Volume 87
Issue 1 *Dickinson Law Review - Volume 87, 1982-1983*

10-1-1982

Recent Cases

ADMINISTRATIVE LAW — HEARSAY EVIDENCE — UNCORROBORATED HEARSAY EVIDENCE WILL NOT SUPPORT A FACTUAL FINDING IN UNEMPLOYMENT COMPENSATION PROCEEDINGS. *Commonwealth Unemployment Compensation Board of Review v. Ceja,* 493 Pa. 588, 427 A.2d 631 (1981).

In *Commonwealth Unemployment Compensation Board of Review v. Ceja,*[1] the Pennsylvania Supreme Court held[2] that uncorroborated hearsay[3] evidence will not support a finding of an employee's willful misconduct.[4] The court divided[5] on the validity of the existing standard for evaluating hearsay in unemployment compensation proceedings. Announcing the judgment of the court, Justice Kauffman espoused new guidelines for evaluating the competency and trustworthiness of hearsay evidence.[6] As a necessary adjunct to administering these guidelines, Justice Kauffman determined that an uncounseled claimant must be advised of his right to have an attorney, to offer witnesses, and to cross-examine adverse witnesses.[7]

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1. 493 Pa. 588, 427 A.2d 631 (1981).

2. Justice Kauffman filed an opinion in which Justices O'Brien and Nix concurred in the result. Justice Roberts filed a concurring opinion, in which Justices Larsen and Flaherty joined. Justice Flaherty also filed a separate concurring opinion. Chief Justice Eagen did not participate in the decision.

3. Professor McCormick defines hearsay evidence as "testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." C. MCCORMICK, HANDBOOK ON THE LAW OF EVIDENCE § 246, at 584 (2d ed. 1972) [hereinafter cited as C. MCCORMICK].

4. *See infra* notes 13 and 15.

5. Justices Nix and O'Brien concurred only in the result indicating that they rejected Justice Kauffman's reasoning and conclusions of law. Justice Roberts' concurring opinion, in which Justices Flaherty and Larsen joined, expressly rejected Justice Kauffman's analysis. Justice Flaherty's separate concurring opinion also declined to adopt Justice Kauffman's analysis. *See infra* note 18.

6. Justice Kauffman adopted a novel evaluation of hearsay evidence in unemployment compensation cases. *See infra* note 44 and accompanying text.

7. 493 Pa. at 611, 427 A.2d at 643. Justice Kauffman expressly overruled prior Commonwealth Court decisions which hold that claimants need not be advised of their due process rights. *Id.* (citing Unemployment Compensation Board of Review v. Tumolo, 25 Pa. Commw. 264, 360 A.2d 763 (1976) and Paoloco v. Commonwealth Unemployment Compensation Board of Review, 10 Pa. Commw. 214, 309 A.2d 594 (1973)). *See, e.g.,* Schultz v. Commonwealth Unemployment Compensation Board of Review, 48 Pa. Commw. 36, 408 A.2d 1177 (1979) (referee's failure to advise claimant of his right to counsel did not deny claimant due process); Bracy v. Commonwealth Unemployment Compensation Board of Review, 34 Pa. Commw. 173, 382 A.2d 1295 (1978) (referee's failure to inform claimant that he could object to testimony did not affect fundamental fairness of hearing); Knox v. Commonwealth Unemployment Compensation Board of Review, 12 Pa. Commw. 588, 317 A.2d 60 (1974) (referee's failure to counsel unrepresented claimant on how to prove his case did not deny claimant due process). *See infra* note 56.

On January 4, 1977, the Commonwealth Department of Revenue dismissed claimant, Theresa J. Ceja, from her job as a calculating operator.[8] Thereafter, the Bureau of Employment Security determined claimant ineligible for unemployment compensation benefits. After a hearing before a referee on appeal, she was again denied benefits.[9]

At the hearing, the employer offered documentary evidence of claimant's past misconduct. The evidence included two notices of suspension and several reports of disciplinary proceedings.[10] In addition, the employer presented written inter-office communications to show that claimant had called her supervisor an "S.O.B." and had created a disturbance in her work area. This incident led directly to claimant's dismissal. The employer's evidence of the incident included a memorandum, based on information supplied by others, written by the Chief of the Taxing and Resettlement Division to the Director of the Bureau of Corporation Taxes describing claimant's conduct.[11] The referee also admitted two eyewitness accounts of claimant's behavior that were written at the request of the Bureau's Assistant Director.

The uncounseled claimant never formally objected to the introduction of the employer's evidence, although she denied the reasons for suspension given in the notices and characterized the memoranda as "inaccurate" and "twisted."[12] A representative of the employer read the documents into the record. The employer called no witnesses who had personal knowledge of either the disputed events or the manner in which the reports had been prepared.

The Unemployment Compensation Board of Review affirmed the referee's denial of benefits. The Board found that claimant's proper discharge for willful misconduct precluded her from receiving compensation under the Unemployment Compensation Law.[13]

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8. The Department of Revenue had employed Ceja for ten years.

9. The Bureau of Employment Security and the referee determined that claimant's discharge for willful misconduct precluded her from receiving benefits. *See infra* note 13.

10. The Department of Revenue's case consisted of thirteen memoranda, including eight reports of incidents involving the claimant's alleged misconduct and summaries of the disciplinary proceedings that followed. Ceja v. Commonwealth Unemployment Compensation Board of Review, 41 Pa. Commw. 487, 488 n.1, 399 A.2d 807, 808 n.1 (1979).

11. Upon receiving the letter describing the incidents of claimant's misconduct, the Director of Corporation Taxes wrote to the Assistant to the Secretary of Revenue and recommended claimant's dismissal. 493 Pa. at 592, 427 A.2d at 633.

12. *Id.* Claimant denied using abusive or profane language, or engaging in disruptive conduct on the day of the alleged incident. Ceja v. Commonwealth Unemployment Compensation Board of Review, 41 Pa. Commw. at 489 n.3, 399 A.2d at 808 n.3.

13. The Unemployment Compensation Law provides in pertinent part that "[a]n employee shall be ineligible for compensation for any week . . . [i]n which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work." PA. STAT. ANN. tit. 43, § 802(e) (Purdon 1964).

The Pennsylvania Commonwealth Court, in Kentucky Fried Chicken of Altoona, Inc. v.

On appeal, the Commonwealth Court reversed,[14] holding that the employer had failed to meet its burden of proving willful misconduct because the evidence offered at the hearing consisted of uncorroborated hearsay.[15] The court relied on *Walker v. Unemployment Compensation Board of Review,*[16] which held that hearsay admitted without objection cannot support a factual finding unless corroborated by competent evidence.[17] The Pennsylvania Supreme Court granted allocatur to consider the propriety of the *Walker* guidelines[18] and affirmed the decision of the Commonwealth Court.[19]

Traditionally, the strict rules of evidence applicable in jury trials have not bound administrative agencies.[20] The examiner may hear and consider all testimony, including hearsay, offered at an administrative hearing.[21] Nevertheless, the hearing officer must make findings of fact supported by substantial evidence in the record.[22] These conflicting principles led to the development of the legal residuum rule, which requires that some of the evidence supporting an

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Unemployment Compensation Board of Review, 10 Pa. Commw. 90, 309 A.2d 165 (1973), defined willful misconduct as

> (1) the wanton and wilful disregard of the employer's interest, (2) the deliberate violation of rules, (3) the disregard of standards of behavior which an employer can rightfully expect from his employee, or (4) negligence which manifests culpability, wrongful intent, evil design, or intentional and substantial disregard for the employer's interests or the employee's duties and obligations.

Id. at 97, 309 A.2d at 168-69. *See infra* note 15.

14. Ceja v. Commonwealth Unemployment Compensation Board of Review, 41 Pa. Commw. 487, 399 A.2d 807 (1979). The court initially determined that the Department of Revenue's documentary evidence fell outside the statutory hearsay exception provided by the Uniform Business Records as Evidence Act, PA. STAT. ANN. tit. 28, § 91b (Purdon 1958). *See infra* note 40.

15. 41 Pa. Commw. at 490, 399 A.2d at 809. The employer assumes the burden of proving willful misconduct. McLean v. Unemployment Compensation Board of Review, 476 Pa. 617, 383 A.2d 533 (1978); Philadelphia Geriatric Center v. Commonwealth Unemployment Compensation Board of Review, 46 Pa. Commw. 357, 406 A.2d 1177 (1979).

16. 27 Pa. Commw. 522, 367 A.2d 366 (1976).

17. *Id.* at 527, 367 A.2d at 370.

18. The Justices could not agree on the appropriate standard of review for hearsay in unemployment compensation proceedings. Although Justice Kauffman discredited the guidelines set forth in *Walker,* Justice Roberts' concurring opinion stated that "any modification of our rules against hearsay should be made cautiously, if at all. In the absence of any error below, this case most certainly does not provide the proper vehicle for modification, nor does the opinion of Mr. Justice Kauffman provide the proper direction." 493 Pa. at 618, 427 A.2d at 647.

19. *Id.* at 614, 427 A.2d at 644.

20. *See* McCauley v. Imperial Woolen Co., 261 Pa. 312, 104 A. 617 (1918); 1 F. COOPER, STATE ADMINISTRATIVE LAW 379-80 (1965) [hereinafter cited as F. COOPER]; 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.4 (2d ed. 1980) [hereinafter cited as K. DAVIS]; C. MCCORMICK, *supra* note 3, §§ 348-49; 1 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 4a (3d ed. 1940) [hereinafter cited as J. WIGMORE]; Collins, *Hearsay in the Administrative Process: A Review and Reconsideration of the State of the Law of Certain Evidentiary Procedures Applicable in California Administrative Proceedings,* 8 SW. U.L. REV. 577, 589-90 (1976).

21. C. MCCORMICK, *supra* note 3, § 350.

22. *See* 1 F. COOPER, *supra* note 20, at 404-05; C. MCCORMICK, *supra* note 3, § 352. Judicial review of administrative findings of fact is restricted to whether substantial evidence supports such findings, "leaving to the Board questions of credibility and giving to the party prevailing below the benefit of all reasonable and logical inferences." Rice v. Unemployment Compensation Board of Review, 19 Pa. Commw. 592, 594, 338 A.2d 792, 794 (1975).

administrative finding be admissible in a jury trial situation.[23]

The Supreme Court of Pennsylvania first adopted the legal residuum rule in *McCauley v. Imperial Woolen Co.*[24] While recognizing that technical rules of evidence do not bind the Workmen's Compensation Board and the referee, the *McCauley* court held that "when all the irrelevant and incompetent testimony has been put aside, the findings must rest upon such relevant and competent evidence of sound, probative character as may be left, be this either circumstantial or direct."[25] Language of the United States Supreme Court in *Consolidated Edison v. NLRB*[26] supports the legal residuum rule. The Court defined substantial evidence as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,"[27] but went on to state that "[m]ere uncorroborated hearsay or rumor does not constitute substantial evidence."[28]

Many critical authorities label the legal residuum rule a mere technicality that prevents the examiner from weighing the reliability and probative worth of potentially trustworthy hearsay evidence.[29] Consequently, a few states have abandoned the rule[30] and the federal courts have restricted the rule's application.[31] Nonetheless, a majority of states that have considered the question continue to support the legal residuum rule.[32]

As applied to hearsay evidence in Pennsylvania unemployment compensation cases, the legal residuum rule resulted in a conflicting standard of appellate review. As the general rule, hearsay evidence,

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23. The legal residuum rule originated in a New York workmen's compensation case, Carrol v. Knickerbocker Ice Co., 218 N.Y. 435, 113 N.E. 507 (1916). Professor Cooper has noted: "Under [the legal residuum] rule, it is said that a finding cannot be deemed to be supported by substantial evidence unless at least a residuum of the supporting evidence would be competent under the exclusionary rules. For example, if the supporting evidence were all hearsay, it could not be deemed substantial." 1 F. COOPER, *supra* note 20, at 405.

24. 261 Pa. 312, 104 A. 617 (1918).

25. *Id.* at 326, 104 A. at 622.

26. 305 U.S. 197 (1938).

27. *Id.* at 229.

28. *Id.* at 230.

29. *See, e.g.,* 3 K. DAVIS, *supra* note 20, § 16:6; C. MCCORMICK, *supra* note 3, §§ 350-51; 1 J. WIGMORE, *supra* note 20, § 4b; K. DAVIS, *Hearsay in Administrative Hearings,* 32 GEO. WASH. L. REV. 689 (1964). *But see, e.g.,* 1 F. COOPER, *supra* note 20, at 391-93, 411; B. SCHWARTZ, ADMINISTRATIVE LAW §§ 114-121 (1976).

30. *See* Reynolds Metals Co. v. Industrial Comm'n, 98 Ariz. 97, 402 P.2d 414 (1965) (hearsay alone may support award in workmen's compensation case if in all the circumstances it sufficiently satisfies the reasonable mind); C.T.S. Corp. v. Schoulton, 354 N.E.2d 324 (Ind. App. 1976) (hearsay may provide basis of decision in workmen's compensation proceeding if trustworthy and credible); Redding v. Board of County Comm'rs, 263 Md. 94, 282 A.2d 136 (1971) (hearsay may provide sole basis of administrative decision if credible and of sufficient probative value).

31. *E.g.,* Richardson v. Perales, 402 U.S. 389 (1971); Calhoun v. Bailar, 626 F.2d 145 (9th Cir. 1980). *See infra* notes 65-67 and accompanying text.

32. 1 F. COOPER, *supra* note 20, at 406-410; B. SCHWARTZ, ADMINISTRATIVE LAW § 117 (1976). For a collection of cases concerning hearsay evidence in state administrative proceedings, see Annot., 36 A.L.R.3d 12 (1971).

properly objected to, could not support a factual finding.[33] Conversely, administrative bodies accorded hearsay admitted without objection its natural probative effect. In some cases, therefore, hearsay admitted without objection was found sufficient to support a decision.[34] The Commonwealth Court corrected this inconsistency in *Walker v. Unemployment Compensation Board of Review*[35] by establishing guidelines for evaluating hearsay evidence. The court held that hearsay, properly objected to, cannot competently support a finding of an administrative board, but hearsay admitted without objection will be given its natural probative effect and may support a finding if corroborated by any competent evidence in the record.[36] *Walker*, in effect, restates the traditional legal residuum rule and has been followed in the majority of unemployment compensation cases decided since its adoption.[37] *Walker* remains the accepted standard of review, despite Justice Kauffman's reasoning in *Ceja.*[38]

In *Ceja,* the Pennsylvania Supreme Court initially determined that the evidence introduced by the employer[39] at the unemployment compensation hearing did not fall within the existing statutory hearsay exception for business records.[40] Furthermore, because the evi-

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33. *E.g.,* Unemployment Compensation Board of Review v. Cooper, 25 Pa. Commw. 256, 360 A.2d 293 (1976); Bickling v. Commonwealth Unemployment Compensation Board of Review, 17 Pa. Commw. 619, 333 A.2d 519 (1975).

34. *E.g.,* Owen v. Unemployment Compensation Board of Review, 26 Pa. Commw. 278, 363 A.2d 852 (1976); Unemployment Compensation Board of Review v. Stiles, 19 Pa. Commw. 38, 340 A.2d 594 (1975); Covell v. Commonwealth Unemployment Compensation Board of Review, 16 Pa. Commw. 637, 330 A.2d 319 (1975); Pelligrino v. Unemployment Compensation Board of Review, 8 Pa. Commw. 486, 303 A.2d 875 (1973).

35. 27 Pa. Commw. 522, 367 A.2d 366 (1976).

36. *Id.* at 527, 367 A.2d at 370.

37. *See, e.g.,* Mine Safety Appliances Co. v. Commonwealth Unemployment Compensation Board of Review, 55 Pa. Commw. 517, 423 A.2d 798 (1980); Maxwell v. Commonwealth Unemployment Compensation Board of Review, 54 Pa. Commw. 604, 423 A.2d 430 (1980); Lee v. Commonwealth Unemployment Compensation Board of Review, 52 Pa. Commw. 171, 415 A.2d 456 (1980); Bracy v. Commonwealth Unemployment Compensation Board of Review, 34 Pa. Commw. 173, 382 A.2d 1295 (1978).

38. In Legare v. Commonwealth Unemployment Compensation Board of Review, — Pa. —, 444 A.2d 1151 (1982), the Pennsylvania Supreme Court held that uncorroborated hearsay evidence is not competent to support a factual finding of the Unemployment Compensation Board of Review. Justice Larsen's majority opinion cited *Walker* and the concurring opinions in *Ceja* as support for this holding. In Fritzo v. Commonwealth Unemployment Compensation Board of Review, 59 Pa. Commw. 268, 429 A.2d 1215 (1981), the Commonwealth Court refused to adopt the reasoning that Justice Kauffman employed in *Ceja.* The *Fritzo* court reiterated the *Walker* rule and continued to state the following:

> [T]his rule regarding unobjected to but corroborated hearsay evidence was evaluated and found wanting by one Justice of the Supreme Court of Pennsylvania, but, since two other Justices only concurred in the result reached in that case and three other Justices disagreed with the analysis of the single Justice, we do not understand the rule to be overruled.

Id. at 274, 429 A.2d at 1218-19.

39. *See supra* note 10 and accompanying text.

40. At the time of the hearing, the Uniform Business Records as Evidence Act provided, in pertinent part, the following:

> A record of an act, condition or event shall, insofar as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business at or near the

dence consisted of uncorroborated hearsay, the court found that the employer had failed to prove willful misconduct[41] and, thus, claimant was not barred from receiving benefits.

The Justices concurred only in the result reached in *Ceja.* The court's lack of unity[42] resulted from conflicting views on which evidentiary standard should be utilized for evaluating hearsay evidence in administrative proceedings.

Announcing the judgment of the court, Justice Kauffman prescribed a new standard whereby any evidence, if relevant and reliable, may support a factual finding.[43] Under Justice Kauffman's scheme, hearsay evidence will be deemed competent if it meets two requirements. First, the hearsay must fall within a recognized exception to the hearsay rule or exhibit equivalent circumstantial guarantees of trustworthiness. Second, the evidence must be relevant and have sufficient probative worth.[44]

Justice Kauffman discredited the legal residuum rule as set forth in *McCauley,*[45] referring to criticisms leveled against the rule by numerous legal scholars.[46] Justice Kauffman pointed out that in fact, the rule operates to create a more demanding evidentiary standard for administrative hearings than for jury trials. This anomaly results because hearsay, unobjected to, cannot support a factual finding in an administrative hearing, but can stand alone in support of a ver-

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time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission.

PA. STAT. ANN. tit. 28, § 91b (Purdon 1958) (The Uniform Business Records as Evidence Act was subsequently repealed in 1978 and reenacted as 42 PA. CONS. STAT. ANN. § 6108(b) (Purdon 1981)). In *Ceja,* the court held that the employer's documents did not meet the criteria set forth in the Act because no attempt was made to establish the employer's representative as the custodian of the documents or the custodian's qualifications to testify concerning their mode of preparation, nor was an attempt made to demonstrate someone prepared the documents in the regular course of business. 492 Pa. at 592-93, 427 A.2d at 633-34.

41. *See supra* notes 13 and 15.

42. *See supra* notes 2 and 5.

43. 493 Pa. at 610-12, 427 A.2d at 642-44.

44. Justice Kauffman provided the following guidelines:

1. Hearsay evidence is generally admissible.
2. Hearsay evidence will be accepted as competent if it falls within the statutory or common law exceptions to the hearsay rule, or has equivalent circumstantial guarantees of trustworthiness and is more probative on the point for which it is offered than any other evidence which the proponent could reasonably be expected to procure under the circumstances of the case.
3. The hearsay proponent carries the burden of making a prima facie showing of competence before the evidence can be used to support a finding.

Id. at 611, 427 A.2d at 643.

45. *See supra* note 24 and accompanying text.

46. 493 Pa. at 594-601, 427 A.2d at 634-37. *See* 1 R. BENJAMIN, ADMINISTRATIVE ADJUDICATION IN THE STATE OF NEW YORK, 174-75 (1942); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 14.10 (1958 & Supp. 1970); C. MCCORMICK, *supra* note 3, §§ 350-52; 1 J. WIGMORE, *supra* note 20, § 4b. Justice Kauffman cited Judge Learned Hand for the proposition that hearsay may support a decision if reasonable persons would rely on that type of evidence in conducting serious business matters. *E.g.,* United States v. Costello, 221 F.2d 668, 677-79 (2d Cir. 1955).

dict in a jury trial.[47] The opinion maintains that a better standard of review would allow the administrator to measure "the quantity and quality of the supporting evidence regardless of its category or label."[48] Similarly, Justice Kauffman rejected the *Walker*[49] guidelines because he felt that they preserved an "artificial" distinction between objected to and unobjected to hearsay evidence which fails to adequately test the competency of the evidence.[50]

In spite of severe criticism, the legal residuum rule has operated to protect the rights of litigants by requiring agencies to carefully scrutinize evidence presented in contested cases.[51] The concern in jurisdictions that continue to apply the rule is that broad admission of hearsay evidence may hamper "the discovery of the truth and may even serve as an invitation to perjury."[52] Justice Flaherty articulated this concern in his concurring opinion. Although he recognized merit in allowing the administrator to test hearsay evidence for reliability, Justice Flaherty stated that Justice Kauffman's lenient position could result in findings based upon "rank" hearsay.[53]

Justice Kauffman reasoned that the exclusionary rules of evidence function to protect the jury from hearing untrustworthy evidence and, therefore, do not apply in the administrative setting.[54] Indeed, the Administrative Agency Law in Pennsylvania frees agencies from the duty to observe strict rules of evidence by declaring admissible all relevant evidence of reasonable probative value.[55] Nonetheless, due process considerations require protection of the litigants' right to a fair and impartial hearing,[56] and the unrestricted

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47. C. McCORMICK, *supra* note 3, § 352.

48. 493 Pa. at 598-99, 427 A.2d at 636.

49. *See supra* notes 35, 36 and accompanying text (quoting C. McCORMICK, *supra* note 3, § 352 at 848).

50. — Pa. at —, 427 A.2d at 638.

51. 1 F. COOPER, *supra* note 20, at 411. All administrative agency hearings must afford due process of law. Brookwood Farms v. Milk Marketing Bd., 8 Pa. Commw. 511, 304 A.2d 510 (1973). In *Ceja,* the due process rights of the parties particularly concerned Justice Roberts because the admission of hearsay denies the right to cross-examine and confront adverse witnesses. 493 Pa. at 618, 427 A.2d at 647.

52. 1 F. COOPER, *supra* note 20, at 393.

53. 493 Pa. at 619, 427 A.2d at 647. Justice Flaherty observed that "[f]undamental due process requires that no adjudication be based solely upon hearsay evidence. This tenet of our law is not a 'technicality,' but rather lies at the root of the truth determining process." *Id.*

54. *Id.* at 619, 427 A.2d at 634. *See supra* note 20 and accompanying text.

55. The Administrative Agency Law provides that "agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross examination shall be permitted." 2 PA. CONS. STAT. ANN. § 505 (Purdon Supp. 1964-1980). (This section is substantially a reenactment of PA. STAT. ANN. tit. 71, § 1710.32 (Purdon 1962)). At the time of the hearing in *Ceja,* this section appeared at PA. STAT. ANN. tit. 71, § 1710.32 (Purdon 1962).)

56. Claimant must show specific deprivations of the rights to counsel, to offer witnesses, or to cross-examine witnesses in order to prove a violation of his due process rights. Alternatively, claimant must demonstrate "an unfairness permeating the hearing so as to strike at the conscience." Knox v. Commonwealth Unemployment Compensation Board of Review, 12 Pa. Commw. 588, 592, 317 A.2d 60, 63 (1974). *See also* Quality Bakery v. Unemployment Compensation Board of Review, 194 Pa. Super. 79, 166 A.2d 303 (1960). Where these due process

admission of hearsay evidence denies the party against whom the evidence is admitted the right to cross-examine adverse witnesses.[57]

Justice Kauffman resolved this conflict by stating that a party has a "reasonable opportunity"[58] to challenge the reliability of adverse hearsay through the referee's authority to subpoena the hearsay proponent upon a determination that further investigation is required. Justice Kauffman indicated that this safeguard both protects a litigant's due process rights and serves "the governmental interest in summary adjudications."[59] In a concurring opinion, Justice Roberts disagreed with Justice Kauffman's formulation. Justice Roberts stressed the importance of claimant's due process rights regarding admissibility of hearsay evidence in an administrative hearing, because the hearing will often determine the claimant's "livelihood," a fundamental property right.[60]

To support his conclusion that tribunals should no longer apply the residuum rule in administrative hearings, Justice Kauffman cited the Federal Rules of Evidence.[61] The Federal Rules prohibit the use of hearsay unless it falls within a statutory exception.[62] The "residual" hearsay exception admits hearsay statements not covered by other specific exceptions upon certain determinations by the court, provided the statement has "equivalent circumstantial guarantees of trustworthiness."[63] Justice Kauffman gives the Rules considerable weight as indicated by his adoption of the specific "residual exception" language in framing his guidelines for the evaluation of hearsay evidence.[64]

In addition, Justice Kauffman cited a United States Supreme

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rights have been denied, the Commonwealth Court has remanded or reversed. Kentucky Fried Chicken of Altoona, Inc. v. Unemployment Compensation Board of Review, 10 Pa. Commw. 90, 309 A.2d 165 (1973); Cerceo v. Borough of Darby, 3 Pa. Commw. 174, 281 A.2d 251 (1971). *See infra* notes 74, 75 and accompanying text.

57. C. MCCORMICK, *supra* note 3, § 351.

58. 493 Pa. at 609-10, 427 A.2d at 642. Justice Kauffman noted that the "reasonable opportunity" determination hinges upon a balancing of interests test similar to the test adopted by the United States Supreme Court in Goldberg v. Kelly, 397 U.S. 254 (1970). The Court stated that, in administrative proceedings, "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss, and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication." *Id.* at 262-63 (citations omitted).

59. 493 Pa. at 610, 427 A.2d at 642-43.

60. *Id.* at 617, 427 A.2d at 646.

61. FED. R. EVID. 803(24).

62. FED. R. EVID. 802.

63. FED. R. EVID. 803(24). The Federal Rules of Evidence provide for the admission of hearsay:

> if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will be served by admission of the statement into evidence.

Id.

64. *See supra* note 44.

Court decision, *Richardson v. Perales,*[65] which has been influential in undermining the basic tenet of the residuum rule in federal administrative proceedings.[66] In *Perales,* the Court held that written physicians' reports can constitute substantial evidence supporting a finding by the hearing examiner, despite both their hearsay character and an absence of cross-examination. However, the Court limited its holding to those cases in which a claimant with a right to subpoena the reporting physician has not exercised that right.[67]

Justice Roberts found Justice Kauffman's reliance on *Perales* misplaced because in Pennsylvania only the Board of Compensation, and not claimant, has the right to subpoena witnesses.[68] Furthermore, Justice Roberts pointed out that requiring the claimant to call witnesses against himself conflicts with usual procedures because the employer in unemployment compensation cases has the burden of proving willful misconduct.[69]

Justice Kauffman warned that "fairness must be the touchstone"[70] in the administration of his new guidelines. To further this objective and in reliance upon the rules governing practice and procedure in unemployment compensation cases,[71] Justice Kauffman declared that "at the very least, the referee must advise an uncounseled claimant of his right to have an attorney, to offer witnesses and to cross-examine adverse witnesses."[72] Justice Kauffman's opinion expressly overruled prior Pennsylvania case law on this issue.[73] However, in light of the division of the court and because the uncounseled claimant did not allege denial of a fair and impartial hearing, the determination of this issue is clearly dictum. Nonetheless, the opinions of Justice Roberts and Justice Flaherty failed to address this question and hence did not indicate disagreement with Justice Kauffman's pronouncement.

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65. 402 U.S. 389 (1971).

66. *See* 3 K. DAVIS, *supra* note 20, §§ 16:7, 16:8 and cases cited therein.

67. 402 U.S. at 402.

68. 493 Pa. at 618, 427 A.2d at 646. The Pennsylvania Unemployment Compensation Law provides that "the department and the board shall have the power to issue summons or subpoenas to compel the attendance of witnesses and the production of books, papers, correspondence, memoranda, and other records deemed necessary as evidence in connection with a disputed claim or the administration of this act." PA. STAT. ANN. tit. 43, § 826 (Purdon 1964).

69. 493 Pa. at 618, 427 A.2d at 647. *See supra* note 15.

70. *Id.* at 611, 427 A.2d at 643.

71. The rules promulgated pursuant to the Unemployment Compensation Law, PA. STAT. ANN. tit. 43, § 763 (Purdon 1964), provide:

> a) In any hearing the tribunal may examine the parties and their witnesses. Where a party is not represented by counsel the tribunal before whom the hearing is being held should advise him as to his rights, aid him in examining and cross examining witnesses, and give him every assistance compatible with the impartial discharge of its official duties.

34 PA. CODE 101.21(a).

72. 493 Pa. at 611, 427 A.2d at 643.

73. *Id.* at 611 n.35, 427 A.2d at 643 n.35. *See supra* note 7 and accompanying text.

In *Hoffman v. Commonwealth Unemployment Compensation Board of Review,*[74] the Commonwealth Court relied on Justice Kauffman's *Ceja* dictum and reversed a ruling adverse to the claimant because the referee did not advise the claimant of her right to have an attorney, to offer witnesses, and to cross-examine adverse witnesses.[75] However, in other cases decided since *Ceja,* the Commonwealth Court has declined to reverse a denial of benefits absent a showing that the referee's failure to advise claimant of his rights resulted in prejudice to the claimant.[76]

In applying his guidelines to the facts in *Ceja,* Justice Kauffman focused upon the unsatisfactory conduct of the referee at the hearing. Specifically, Justice Kauffman found that the referee did not protect the rights of the uncounseled claimant because he failed to advise the claimant of her right to have an attorney, failed to provide her with an opportunity to challenge the evidence, and interrupted her when she tried to interject comments.[77] Thus, it appears that the conduct of the referee influenced Justice Kauffman's decision more than the guidelines adopted in his opinion.

Justice Kauffman maintained that his guidelines represent a "simple common-sense"[78] analysis. Actually, he advances a confusing standard. Indeed, Justice Roberts noted that applying the guidelines to the facts in *Ceja* could well have resulted in a determination adverse to the claimant.[79] Claimant did not object to the evidence introduced by the employer at the hearing before the referee and all the documents introduced were part of the employer's records.[80] Therefore, under Justice Kauffman's formulation, there existed "some foundation" for the reliability of the hearsay.[81]

In *Commonwealth Unemployment Compensation Board of Review v. Ceja,* the Pennsylvania Supreme Court created unnecessary confusion. Although the court indicated dissatisfaction with the existing hearsay evidentiary rule, the justices, unable to agree on an employable standard, established no clear precedent. The "indicia of reliability" test espoused by Justice Kauffman did not gain the

74. 60 Pa. Commw. 108, 430 A.2d 1036 (1981).

75. *Id.* at —, 430 A.2d at 1037. Similarly, in Katz v. Commonwealth Unemployment Compensation Board of Review, 59 Pa. Commw. 427, 430 A.2d 354 (1981), the Commonwealth Court reversed and remanded an order of the Unemployment Compensation Appeal Board because the claimant was not advised of her rights. Justice Kauffman's dictum in *Ceja* persuaded the court to take this action.

76. Lauffer v. Commonwealth Unemployment Compensation Board of Review, 61 Pa. Commw. 519, 434 A.2d 249 (1981); Snow v. Commonwealth Unemployment Compensation Board of Review, 61 Pa. Commw. 396, 433 A.2d 922 (1981); D. Robinson v. Commonwealth Unemployment Compensation Board of Review, 60 Pa. Commw. 275, 431 A.2d 378 (1981).

77. 493 Pa. at 612-13, 427 A.2d at 644.

78. *Id.* at 609, 427 A.2d at 642.

79. *Id.* at 615, 427 A.2d at 645.

80. *See supra* notes 10-12 and accompanying text.

81. 493 Pa. at 611-12, 427 A.2d at 463.

support of the other justices and, therefore, the Pennsylvania courts have declined to adopt it.[82] Conversely, lower court decisions since *Ceja* have followed Justice Kauffman's dictum, which requires the referee to advise an uncounseled claimant of his procedural rights.[83] This occurrence should have a marked influence on subsequent procedure in unemployment compensation hearings. Significantly, the *Ceja* decision evinces the court's willingness to further scrutinize the existing hearsay evidentiary standard.[84] Any modification of the legal residuum rule in future decisions will likely take into account the reliability factor in evaluating hearsay evidence.

82. Le Gare v. Commonwealth Unemployment Compensation Board of Review, — Pa. Commw. —, 444 A.2d 1151 (1982); Fritzo v. Commonwealth Unemployment Compensation Board of Review, — Pa. Commw. —, 429 A.2d 1215 (1981). *See supra* note 38 and accompanying text.

83. *See supra* notes 74, 75 and accompanying text.

84. The Pennsylvania Commonwealth Court continues to apply the evidentiary standard set forth in Walker v. Unemployment Compensation Board of Review, 27 Pa. Commw. 522, 367 A.2d 366 (1976). *See supra* notes 35-38 and accompanying text.

[Casenote by Nancy M. Armezzani]