

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 30, 1999

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. **99-0256**

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

TIMOTHY J. WEISS,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION, THE BRUCE
COMPANY OF WISCONSIN, INC., AND GTE NORTH,
INC., C/O GATES MCDONALD CO.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Columbia County:
RICHARD L. REHM, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Timothy Weiss appeals a trial court order that upheld an unemployment compensation ruling by the Labor and Industry Review Commission (LIRC). LIRC ordered Weiss to repay over \$3,000 in overpaid

unemployment compensation benefits. LIRC upheld the administrative law judge's (ALJ) ruling that Weiss had not made reasonable work-search efforts and that he had misrepresented those efforts. Weiss argues that the ALJ displayed bias and favoritism by the way she cross-examined him at the hearing, assuming the role of an advocate, in violation of due process principles established in *Guthrie v. WERC*, 111 Wis.2d 447, 331 N.W.2d 331 (1983), and *Nova Services, Inc. v. Village of Saukville*, 211 Wis.2d 691, 565 N.W.2d 283 (Ct. App. 1997). For that reason, Weiss asks us to set aside LIRC's decision and dismiss the matter. In response LIRC argues, among other things, that the trial court lacked jurisdiction to review LIRC's decision. We conclude the ALJ did not show bias and favoritism and reject Weiss' claims on their merits. We therefore need not address LIRC's jurisdictional arguments.

We briefly mention a few actions by the ALJ that Weiss cites as improper. At one point Weiss was testifying about his telephone conversation with a claims investigator. He stated that the conversation took place just after the death of a good friend, and as a result he was distraught and gave the investigator misleading information. The ALJ asked Weiss if he asked to have the telephone interview rescheduled for that reason and Weiss answered "no." At another point the ALJ asked Weiss in direct terms whether he was conceding that he failed to look for work over a time frame that he did not account for in his application. The ALJ also asked Weiss to explain the unusually large number of prospective employers he contacted who were not hiring workers, implying that Weiss had purposefully sought out nonhiring employers. In a similar line of questioning, the ALJ asked Weiss whether he secured any job offers during the time he was applying for benefits, seemingly suggesting dishonesty by Weiss. Last, the ALJ

made some evidentiary rulings against Weiss and asked his counsel not to use leading questions.

A party to an administrative hearing has a due process right to a fair and impartial decision maker, and this right is violated both when there is bias in fact and when the risk of bias is impermissibly high. See *Guthrie*, 111 Wis.2d at 454, 331 N.W.2d at 335. In *Guthrie*, the court held that where the decision maker had acted as counsel to any party in the same action or proceeding, the risk of bias was impermissibly high. *Id.* at 460, 331 N.W.2d at 337. Similarly, in *Nova* we held that a village attorney acting as prosecutor in an adversarial proceeding and then participating in the decision making process violated due process because the risk of bias was impermissibly high. See *Nova*, 211 Wis.2d at 697, 565 N.W.2d at 286. The ALJ in this case had never been an attorney for any party to this proceeding. Having carefully reviewed the record, we do not agree that she was acting as an advocate for any party, and we see no bias or favoritism by the ALJ in any of the actions mentioned above or at any other place in the transcript.

The court in *Guthrie* specifically noted that the combination of the investigatory and adjudicatory functions in a single tribunal does not necessarily present an impermissibly high risk of bias, and there is a presumption of honesty and regularity in those serving as adjudicator, which must be overcome by one challenging the fairness of a tribunal on such a theory. See *Guthrie*, 111 Wis.2d at 455, 331 N.W.2d at 335. Courts in other jurisdictions have recognized that ALJs may vigorously cross-examine witnesses without becoming guilty of bias or favoritism. See *Meadows v. SEC*, 119 F.3d 1219, 1227-28 (5th Cir. 1997); *In re O'Connor*, 561 N.Y.S.2d 318, 320 (N.Y. App. Div. 1990). Here the ALJ thoroughly cross-examined Weiss about his work-search efforts and other matters, putting Weiss through a pointed but fair-minded inquiry. The ALJ has a mandate

to develop the facts and the power to execute that mandate, *see* WIS. ADM. CODE §§ DWD 140.15 and 140.16, and execution of that mandate may sometimes require probing questions to get to the truth. We likewise see no bias in the ALJ's evidentiary rulings. They represent fair and dispassionate control of the proceedings. We therefore conclude that the trial court correctly decided Weiss' due process rights were not violated.

By the Court.—Order affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

