STATE OF RHODE ISLAND

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: April 15, 2024)

DANIEL DWYER	:	
	:	
	:	
v.	:	**C.A. No. PC-2023-00255**
	:	
THE RHODE ISLAND DEPARTMENT OF LABOR & TRAINING and KASEY CROCKER	:	

DECISION

LANPHEAR, J. Before the Court for decision is Appellant Daniel Dwyer's (Dwyer) Petition appealing from the December 19, 2022 decision issued by the Rhode Island Department of Labor and Training (DLT) in LS#2017-043.[1] Jurisdiction is pursuant to G.L. 1956 § 42-35-15, the Administrative Procedures Act (APA).

I

Facts and Travel

The Hearing Officer found the following facts.[2]

Appellee Kasey Crocker (Crocker) was employed as a salaried inside salesperson by Dwyer at Dwyer Insurance Agency (Dwyer Insurance), a sole proprietorship, from June 2014 to November 10, 2016.

[1] The Decision is dated December 19, 2022 and is the third document in the Certified Record.

[2] It is challenging to ascertain the facts found as it is grouped together with travel in the decision. In finding facts, the Hearing Officer intermeshed the facts with descriptions of conflicting testimony.

Crocker filed a Non-Payment of Wages Complaint Form with the DLT on or about February 22, 2017, alleging that she had received neither her stated salary nor commission for the eight days she worked in November 2016. In her complaint, she alleged that she was owed $1,092.78 in salary and an unspecified amount of commission. (Non-Payment of Wages Complaint Form, 2.) She further alleged that she attempted to contact Dwyer numerous times but never received a response. *Id*.

Accordingly, this matter came before the DLT Hearing Officer for a prehearing conference on August 16, 2022, which was continued to October 13, 2022 after Dwyer failed to appear. The October 13, 2022 prehearing conference was then continued in order to allow Dwyer an opportunity to obtain legal counsel, as a question arose as to whether Dwyer Insurance was incorporated and unable to represent itself. (Hr'g Tr. 3-4, Nov. 22, 2022.) In the order, the Hearing Officer stated that "[t]here should be no further continuances in this matter." *Id*. at 4:6-7.

The full evidentiary hearing was held on November 22, 2022. Dwyer was not represented by counsel at the hearing. He confirmed that Dwyer Insurance was a sole proprietorship operated by him. When asked why he did not seek a continuance to obtain counsel, he referred to the Hearing Officer's order and stated that he "didn't think that [he] would get any consideration." (Hr'g Tr. at 12:22.) The Hearing Officer stated that "throughout the entire process of this case, [Dwyer] could have obtained legal counsel . . . to assist [him]." *Id*. at 90:15-19. In his decision, the Hearing Officer noted that Dwyer was "allowed" to represent himself because Dwyer Insurance was a sole proprietorship.

At the hearing, counsel for DLT introduced the following exhibits:

> "(1) a copy of the Notice of Hearing; (2) a copy of the Complaint; (3) a copy of June 4, 2014 'employment letter'

> from Dwyer Insurance to Crocker/Ahearn (Employment Offer); (4) a copy of a June 8, 2018 letter from D.F. Dwyer to the Department; (5) a copy of a check dated October 28, 2016 from Dwyer to Crocker/Ahearn; (6) a copy of a Commission spreadsheet (Commission List); (7) a copy of a Wage Calculation Worksheet; and, (8) a copy of an additional Wage Calculation worksheet." DLT Decision 1-2; *see also* Hr'g Tr. 27:9-34:5.

As the exhibits were being entered into evidence, the Hearing Officer asked Dwyer if he objected to each exhibit being marked as full to which Dwyer stated "no." The Hearing Officer added that "all [the] exhibits are subject to foundational evidence from the witness before being entered [in] full . . ." and reiterated that Dwyer could voice an objection later if he believed any piece of evidence should not be admitted as a full exhibit. *Id*. at 31:2-4.

On direct examination, Crocker testified that, as part of her employment, she would receive both commission and her salary. The Employment Offer delineated that Crocker was entitled to both commission and salary but was not descriptive on the calculation of the amounts to be paid. In determining the commission she was owed each month, Crocker stated that she

> "would put together an Excel sheet that had the date the policy was effective, the premium amount, and here, [she] just put [10] percent commission, because each carrier [they] represented had different commission pay-outs, but [she] was not privy to those agreements, so [she didn't] know if they're differing amounts, based on the carrier, but the minimum was usually [10] percent." (Hr'g Tr. at 49:21-50:5.)

Crocker added that she "would sell insurance policies to clients, then each carrier that [they] represented at the agency would pay the agency a certain percentage of commission." *Id*. at 46:23-47:2. At 10 percent, the total commission for the full month of November was $5,635.20.

Although Dwyer chose not to cross-examine Crocker, he was examined by DLT counsel and testified on his own behalf. *See* Hr'g Tr. 54:18-21; 55:8-9; 79:11-22. He also introduced two exhibits: a one-page document from Dwyer Insurance's employee handbook and Crocker's employee earning statements for the period in question. He testified he would go through the commission lists created by Crocker each month and apportion the amount of commissions Dwyer Insurance received and Crocker received. *Id*. at 60:6-13. Dwyer asserted that the Commission List Crocker produced was not factually accurate because the 10 percent figure was "an estimate of the commissions. She wasn't paid the full – the [100] percent commission. She was paid a percentage of the commissions that we were paid." *Id*. at 66:11-14. Dwyer testified that they would split what they received from the insurance carriers "50-50." *Id*. at 89:1-4. Dwyer also added that, as is custom in the industry, commission is based on servicing the accounts, not just the act of renewing it, and thus, because Crocker did not work more than eight days in November, she was not entitled to the rest of her estimated commissions on the Commission List.

The Hearing Officer issued his decision on December 19, 2022. He concluded Crocker was a salaried employee at the rate of $40,000 per year and thus was owed $1,092.78, basing his determination on the Employment Offer and Dwyer's failure to produce the full employee handbook and the employee contract. *See* DLT Decision at 3-4. The Hearing Officer also found that "Crocker/Ahearn was entitled to commissions for policies renewed prior to the end of her employment with Dwyer" in the amount of $5,632.50 as "there was nothing in writing indicating the distinction or limitations in commission payments . . ." *Id*. at 4. Finally, the Hearing Officer awarded interest in the

amount of $2,622.86 and a civil penalty under G.L. 1956 § 28-14-19(d) of $6,725.28 because he found that "the failure of the Employer to pay the proper amounts of wages due and failure to respond to Complainant's numerous inquiries to be willful," based on the statutory factors. *Id*.

Dwyer appealed the DLT Decision to this Court on January 18, 2023. *See* Petition.

II

Standard of Review

The Superior Court's review of an appeal from an administrative agency decision is governed by the APA, § 42-35-15(g), which provides in pertinent part:

> "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings, or it may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:
> "(1) In violation of constitutional or statutory provisions;
> "(2) In excess of the statutory authority of the agency;
> "(3) Made upon unlawful procedure;
> "(4) Affected by other error of law;
> "(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
> "(6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." Section 42-35-15(g).

The Court "sits as an appellate court with a limited scope of review," and thus "is limited to questions of law . . . ." *Mine Safety Appliances Co. v. Berry*, 620 A.2d 1255, 1259 (R.I. 1993); *Lee v. Rhode Island Council 94*, 796 A.2d 1080, 1083 n.1 (R.I. 2002). The Court may not "weigh the evidence nor pass upon the credibility of witnesses nor substitute its findings of fact for those made at the administrative level." *E. Grossman &*

Sons, Inc. v. Rocha, 118 R.I. 276, 285, 373 A.2d 496, 501 (1977). In reviewing the certified record, the Court is tasked with determining whether there is any legally competent evidence, or "'relevant evidence that a reasonable mind might accept as adequate to support a conclusion . . . an amount more than a scintilla but less than a preponderance'" to support the agencies' determination. *Arnold v. Rhode Island Department of Labor and Training Board of Review*, 822 A.2d 164, 167 (R.I. 2003) (quoting *Rhode Island Temps, Inc. v. Department of Labor and Training, Board of Review*, 749 A.2d 1121, 1125 (R.I. 2000); *see Nickerson v. Reitsma*, 853 A.2d 1202, 1205 (R.I. 2004). Therefore, so long as "legally competent evidence exists to support that determination, [the Court] will affirm it unless one or more errors of law have so infected the validity of the proceedings as to warrant reversal" or the conclusions "are totally devoid of competent evidentiary support in the record." *Murphy v. Zoning Board of Review of Town of South Kingstown*, 959 A.2d 535, 540 (R.I. 2008); *see also Baker v. Department of Employment Training Board of Review*, 637 A.2d 360, 363 (R.I. 1994).

Moreover, "if a tribunal fails to disclose the basic findings upon which its ultimate findings are premised," the Court may "either order a hearing de novo or remand in order to afford the board an opportunity to clarify and complete its decision." *Hooper v. Goldstein*, 104 R.I. 32, 44, 241 A.2d 809, 815-16 (1968).

III

Analysis

Dwyer brings two issues before this Court: (1) that the decision of the Hearing Officer was clearly erroneous because the evidence Crocker introduced relating to commissions lacked foundation, and (2) that the Hearing Officer abused his discretion in

failing to provide Dwyer with a continuance to retain counsel. *See* Dwyer's Mem. 7, 11. Each will be addressed in turn.

A

Evidentiary Issues as to the Determination of Commission

Section 42-35-10 delineates the applicability of the evidentiary rules in an administrative proceeding "contested case":

> "The rules of evidence as applied in civil cases in the superior courts of this state shall be followed; but, when necessary to ascertain facts not reasonably susceptible of proof under those rules, evidence not admissible under those rules may be submitted (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men and women in the conduct of their affairs." Section 42-35-10(1).

Accordingly, the admissibility of evidence is more generous in an administrative proceeding than it is in judicial trials. *Id.*; *see also Foster-Glocester Regional School Committee v. Board of Review, Department of Labor and Training*, 854 A.2d 1008, 1017 (R.I. 2004). A hearing officer is afforded discretion "'in deciding what types of evidence it will receive and consider,'" although the Court may reverse that decision if it deems the decision to be "'arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.'" *Loungxay, Inc. v. Rhode Island Department of Labor and Training and Joseph Giocastro*, No. A.A. 06-2889, 2008 WL 4376190 (R.I. Super. Sept. 12, 2009) (quoting *Foster-Glocester Regional School Committee*, 854 A.2d at 1017). For example, "hearsay evidence is admissible in administrative hearings." *Foster-Glocester Regional School Committee*, 854 A.2d at 1018.

Although the Rhode Island Supreme Court has "accepted the view that the positive testimony of a witness, when uncontradicted and unimpeached by other positive

testimony or by circumstantial evidence, whether extrinsic or intrinsic, cannot be disregarded by the trier of fact but must control the findings thereof," the Hearing Officer is "'at least required to consider the [evidence], determine what weight such [evidence] should be accorded, and make [his] own findings of fact.'" *Correia v. Norberg*, 120 R.I. 793, 800, 391 A.2d 94, 97-98 (1978); *Gomes v. Orefice*, No. PC-05-6501, 2011 WL 3645519 (R.I. Super. Aug. 12, 2011) (quoting *Foster-Glocester Regional School Committee*, 854 A.2d at 1021). Therefore, "'a decision that 'place[s] no weight at all on otherwise relevant, material and nonrepetitious evidence . . . is an abuse of discretion.'" *Gomes*, 2011 WL 3645519 (quoting *Foster-Glocester Regional School Committee*, 854 A.2d at 1018-19). Moreover, there must be "an ample decisional demonstration of the grounds upon which an ultimate conclusion is predicated . . . [I]f a[n] [agency] fails to disclose the basic findings upon which its ultimate findings are premised, [the Court] will neither search the record for supporting evidence nor will [it] decide . . . what is proper in the circumstances." *Hooper*, 104 R.I. at 44, 241 A.2d at 815-16.

Here, Dwyer first asserts that the Hearing Officer admitted the Commission List created by Crocker without identifying competent foundational evidence and that the only basis for its admission was the absence of records to the contrary. He argues that the Commission List is speculative because Crocker created it herself and included entries for dates after she was let go. Dwyer further adds that the Commission List is inaccurate because it did not include Crocker's divided portion of the commission but included the full 10 percent commission given to Dwyer Insurance from the insurance carriers and was based on renewals which she did not service.

Conversely, Appellees argue that the Commission List was not speculative because Crocker kept track of her policies sold and renewed throughout her employment, and Dwyer never disputed said calculations. Appellees also add that nothing in the Employment Offer specifies the percentage of commission that Dwyer Insurance receives from the insurance carriers, nor what percentage Crocker would receive from that. They further argue that there is no evidence that commissions based on renewals are only paid out if they are serviced. Regardless, Appellees note that Dwyer never formally objected to the introduction of the Commission List or any other exhibit.

Here, the Hearing Officer did not make sufficient findings of fact based on legally competent evidence. *See Correia*, 120 R.I. at 800, 391 A.2d at 97-98. First, although the Hearing Officer stated that "all the exhibits are subject to foundational evidence from the witness before being entered into full," it is unclear from the record which exhibits were marked as full, which exhibits were found to be supported by foundational evidence, and which exhibits were deemed authentic. None of the exhibits are marked as full, and others do not contain any identification at all. It appears from the record that all of Appellees' exhibits were entered into evidence while one of Dwyer's exhibits, a single-page copy of a portion of the employee handbook, was "subject to whether or not it passes evidentiary guidelines" and ultimately was not considered after Appellees' objection. The Hearing Officer afforded great weight to Appellees' exhibits, though many of them were only portions of larger documents and based on estimations.

Second, in rendering his decision, the Hearing Officer did not establish that the Commission List was based on a proper foundation but instead accepted the Commission List because Dwyer had no documentation to refute it. Although Dwyer did not formally

object to the Commission List's introduction, the Hearing Officer did not afford any weight to Dwyer's arguments heavily disputing its authenticity. Specifically, Dwyer asserted that the Commission List produced by Crocker was an estimate and not factually accurate as she was not entitled to the full 10 percent she included. Dwyer further points out that no weight was afforded to his testimony regarding industry custom and practice within his agency, which was not refuted. Specifically, Dwyer argues that, because Crocker was no longer employed and did not service any accounts based on the renewals, she should not receive any of the estimated commission.

Finally, in reviewing the record before the Court, including the testimony of Dwyer, the Commission List may be categorized as speculative, at best. "Damages do not have to be calculated with mathematical exactitude; all that is required is that they are based on reasonable and probable estimates." *Butera v. Bouchar*, 798 A.2d 340, 350 (R.I. 2002). The record is devoid of explanation as to how Crocker calculated the $1092 in claimed salary owed, and the Hearing Officer accepted this amount. The decision did not take into account Dwyer's assertions that the "10% Commission" column included multiple entries for dates after Crocker's employment ended or that such numbers were estimates because Crocker was not "privy" to that information. Nor did the decision reference Dwyer's testimony contradicting the Commission List, specifically that the 10 percent amount referenced was the total paid from the insurance carriers to Dwyer Insurance that would then be split between the inside salesperson and the agency. (Hr'g Tr. at 88:22-89:4.) Even Crocker testified that she was given a portion from this total amount. *Id*. at 47:2-4. Instead, the Hearing Officer found that Dwyer could not "now attempt to rely on the fact that the records do not exist to support his defenses or to

dispute Complainant's claim," (DLT Decision at 4), thereby disregarding his uncontroverted testimony completely. Further, although Crocker asserts that she had been paid the full amount of commission in the past, she never had worked only eight days out of a month before. Accordingly, the Hearing Officer should have inquired into this issue and taken it into account in rendering his decision.

While the Court must give deference to the Hearing Officer, particularly on the admission of evidence, *see Foster-Glocester Regional School Committee*, 854 A.2d at 1019-20, it is difficult to determine what evidence has been admitted, or even what is found to be authentic. Because the Hearing Officer did not sufficiently address the status of the exhibits, Dwyer could not know what was being used against him or what he was required to respond to; thus, it is unclear whether there is even legally competent evidence in the record to award the commissions to Crocker. Moreover, the Hearing Officer relied on the speculative Commission List in making his determination of the total commission owed to Crocker, even though Dwyer disputed its accuracy. The Hearing Officer appears to have given no weight to Dwyer's testimony without stating why in his decision. Accordingly, the Court finds that the Hearing Officer abused his discretion in determining the commission award.

B

Continuance to Acquire Legal Representation

Dwyer also asserts that the Hearing Officer abused his discretion in failing to continue the hearing to afford Dwyer the opportunity to acquire legal representation. *See* Dwyer's Mem. 11.

"There is no absolute constitutional right to counsel in administrative proceedings," just as the right to counsel in a civil action is not a constitutional right but "a matter of legislative grace." 2 Admin. L. & Prac. § 5:21 (3d ed.); *accord Campbell v. State*, 56 A.3d 448, 454 (R.I. 2012). "[T]here is a long line of authority rejecting the notion that pro se litigants in either civil or regulatory cases are entitled to extra procedural swaddling." *O'Brien v. Sherman*, No. 05-957, 2009 WL 361065, *6 (R.I. Super. Feb. 2, 2009).

Here, the Hearing Officer properly utilized his discretion in proceeding with the hearing without counsel. The proceedings were first initiated in February 2017. *See* DLT Decision. A preconference hearing was scheduled in August 2022 which Dwyer did not attend and was thus rescheduled for October 2022. At that hearing, Dwyer sought to represent himself, but the question arose as to whether Dwyer Insurance was a corporation which could not represent itself, and the Hearing Officer continued the hearing to provide Dwyer the opportunity to retain counsel. Prior to the question being raised as to whether he would be permitted to appear *pro se* on behalf of a corporate entity, Dwyer had not attempted to retain counsel at any time in the five years the claim had been pending. The Hearing Officer was more than patient. The Court finds that the Hearing Officer did not abuse his discretion in choosing to move forward with the hearing even though Dwyer was unrepresented.

IV

Conclusion

For the foregoing reasons, the Court remands the case to the Hearing Officer in order to properly label and authenticate the evidence in the record as well as adjust his

decision to account for the documentary and testimonial evidence regarding the Commission List.[3] The Court denies the appeal as it pertains to the Hearing Officer's decision to move forward with the hearing even though Dwyer did not have an attorney.

[3] The Hearing Officer awarded a civil penalty of $6,725.28, finding under § 28-14-19(d) "the failure of the Employer to pay the proper amounts of wages due and failure to respond to Complainant's numerous inquiries, to be willful." (DLT Decision 4.) The Hearing Officer also added that this decision was "based on the statutory factors." *Id*. While the Court was concerned with whether each of the statutory factors was applied, the issue was not raised on appeal, and the Court will not address the civil penalties awarded below. *See Parmelee v. R.I. Department of Labor and Training*, No. PC-2012-0441, 2015 WL 8033058, *1, n.1 (R.I. Super. Dec. 2, 2015); *see also Blue Cross & Blue Shield of Rhode Island v. McConaghy*, No. CIV.A-01-1570, 2002 WL 393692, *13 (R.I. Super. Mar. 4, 2002) ("where the Court merely disagreed with the sanction decided upon by the Department, it may not reverse the agency's decision") (internal quotation omitted). This Court strongly recommends that when civil or administrative penalties are awarded, a detailed analysis of the appropriate factors should be addressed at the department level.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	**Daniel Dwyer v. The Rhode Island Department of Labor & Training and Kasey Crocker**
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COURT:	**Providence County Superior Court**
DATE DECISION FILED:	**April 15, 2024**
JUSTICE/MAGISTRATE:	**Lanphear, J.**
ATTORNEYS:	
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