

STATE OF MONTANA
DEPARTMENT OF LABOR AND INDUSTRY
HEARINGS BUREAU

BEAL LAW FIRM, PLLC,)	Case No. 1288-2010
)	
Appellant,)	
)	FINDINGS OF FACT,
vs.)	CONCLUSIONS OF LAW
)	AND DECISION
UNEMPLOYMENT INSURANCE DIVISION,)	
)	
Respondent.)	

* * * * *

I. INTRODUCTION AND PROCEDURAL MATTERS

On December 31, 2009, the appellant Beal Law Firm(Beal) filed a notice of appeal of the department determination which indicated that Beal’s total tax rate would increase from 1.4% in 2009 to 2.2% in 2010. After some discussions and correspondence between the parties, the Contributions Bureau of the Unemployment Insurance Division transmitted the appeal to the Hearings Bureau on February 9, 2010. On February 11, 2010, the Hearings Bureau issued a Notice of Hearing and Telephone Conference setting a scheduling conference in the matter for March 3, 2010. At the appellant’s request the telephone conference was rescheduled for March 17, 2010. At the scheduling conference, the parties agreed to an extended time frame for discovery and a hearing date six months from the date of the scheduling conference, October 13, 2010.

On August 20, 2010, the Appellant filed a motion to compel discovery and to continue the proceedings in this matter for 90 days. The department did not oppose the continuance. However, on August 26 the department filed a motion for protective order. During this time the parties wisely discussed the discovery requests and the motions for protective order between themselves and were able to resolve a number of the issues. The hearing officer held a telephone conference to help resolve the remaining issues and the parties were able to resolve the motion to compel provided that Mr. Nevin develop a document explaining certain calculations that the department had made (Exhibit 14). Accordingly, both the motion to compel and the motion for protective order were resolved without the hearing officer having to issue an order on either motion. The hearing officer did not find good cause for continuing

the matter for 90 days, but did grant the continuance for 60 days and rescheduled the hearing for December 15, 2010.

On October 29, 2010, the respondent filed a motion in limine to preclude introduction of evidence or argument related to some of Beal's discovery requests at hearing. Beal filed its response on November 12, 2010. On November 19, 2010, the hearing officer issued an order granting the motion in limine, which also notified the parties that the only issue to be determined at the hearing in this matter was whether UID correctly determined the applicable rate or the amount of the unemployment insurance taxes applicable to the Beal Law Firm. The Hearing officer determined that a majority of the discovery requests at issue were not related to the issue of the unemployment insurance taxes applicable to the Beal Law Firm, but rather to whether UID properly managed the trust from which it pays claims for benefits. In accord with that finding, the hearing officer precluded the introduction of documents or testimony related to Interrogatories numbered 21-25, 27, 28, 31, 32 40-46, Requests for Admissions numbered 22-25 and Requests for Production numbered 25-27.

On December 2, 2010, the Appellant filed a motion to continue the proceedings in this matter for an additional 60 days. The department did not oppose the motion. Accordingly, the hearing was rescheduled for April 14, 2011.

On March 31, 2011, the unemployment insurance division filed a motion to preclude witnesses, quash subpoenas, and objection to exhibits. Argument on the motion was heard at the prehearing conference held on April 7, 2011. In granting the motion, the hearing officer determined that the testimony of Pam Bucy was not relevant to the issue of whether UID correctly determined the applicable rate or the amount of the unemployment insurance taxes applicable to Beal. The hearing officer further determined that the testimony of Joseph Nevin may be relevant to the issue of whether UID correctly determined the applicable rate or the unemployment insurance taxes applicable to Beal, but only with respect to his preparation of Exhibit 14.

The hearing officer decided that the relevance of the testimony of Nancy Jones, Mary Buswell, and Donna Rogers would be determined after a brief Rule 602 examination of the witnesses at the beginning of the April 14 hearing to learn if they had relevant testimony to offer with regard to the issue of whether UID correctly determined the applicable rate or the amount of unemployment insurance taxes applicable to Beal.

The hearing officer determined that exhibits 9, 12, 13, 15, 16, 18, 20, 21, 24, 25, 28, 30-42, and 47-51 would not be introduced at hearing as they were not

relevant to the issue of whether UID correctly determined the applicable rate or the amount of unemployment insurance taxes applicable to the Beal law firm. Given the short time-frame between the filing of the motion and the hearing date, the order stated that the basis for the hearing officer's ruling would be further explained in this decision. That explanation is found in Section IV(A) of this decision.

The contested case hearing in this matter convened and concluded on April 14, 2011 in the Sacajawea Conference Room of the Montana Department of Labor and Industry, Helena, Montana. The hearing was held pursuant to Mont. Admin. R. 24.11.328. However, the parties had agreed that Respondent, Unemployment Insurance Division (UID), would present its case first. Complainant Beal Law Firm was represented by Jon Beal and John Horrell. The Respondent, Unemployment Insurance Division (UID), was represented by Joseph Nevin and Patricia Bik, Department Legal Services.

Three witnesses named by Appellant, Beal Law Firm, LLC (Beal), were sworn and preliminarily examined pursuant to Rule 602 to determine whether they possessed any relevant personal knowledge. Mary Buswell and Donna Rogers were examined and excused. Nancy Jones was examined and it was determined she would not be excused as she possessed relevant personal knowledge, however, she did not testify in either party's case in chief.

Annette Rinehart and Joseph Nevin testified under oath at hearing. Joseph Nevin's testimony was limited to a document he authored entitled Explanation of Calculations. The Hearing Officer admitted Exhibits 3, 8, 10, 14, 15, 17, 19, 22, 23, 43, 53, H, and K into evidence.

At the prehearing conference, the parties stipulated that Beal's wages from the fourth quarter of 2007 through the third quarter of 2009 are what Beal reported on forms UI-5 and UI-5A, UID exhibit M. The parties stipulated to the following facts from Beal's Pre-Hearing Filing: 1, 2, 4, 6, 7, 8, 10, 15, 16, 18, 21, 22, and 23. Only those facts found relevant to the issue in this matter are included below.

Midway through the hearing, the parties stipulated that UID's responses to discovery not previously precluded by the Order Granting Motion in Limine, dated November 19, 2010, were admissible.

Subsequent to the hearing, the parties agreed to a briefing schedule that would allow the last brief to be filed on or before August 8, 2011. On July 21, 2011 the appellant submitted a motion to continue the briefing schedule to allow the last brief to be filed on or before September 8, 2011. The department did not oppose the motion and the hearing officer issued an order granting it on July 25, 2011.

On September 19, 2011 the appellant submitted a Notice of Additional Authority in Support of its Proposed Findings of Fact and Conclusions of Law. On September 30, 2011 UID submitted its response.

Having considered the evidence adduced, the applicable legal authorities and the arguments of the parties, the Hearing Officer makes the following findings and conclusions and issues the following order. This is the Department of Labor and Industry's final agency decision, appealable to the Board of Labor Appeals in accord with the notice at the end of this decision, before the certificate of mailing.

II. STIPULATED FACTS

1. Beal's unemployment tax contribution rate increased by approximately 57% from 2009 to 2010.

III. FINDINGS OF FACT¹

1. The trust fund balance as of October 31, 2009 was \$191,203,922.26.
2. The total covered wages, excluding reimbursable, state and local government wages for the time period from July 1, 2008 through June 30, 2009, was \$9,801,416,035.00.
3. The ratio of reserves to total wages, that is reserves divided by total wages,

¹ Beal submitted 79 proposed findings of fact and the department submitted 22. Those findings not included herein are specifically rejected as not relevant to a determination of whether UID correctly determine the applicable rate or the amount of unemployment insurance taxes applicable to the Beal Law Firm. In addition to not being relevant, many of the proposed findings of fact were merely recitations of testimony and not a finding of fact. While this is not a contested case governed by Mont. Code Ann. § 2-4-623(4), that provision has been construed as not requiring a separate, express ruling on each proposed finding of a party, as long as the agency's decision and order on such [*193] party's proposed [***19] findings are clear. *Montana Consumer Counsel v. Public Serv. Comm'n*, 168 Mont. 180, 192-193, 541 P.2d 770, 777(1975)(citing *National Labor Rel. Bd. v. State Center Warehouse & C. S. Co.*, 9 Cir., 193 F.2d 156; *American President Lines, Ltd. v. N. L. R. B.*, 9 Cir., 340 F.2d 490).

In addition, some of the findings of fact are the same or similar to those proposed by counsel for the parties. The Montana Supreme Court has ruled that findings of fact which are "sufficiently comprehensive and pertinent to the issues to provide a basis for decision, and which are supported by [***11] the evidence," will not be prejudicial merely because the court followed proposals of counsel. *Donnes v. State*, 206 Mont. 530, 538 (Mont. 1983)(citing *In Re the Marriage of Parenteau*, 204 Mont., 664 P. 2d 900, 903 (1983).

was 0.0195 as of October 31, 2009 (\$191,203,922.26 divided by \$9,801,416,035.00).

4. Pursuant to § 39-51-1218, MCA, Schedule V applies to a reserve to total wage ratio of 0.0195.

5. Beal's taxable payroll for federal fiscal year 2007 was \$77,051.19.

6. Beal's taxable payroll for federal fiscal year 2008 was \$193,610.93.

7. Beal's taxable payroll for federal fiscal year 2009 was \$231,182.20.

8. Beal's average taxable payroll for federal fiscal years 2007, 2008, and 2009 was \$167,281.44.

9. Beal has made UI contributions of \$9,896.15 since its inception.

10. A total of \$131.22 in UI benefits have been charged against Beal's account.

11. Beal's reserve, that is, its contributions minus benefits charged, is \$9,764.93.

12. The quotient of Beal's reserve divided by Beal's average taxable payroll for federal fiscal years 2007, 2008, and 2009, to six decimal places, is 0.058374.

13. An eligible employer is one whose contributions paid in exceed benefits paid out.

14. Beal is an eligible employer.

15. Based on Beal's reserve ratio of 0.058374, and Beal's status as an eligible employer, Beal's rate class for 2010 was Eligible 09.

16. Under schedule V of Section 39-51-1218, MCA, an employer with a rate class of Eligible 09 has a contribution rate of 2.02%.

17. The administrative fund tax rate for 2010 was 0.18%.

18. Beal's total UI tax rate for 2010 was 2.20%.

IV. DISCUSSION²

A. *The hearing officer's order granting the department's Motion to preclude witnesses, quash subpoenas and objection to exhibits.*

All relevant evidence is admissible, except as otherwise provided by constitution, statute, these rules, or other rules applicable in the courts of this state. Evidence which is not relevant is not admissible.

Mont. Code Ann. § 26-10-402.

Relevant evidence is evidence having “any tendency to make the existence of any fact that is *of consequence to the determination* of the action more probable or less probable than it would be without the evidence.”

Rule 401, M.R.Evid (emphasis added).

Generally, all relevant evidence is admissible. Rule 402, M.R.Evid. However, a court may exclude relevant evidence when the probative value of that evidence is “substantially outweighed by the danger of unfair prejudice, *confusion of the issues*, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.”

Rule 403, M.R.Evid (emphasis added); *Wiman v. Mont. Dep't of Labor & Indus.*, 2004 MT 208, ¶32, 96 P.3d 710, 715.

In *Wiman*, the court found that the “fact of consequence before the hearing officer was the denial of unemployment insurance benefits” and that testimony that did “not tend to make the existence of this fact of consequence more probable or less probable . . . was irrelevant.”

Id. at ¶33

In this matter the only issue is whether UID correctly determined the applicable rate or the amount of unemployment insurance taxes applicable to Beal and the facts of consequence are those that make it more or less probable that UID correctly determined the applicable rate or the amount of unemployment insurance taxes applicable to Beal. The testimony of certain witnesses and documents Beal proposed to offer at hearing were precluded by the hearing officer because they, like

² Statements of fact in this discussion are hereby incorporated by reference to supplement the findings of fact. *Coffman v. Niece* (1940), 110 Mont. 541, 105 P.2d 661.

the rejected evidence in *Wiman*, were not relevant to a determination of the only issue for hearing: whether UID correctly determined the applicable rate or the amount of the unemployment insurance taxes applicable to the Beal Law Firm.

B. *Beal has the burden to prove UID erred in determining the application, duration, or amount of the tax.*

Pursuant to Mont. Admin. R. 24.11.328(1) a party appealing its tax determination “must show that the department erred in determining the application, duration, or amount of the tax.”

Beal made many arguments and allegations regarding the unemployment insurance division’s management of the trust fund. One of those arguments was that because the UID paid benefits to claimants who Beal thought should never have received benefits, who were later determined to be ineligible or who became ineligible while receiving benefits and because UID did not collect all of the overpaid benefits, that somehow UID’s calculation of the amount of Beal’s UI tax rate is erroneous.

While a not insignificant number of overpayments do occur as described above, Beal did not prove, and the hearing officer did not find, that the formula for determining the trust fund balance requires such payments be exempted from the trust fund balance for purposes of determining an employer’s UI tax rate.

Beal also argued that its UI tax determination was violative of its constitutional rights. The hearing officer is without jurisdiction to determine whether Beal’s constitutional rights were violated or not. *Jarussi v. Board of Trustees*, 204 Mont. 131, 135-136, 664 P.2d 316, 318 (1983) (Constitutional questions are properly decided by a judicial body, not an administrative official, under the constitutional principle of separation of powers). *Auto Parts of Bozeman v. Employment Rels. Div. Uninsured Employers’ Fund*, 2001 MT 72, P38, 23 P.3d 193, 200. (Jurisdiction in an administrative hearing, contrary to a District Court’s jurisdiction, is strictly limited by statute. “It is a basic rule of law that . . . an administrative agency, has only those powers specifically conferred upon it by the legislature . . .”) (Internal citations omitted).

Accordingly, the hearing officer may not and cannot determine whether the UID mismanaged the trust fund; whether UID improperly failed to pursue claimants who improperly received benefits; whether Beal’s assessment and taxes constituted a taking under the state or federal constitutions; whether Beal’s constitutional due process rights were violated; whether its equal protection rights were violated; whether its rights to the courts of justice were violated; whether it was deprived of

life, liberty or property without due process of law; and whether the UID violated Article VIII Section 12 of the Montana Constitution.

No variable involved in determining Beal's UI tax rate was shown to be erroneous. Furthermore, there are no arithmetic errors in the calculations involving the variables used to determine Beal's UI tax rate. See Exhibits H, K, and 14. Beal's 2010 UI Tax Rate was correctly determined.

There are only a handful of variables involved in determining an employer's UI tax rate. Beal has not shown that any of these variables were incorrectly determined, nor has Beal shown that any calculation performed by UID involving these variables was incorrect. Therefore, Beal has failed to meet its burden of proof in this matter.

V. CONCLUSIONS OF LAW

1. The Hearings Bureau has jurisdiction to hear the Beal Law Firm's appeal of its 2010 UI tax rate determination. Admin R. Mont. 24.11.328.

2. Beal failed to carry its burden to prove that the department erred in determining the application duration or amount of its 2010 UI tax rate.

3. The department did not err in determining the application, duration or amount of Beal's 2010 UI tax rate.

VI. ORDER

IT IS THEREFORE ORDERED THAT:

The department's tax determination is AFFIRMED.

DATED this 9th day of December, 2011.

By: /S/DAVID A. SCRIMM
David A. Scrimm, Chief
Hearings Bureau
Department of Labor and Industry