insurance Appeal Board ("UIAB" or "Board"). The Board accepted her appeal. Claimant was notified of a hearing date, but did not appear. The result was that the Board dismissed her appeal. Despite the Claimant's failure to attend her appeal, this Court will review the merits of the case based on the futility exception to the general rule requiring exhaustion of administrative remedies. That position is taken because of the discovery of numerous violations of due process and abuses of discretion during review. For these reasons, the Administrative decision is REVERSED, and this matter is **REMANDED** to the Board for proceeding consistent with this decision.

FACTS

Melissa Eckeard was hired by Pizza Hut, owned by NPC International, Inc., as a full-time employee. Initially, she worked full-time hours on a regular basis. At some point, around January 2010, the restaurant cut her hours to less than half the time she had previously been working. When her hours were cut back, Ms.

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Eckeard applied for, and received, partial unemployment benefits. Her weekly benefit amount was \$100. In some weeks the benefit amount was lowered based upon the amount of gross wages she earned. Claimant was required to report her gross earnings to the Division of Unemployment Insurance. A cross-match investigation was initiated by the Division some time after she began collecting benefits. That investigation appeared to reveal a disparity between the gross wages reported by Claimant's employer, and the amount reported by the Claimant. Ms. Eckeard was mailed a notice on February 4, 2011, which asked her to respond for an interview concerning the alleged under reporting. When she failed to respond, the Division sent her another letter, this time notifying her that she had been disqualified from receiving unemployment benefits for one year, due to fraud and/or under reporting. This initial finding was made by a claims deputy.

Claimant requested an appeal of the claims deputy's decision. As a result of her request, a telephone appeal hearing was held on April 14, 2011. Ms. Eckeard and representatives of the state agency participated in the hearing. The agency representatives provided documents and related testimony. The documents were given to the state government by the Employer. Claimant provided testimony regarding the circumstances surrounding the alleged under-reporting of her wages. It is her contention that the discrepancy between the amount she reported and the gross pay on her pay stubs was due to a flaw in Pizza Hut's computer system.

On the days she worked, Ms. Eckeard's primary responsibility was "opening" the restaurant. That job involved preparing the restaurant for customers to enter at 11:00 a.m. Claimant worked for minimum wage between the hours of

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9:00-11:00 a.m. During those periods, she would not be receiving tips, since the restaurant was not open to customers. During all other hours, she worked for a little over \$2.00 per hour, plus tips. 'According to Ms. Eckeard, the Pizza Hut computer system required her to report tips for all the hours she worked, including those hours when the restaurant was not open to customers. She would be unable to clock-out without reporting tips, even when she had not actually received any. At midnight, the system recalculated her pay rate for the morning hours, but did not deduct the calculated, but unreceived tips she was required to claim, even though no such income was received. Ms. Eckeard contends that the reason her gross earnings appear to show under-reporting is that Pizza Hut removed the fake tips from her gross pay, much like a tax withholding. The actual amount she made, less those chimerical tips and tax, appeared as her net. To get the amount she reported to the government as gross earnings, she merely subtracted the tips she had to report, but did not earn, from her gross pay.

Several months after the telephone hearing, the Appeals Referee issued her opinion affirming the claims deputy's decision. Ms. Eckeard appealed the Referee's decision to the Unemployment Insurance Appeal Board. The Board accepted her appeal. Claimant was then notified by mail that a hearing date had been set for January 24, 2012. Ms. Eckeard did not appear at that hearing, and thus, the Board dismissed her appeal.

¹ According to the record, Ms. Eckeard claims she received \$2.23 per hour + tips, and the Referee says that Claimant was paid \$2.35 per hour + tips. This discrepancy is not explained.

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STANDARD OF REVIEW:

For administrative board appeals, this Court is limited to reviewing whether the Board's decision is supported by substantial evidence and free from legal errors.² Substantial evidence is that which "a reasonable mind might accept as adequate to support a conclusion."³ It is "more than a scintilla, but less than preponderance of the evidence."⁴ An abuse of discretion will be found if the board "acts arbitrarily or capaciously...exceeds the bounds of reason in view of the circumstances and has ignored recognized rules of law or practice so as to produce injustice."⁵ Questions of law will be reviewed *de novo*.⁶ In the absence of an error of law, lack of substantial evidence or abuse of discretion, the Court will not disturb the decision of the board.⁷

DISCUSSION:

Before engaging in a discussion of the merits, this Court must address a preliminary issue. Ms. Eckeard did not appear for her Board appeal. The general

² 29 Del C. §10142(d); Avon Prods. v. Lamparski, 203 A.2d 559, 560 (Del. 1972).

³ Olney v. Cooch, 425 A.2d 610, 614 (Del. Super. 1981) (citing Consolo v. Fed. Mar. Comm'n, 383 U.S. 607, 620 (1966)).

⁴ *Id.* (quoting *Cross v. Calfano*, 475 F.Supp. 896, 898 (D. Fla. 1979).

⁵ Delaware Transit Corp. v. Roane, 2011 WL 3793450, at *5 (Del. Super. Aug. 24, 2011) (quoting Straley v. Advanced Staffing, Inc., 2009 WL 1228572, at *2 (Del. Super. April 30, 2009)0.

 $^{^6}$ Anchor Motor Freight v. Ciabattoni, 716 A.2d 154, 156 (Del. 1998).

⁷ Carrion v. City of Wilmington, 2006 WL 3502092, at *3 (Del. Super. Dec. 5, 2006).

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rule is that one must exhaust his or her administrative remedies before the Court will accept an appeal.⁸ Some Delaware case law has held that failure to participate at the administrative board hearing forfeits a party's right to appeal to the courts.⁹ In other words, the decision not to appear has sometimes been equated with a failure to exhaust administrative remedies. It is true that an appellant "may not simply decide to bypass the administrative board and proceed to judicial review." However, in Delaware, application of the doctrine of exhaustion of administrative remedies is a matter of judicial discretion, and not a matter of jurisdiction. Therefore, certain circumstances may dictate that the exhaustion of administrative remedies is not required before judicial review.

In order to preserve the integrity of the administrative process and the relationship between the courts and administrative agencies, courts have created a

⁸ Griffin v. Chrysler, 2000 WL 33309877, at *1 (Del. Super. April 27, 2001).

⁹ *Id.* (citing *Wilson v. Servalli Restaurant*, Del. Super., C.A. No. 99A-01-005, Del Pesco, J. (Apr. 30, 1999)(ORDER)).

 $^{^{10}}$ Bell v. Northeast Treatment Centers, Inc., 2003 WL 21500336, at $^{*}1$ (Del. Super. June 30, 2003).

¹¹ Levinson v. Delaware Compensation Rating Bureau, Inc., 616 A.2d 1182, 1190 (Del. 1992) ("Since nothing in the Delaware Constitution nor the Delaware Code expressly establishes the exhaustion of administrative remedies as a prerequisite to the exercise of judicial authority, we decline to view exhaustion as a merely jurisdictional threshold. We endorse, instead, the approach of the New Jersey Supreme Court, exemplified by *Brunetti*.")).

 $^{^{12}}$ Bell v. Northeast Treatment Centers, Inc., 2003 WL 21500336, at *1 (Del. Super. June 30, 2003).

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strong presumption in favor of requiring exhaustion.¹³ This presumption, however, can be overcome by a showing that the "interest of justice so requires."¹⁴ More specifically, it can be overcome by a showing that administrative review would be futile; public interest creates the need for a prompt decision; the issue involves a question of law only rather than areas of administrative expertise or discretion; or that irreparable harm would result from the court's denial of relief.¹⁵

The burden of showing an administrative review would be futile "is, necessarily, a high one." Claimant's opening brief makes clear her belief that attending the UIAB appeal would have been futile. This Court agrees. A review of the record shows that throughout this dispute Ms. Eckerd has continuously been subjected to violations of her due process rights. In fact, when she received the letter notifying her of the date for the Board appeal, Claimant had still not received the documents she needed, and was promised, by the Appeals Referee. Because of the nature of the case, and the documents in question, Ms. Eckeard was left with no way to prepare or prove her case before the Board. Based on the violations of due process on the record, the Court finds that this case fits the futility exception

¹³Levinson v. Delaware Compensation Rating Bureau, Inc., 616 A.2d 1182, 1189 (Del. 1992).

 $^{^{14}}$ Id. at 1190 (quoting Brunetti v. Borough of New Milford, 68 N.J.576, 589 350 A.2d 19, 25-26 (1975).

¹⁵ Levinson v. Delaware Compensation Rating Bureau, Inc., 616 A.2d 1182, 1190 (Del. 1992).

¹⁶ Salem Church (Delaware) Associates v. New Castle County, 2006 WL 2873745, at *4 (Del. Ch. Oct. 6, 2006).

to the general rule, and will consider the merits. Because of the special circumstances, there is no record from the Board appeal to consider. Thus, the Court will instead consider the record developed during Claimant's telephone appeal hearing with the Appeals Referee.

While administrative hearings are not subject to all the same "rules" as judicial proceedings, parties to administrative hearings are entitled to the protections provided by substantive due process.¹⁷ In order to adapt to application in various situations, courts have acknowledged that what makes up due process, is not a fixed legal rule.¹⁸ Instead, it is a flexible concept, calling for the procedural protections each particular set of circumstances demands.¹⁹ At a minimum, Ms. Eckeard should have had the opportunity to be heard, to present testimony and other evidence, and to controvert every material fact bearing on questions at issue in the proceedings and upon which a decision was based.²⁰ In more familiar terms, Ms. Eckeard had the right to an opportunity to be heard "at a meaningful time and in a meaningful manner."²¹ Claimant's due process rights were violated when the Referee failed to provide the necessary and promised documents to her at any

¹⁷ Vincent v. Eastern Shore Markets, 970 A.2d 160, 163-64 (Del. 2000); Carousel Studio v. UIAB, 1990 WL 91108, at *1 (Del. Super. June 26, 1990).

¹⁸ *Id.* at 164.

¹⁹ *Id*.

²⁰ *Id*.

²¹ Mathews v. Ekdridge, 424 U.S. 319, 332 (1976) (citing Armstrong v. Manzo, 380 U.S. 545, 552 (1965)).

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point before the hearing, or along with the decision, or in time for Ms. Eckeard's appeal to the UIAB.

According to the record, Ms. Eckeard requested copies of certain documents from the Division of Unemployment Insurance a week before the hearing. Those documents were never provided, but were presented to the Referee for use as evidence at the hearing. When given the opportunity to ask questions during the hearing, Ms. Eckeard asked again for copies of these important documents. The agency representative gave her a circular answer. Ms. Eckeard continued to insist that she needed access to the documents because they were important to her case. The Referee responded that Claimant would be given copies of "everything." The documents in question were used by the Referee during the hearing and in her decision making process. The documents were discussed in detail during the hearing. Ms. Eckeard, unfortunately, did not have those documents during the hearing, and did not even receive the documents with the Referee's decision, as expressly promised. In fact, it appears the first time Claimant was provided with copies of the documents, was when she received a copy of the record for the present appeal.

Because of the cavalier nature of the Referee's dealing with this issue, a portion of the conversation is cited as follows:

"Okay let's not worry about it, because what I'm going to do, Ms. Eckeard, is when I do my decision I'm going to make sure you have copies of everything. And remember, this is an intermediate level appeal, so after I review the case I'm going to enter a decision and then you'll have access to

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everything. And if there is a notable problem that you're dissatisfied with, then you have a right to a further appeal. So let's not worry about it."

At the very least this comment is condescending, and at worst, it seriously mischaracterizes the legal process and the situation. If the documents were essentially useless or irrelevant, such a response might be justified. However, essentially saying "let's just get on with this and worry about that later," is completely inappropriate when the documents are being discussed on the record, and appear to form the primary (and perhaps singular basis) of the decision reached by the Referee.

The unwillingness of the Division of Unemployment Insurance to provide Ms. Eckeard with the documents in question violated her due process rights. Parties before an administrative body have the right to "explain, rebut, contradict, or impeach...documents that were relied upon by the administrative agency for the action it takes on the matter before it." Failure to provide a party with such opportunity is a violation of procedural due process rights. The Appeals Referee clearly relied upon the documents provided by the Employer in reaching a decision. The documents were generated from computer data exclusively within the control of her Employer, Pizza Hut. If neither the Employer nor the Division provided them, Claimant would have no means by which to gain access to the documents or the information contained therein. These documents contain the clock-in/clock-out times and pay check history. This is precisely the information

²² Wilmington Vitamin & Cosmetic Corp. v. Tigue, 183 A.2d 731, 736 (Del. Super. July 18, 1962) (citing *Radic v. Fullilove*, 198 F. Supp. 162 (U.S.D.Ct.N.D. Calif. 1961)).

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upon which the decision was based. Without the documents, Claimant had no way, aside from her own testimony, to defend herself against the allegations. In addition, Ms. Eckeard was unable to analyze the numbers and information in these documents effectively to explain her position. Finally, when Ms. Eckeard still did not get the documents with the decision, or at any point after the hearing, she was deprived of the ability to prepare for her board appeal.

This Court acknowledges that not all relevant documents must be provided to the opposing party. The Delaware Supreme Court has previously rejected the contention that a party involved in administrative proceedings necessarily is entitled to the full breadth of discovery available to a party to judicial legal proceedings. This decision is not intended to extend the discovery rules of administrative proceedings. The circumstances of the current case are quite dissimilar from the actions leading to the aforementioned Supreme Court ruling. In each of those cases, the party claiming a due process violation as a result of not being provided documents was actually provided with the documents, or an opportunity to view them, either at or before the hearing. Generally, the complaints waged were usually about the delay in being given the documents and the alleged prejudice caused thereby. Ms. Eckeard, on the other hand, was not given the documents before or during the hearing, with the decision, or in time for appeal to the UIAB. While administrative proceeding does not provide the full

²³ Kotler v. Board of Medical Practice, 630 A.2d 1102 (Del. 1993) (TABLE), aff'g 1993 WL 54587 (Del. Super. Jan. 19, 1993); *Xcomp. Inc. v. Ropp*, 2002 WL 1753168 (Del. Ch. July 19, 2002); *Matter of Gresick*, 1988 WL 116411 (Del. Super. Nov. 2, 1988).

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spectrum of discovery and evidentiary protections afforded to judicial litigants, a party to an administrative action must be provided documents of this nature at some point before administrative remedies are exhausted.

Next, Ms. Eckeard contends that she was not given proper time to prepare for her UIAB appeal. Her contention is well taken according to the documents she provided, the notice for the appeal was postmarked January 18, 2012. Her appeal hearing was to take place January 24, 2012. This evidence indicates that Claimant was provided only one business day to prepare for her hearing. This certainly seems like short notice, and likely would not provide a party adequate time to prepare. In the past, the UIAB has stated that, for the purpose of sending notice of an appeal, Regulation 19 requires only that the notice is to be mailed "at least five days before the hearing." The notice in question does fall just within the required time frame. Though it certainly seems inadequate to the Court, the notice provided did meet the requirement as set out in the UIAB's Regulations. Because of the document issue, this will not become the basis upon which the Court will determine this case.

Claimant also contends that the Appeals Referee's decision should be overturned because it was not issued within the time frame promised during the hearing. According to the transcript, the Appeals Referee did promise a decision within thirty (30) days. The decision actually took more than four months. After thorough research, the Court cannot find any statutory basis for the thirty (30) day period for decision mentioned by the Referee. There is no mention of the a deadline for a decision in the Claimant Handbook published by the Division of

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Unemployment for the benefit of the public. It appears that the only language specifically describing timing of a decision is found in Unemployment Insurance Appeal Board Regulation 6.1, which indicates that a decision shall issue promptly, "and usually within 14 days" of the date of the hearing. 24 One could certainly argue that the four month period taken for this decision to be issued fails to meet either the 'self-imposed' deadline or the definition of prompt. The language in the regulation, though, indicates that this "is an aspirational standard, rather than a substantive rule of law or procedure." Though the decision in this case was certainly not issued promptly, and some degree of prejudice is inherent in such a delay, this is not a matter requiring further analysis, and is not a basis for determination here.

The due process violations already discussed are sufficient to require reversal. However, judicial review requires a careful and searching inquiry into the record when reviewing an administrative agency's exercise of discretion.²⁶

Thorough analysis has led the Court to conclude that there are serious problems with the decision and with the reasoning offered in support of it. In order to provide guidance for the Board upon remand, the Court will discuss each issue, in detail.

Administrative boards have the authority to weigh evidence and to

²⁴ 19 *Del. C.* §33189(a),(c).

²⁵ Delaware Transit Corp. v. Roane, 2011 WL 3793450, at *11 (Del. Super. Aug. 24, 2011).

²⁶ Kreshtool v. Delmarva Power and Light Co., 310 A.2d 649, 652 (Del. Super. 1973).

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determine questions of credibility.²⁷ As stated previously, this Court's job is not to make such determinations, but rather, to decide whether the evidence is substantial, and whether the exercise of discretion utilized was afforded in a manner not arbitrary or capricious.²⁸ The test for substantial evidence is a low bar to meet, but it is a test. Evidence must be "such that the fact in issue may be reasonably inferred from a consideration of all the evidence presented at the administrative hearing."²⁹ Though the administrative board has discretion to determine the weight and credibility assigned to evidence and testimony, this discretion is not unchecked.³⁰ The exercise of discretion should be "directed by conscience and reason, as opposed to capricious or arbitrary action."³¹ If the reviewing court finds that the board could not have reached the conclusion it did "in view of the relevant rules of law and upon due consideration of the facts" it will not hesitate to reverse.³² The court may also find reversal proper if the board

²⁷ E.g., State v. Dalton, 878 A.2d 451, 454 (Del. 2005); Delaware Transit Corp. v. Roane, 2011 WL 3793450, *8 (Del. Super. Aug. 24, 2011).

²⁸ Kreshtool, 310 A.2d at 652.

²⁹ Bellevue Management Ass'n v. Delaware Alcoholic Beverage Control Com'n, 1981 WL 383067, at *1 (Del. Super. Aug. 5, 1981).

³⁰ Janaman v. New Castle County Bd. of Adjustment, 364 A.2d 1241, 1242-43 (Del. Super. 1976) ("This rule does not, however, permit the Board to do whatever it thinks is best without a factual basis in the record. The Board's discretion is not so wide that it may do whatever it deems to be equitable without regard to statutory requirements and the need for substantial evidence to meet statutory requirements.").

³¹ Pitts v. White, 109 A.2d 786, 788 (Del. 1954).

³² *Pitts*, 109 A.2d at 788.

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has exceeded the bounds of reason; has exercised its judgment in a manner manifestly unreasonable; has reached a conclusion that is clearly wrong; or has reached a decision based on a clear error of judgment.³³

The Unemployment Insurance Appeal Board, like other administrative agencies, has the authority to use discretion in making factual findings and decisions. However, this discretion may not be used to ignore entirely one party's competent testimony and evidence. According to the record, the Referee did not appear to consider Ms. Eckeard's explanation for the discrepancy. If the Appeals Referee did consider Claimant's reasoning, the only discussion on the record is merely a summary of what that explanation was. No reason was given for the Referee's decision simply to ignore, without further analysis, Ms. Eckeard's account of what happened. Admittedly, Ms. Eckeard did not provide much evidence, beyond her testimony, to support her theory. The lack of evidence, however, was brought about by the unwillingness of the Referee to provide Claimant with the documents she needed. Furthermore, the Referee made no apparent effort to explore the plausibility of Ms. Eckeard's allegations. This Court understands that Appeals Referees are under time constraints caused by heavy caseloads. As such, the Court is not asking the Referee to engage in a full scale investigation. Nevertheless, some amount of time considering Claimant's credible explanation is necessary. A reasonable review establishes that Ms. Eckeard's

³³ Id. at 788. See also, Kreshtool v. Delmarva Power and Light Co., 310 A.2d 649, 652 (Del. Super. 1973); Delaware Transit Corp. v. Roane, 2011 WL 3793450, *5 (Del. Super. Aug. 24, 2011).

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explanation could likely be corroborated by the evidence.

Completely ignoring the testimony provided by the Claimant, the Referee based her decision on the evidence and information provided to the State by the Employer. Under these facts, the Employer had its own concerns and interests to protect. Claimant had, after all, alleged that Pizza Hut was engaged in activity resembling a wage and hour violation. The company would presumably be careful about handing over information that could show an aim to avoid paying employees appropriate wages by requiring them to report tips that were not actually earned. At the very least, the Referee should have considered this possibility, instead of simply accepting the evidence and calculations provided by NPC. The Appeals Referee also accepted the figures provided, as true, despite the fact that she came up with a different figure herself. This particular point provides a good transition into a discussion of what the Court will collectively refer to as "mathematical issues."

Resolution of the issues presented by this case truly requires an analysis of the numbers. The Division of Unemployment Insurance claims it overpaid Ms. Eckeard by \$641.00 as a result of her under-reporting or fraud. In order to determine the amount, if any, that Claimant failed to report, the first thing needed by a decision-maker is the hourly wage rate Ms. Eckeard was paid. That figure would then be plugged into an equation to determine gross pay, based on the number of hours worked. Unfortunately, the formula may be simpler in theory than in practice. For example, in this case, the math is more complicated, because Ms. Eckeard was paid two different hourly rates depending on whether she was

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"opening" the restaurant or truly working as a server. The equation is further complicated by the fact that the Employer used a different day of the week as the start of the pay period than was used by the government. For that reason, the Employer could not recreate the gross earnings using the formula provided by the agency. Instead, the Employer provided the Referee with an average pay rate, which was then multiplied by the number of hours earned in the pay periods used by the agency. A portion of Claimant's pay was determined by the amount of tips she earned. In order to work that into the average pay rate, the Employer relied on methodology mandated by the federal government attributing a percentage figure for tips. This final average was then used by the Division of Unemployment Insurance to determine the amount of gross income earned by the Claimant each week.

The Court understands that this type of average is frequently used by the Division of Unemployment Insurance in cases involving the restaurant industry. However, discrepancies arise when an average, as opposed to an exact figure, is plugged into a more complicated equation ultimately used to determine how much an individual would be required to pay back to the government. There are other, more serious, concerns raised by the Referee's analysis.

The average hourly wage calculated by the Employer, and used by the agency, was \$7.25. When the Referee used the information provided to perform her own calculation, the result was an average hourly wage of \$8.33. Despite this inconsistency, the Appeals Referee elected to the \$7.25 figure developed by the Employer. The fact that the agency and the Referee determined different results,

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using the same information and formula, is certainly a reason to wonder about the validity of the final outcome. Arriving at an hourly wage rate is only the first step toward figuring out how much, if anything, Claimant failed to report. There does not appear to be any reason to use averages and complicated equations to arrive at the required figures. The Employer provided the agency with the clock-in/clock-out records which show the number of hours Ms. Eckeard worked at each pay rate, per day. The Referee, the administrative agency, or the Employer could have used that information to make exact calculations of Claimant's earnings, though, usage of the federal government's tip methodology would still be required. The resulting figure would certainly be a better estimate of Ms. Eckeard's actual earnings.

Another inconsistency involving the hourly pay rate also exists, unexplained, in the record. During Ms. Eckeard's telephone hearing, she testified that she was paid \$2.23 per hour when working as a server. No other testimony about that hourly rate appears in the transcript, and yet, the Referee uses a different wage rate, \$2.35 in the decision and calculations. The amounts Claimant is accused of failing to report, per pay period, are relatively low. Such inconsistencies and the use of averages might not be such a concern if the amount in question were larger. However, here we are talking about amounts between \$25-92/pay period. Using numbers that are not exact could easily result in the appearance of a discrepancy in the range of \$20-90.

The next issue is related. The Appeals Referee did not adequately explain her calculations, or as a teacher might say: she did not "show her work," on the record or in the decision. In fact, it appears that, for the most part, the Referee

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merely accepted the figures provided by NPC International, Inc., as true and correct. There is nothing in the record, aside from the \$8.33 hourly rate arrived at by the Referee, that demonstrates an independent analysis was conducted. Instead of taking the evidence and working out the math, the Referee just accepted the figures she was provided without question. The spreadsheet marked as Agency Exhibit 4 is the only demonstration the Referee provides. All this document shows is the difference between the amount of gross income reported by the Employer and the Claimant. It does not reflect any independent analysis, as many of these same figures appear in the initial Notice of Determination sent to the Claimant well before this hearing occurred.

Several issues result from the Referee's failure to provide her independent mathematical analysis of the evidence on the record. First, Claimant, still without the documents or methodology, would not be able to test out the calculations herself in preparation for an appeal. Secondly, any reviewing body is unable to test the math, or see that the Referee did, in fact, perform any analysis herself.

Not only did the Referee fail independently to analyze the evidence, she also failed to give any consideration or effort to confirm Claimant's explanation for the discrepancy. It requires only a cursory glance at the figures for the Court to determine that Claimant's reasoning was at least plausible enough to justify further mathematical analysis. Using a rudimentary process, the Court arrived at results which support Claimant's story. Specifically, the Court used the same document containing clock-in/clock-out times and job codes to figure out how many hours Ms. Eckeard worked per day as the "opening" employee. A review of

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the record reflects that Claimant contended she was told to report at least \$5.00 per hour. According to Ms. Eckeard, she actually claimed between \$7.50-\$10.00 each day that she opened the restaurant. The Court chose three random weeks from those in which it is alleged that she under-reported her gross earnings. The Court then looked at the amount of hours she worked as the "opener" and selected an amount between \$7.50-\$10.00, according to the amount of time actually worked. The next step was to total up the amounts for each day of the pay period. For each week randomly selected, the amount determined as an estimate of the imaginary tips Claimant would have been required to report was right on point with the amount the agency finds to be under-reported wages. The methodology used by the Court was primitive. The main idea of engaging in these calculations was simply to test whether it was possible that Ms. Eckeard's story was truthful. The numbers the Court determined for final figures were very close to those found by the Referee to be unreported income. The small amount of difference could be due to the fact that the Court had to estimate how much Ms. Eckeard reported as tips. It should also be noted that Ms. Eckeard would have been taxed on the amount of gross income listed on her pay stubs, which included the unearned tips. The Court might suggest that this could be a factor in some of the values in play.

Nowhere in any of the documents is Ms. Eckeard's net pay for each pay check provided. While net pay is not used for the routine calculations done by the agency, in this context it could certainly have brought clarity to the situation. This is, at least, a conspicuous oversight under the circumstances. The Employer has to have the amount of net pay for each check somewhere in its system. After all, the

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Employer had to make that calculation to be able to write the checks in the first place. It would have been extremely easy to determine Claimant's accuracy if these values were available. The record shows that Ms. Eckeard claims that the gross income listed on her pay stub included the illusory tips she was required to report. Pizza Hut would then have deducted taxes, any other applicable withholdings, and the unearned tips, to arrive at the net pay amount. As discussed, no net pay figures were provided by the Employer, and the portion of the pay stub retained by Claimant has only the gross pay amount. The next step would be simple: request that Pizza Hut provide the net pay information, or inquire as to whether Claimant had any record of bank deposits or check cashing. All the Referee would have to do then is check the math. If Claimant's gross income minus taxes and withholdings equaled net pay, then Ms. Eckeard's claim that she subtracted unearned tips would be disproved. However, if the gross income minus taxes and withholdings did not equal net pay, then the Referee would have had evidence demonstrating Ms. Eckeard's position was accurate.

By engaging in this mathematical analysis, the Court does not conclude that Pizza Hut was engaged in any untoward behavior. Nor, can the Court determine that Ms. Eckeard was correct. The purpose is merely to demonstrate the possibilities. It is the Referee's job to make factual findings after "consideration of all the evidence." The Referee failed to consider all the evidence or to check the competence of the evidence provided by the Claimant.

"The essence of [adjudicative] discretion is the exercise of judgment

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directed by conscience and reason, as opposed to capricious or arbitrary actions."³⁴ Judicial review based on this standard is not a question of whether the court agrees with the Board, but rather "whether it believes that the [adjudicative] mind in view of the relevant rules of law and upon due consideration of the facts of the case could reasonably have reached the conclusion of which complaint is made here."³⁵ Though the substantial evidence test is minimal, the determination made by the Referee regarding a fact in issue must be based on all of the evidence presented at the administrative hearing in order to be considered proper use of discretion.³⁶ If the Court finds that the discretion exercised was manifestly unreasonable, or if the record indicates that the administrative agency based its decision on improper or inadequate grounds, discretion has been abused and reversal is required.³⁷

For the reasons discussed above, this Court finds that the Appeals Referee abused her discretion. By choosing to ignore completely the competent evidence offered by the Claimant, the Referee reached a decision exceeding the bounds of reason and without due consideration of the facts of the case. Failure to provide adequate due process protection for the Claimant combined with the Referee's

³⁴ City of Wilmington v. Clark, 1991 WL 53441, at *3 (Del. Super. March 20, 1991

³⁵ City of Wilmington, 1991 WL 53441, at *3 (citing Pitts v. White, 109 A.2d 786, 788 (Del. 1954)).

³⁶ Bellevue Management Ass'n v. Delaware Alcoholic Beverage Control Com'n, 1981 WL 383067, at *1 (Del Super. Aug. 5, 1981).

³⁷ Pitts v. White, 109 A.2d 786, 788 (Del. 1954); City of Wilmington v. Clark, 1991 WL 53441, at *3 (Del. Super. March 20, 1991) (quoting Kreshtool v. Delmarva Power & Light Co., 310 A.2d 649, 652 (Del. Super. 1973)).

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failure to consider much of the relevant testimony. Accordingly, the decision was made on inadequate or improper grounds.

Furthermore, the record must clearly show the basis on which the administrative agency acts.³⁸ Even if this Court were to ignore the capricious disregard of competent evidence, it cannot overlook the failure of the Referee to show clearly the basis upon which her decision was made. Though a step-by-step recital of reasoning is not required, an orderly and logical deductive process is. The Referee failed to meet this standard when no mathematical analysis was performed or explained on the record, and conflicting values were given and not explained.

Finally, the record indicates that Ms. Eckeard currently owes the Division close to \$3,000. There is no information in the record to indicate the reasons for charging her more than the \$641.00 determined in telephone hearing. In addition, the Division is charging the Claimant a monthly late fee. This case has been ongoing, leading the Court to believe that such late fees and interest charges could be suspended pending final disposition of the case.

CONCLUSION

For the forgoing reasons, the decision of the Appeals Referee is **REVERSED** and the case is **REMANDED** to the Unemployment Insurance

Appeal Board for further proceedings consistent with the Court's opinion.

³⁸ Kreshtool, 310 A.2d at 652. .

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SO ORDERED this 17th day of October, 2012.

/s/ Robert B. Young	
J.	

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