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ESSAY: TORQUEMADA AND UNEMPLOYMENT COMPENSATION APPEALS

William W. Milligan *

The premise of this Essay is that unemployment compensation appeals hearings take the form of inquests rather than follow the traditional adversarial model. Given this, the hearing officer carries a special burden of ensuring that due process is afforded. State review systems should structure the process so that the difference, along with the unique burden, is made explicit.

A Dark Image

A terrifying image of the Inquisition, personified by Torquemada, Grand Inquisitor of Spain, has come down to us through history. A powerful, if apocryphal, account of Torquemada is included in Dostoyevsky's *The Brothers Karamazov*.¹ In a chapter entitled "The Grand Inquisitor," Dostoyevsky writes, "My story is laid in Spain, in Seville, in the most terrible time of the Inquisition, when fires were lighted every day to the glory of God, and 'in the splendid *auto da fé* the wicked heretics were burnt.'"²

Twentieth century America is not, of course, the same as fifteenth century Spain. Here, as in all modern democratic societies, the sinister practices of the Inquisition have been eliminated from the legal system. Heretics are no longer burned at the stake. Confessions are not extracted by torture. Hearings are open, and due process is enforced.

In spite of these changes, a dark image remains associated with the inquisitorial process. The witch hunts in Salem, Massachusetts, in 1692, serve as a symbol of the excesses of Inquisition-style justice.³ In more recent times the word "inquisition" in America has acquired a special meaning derived from the original. This new meaning has been applied

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1. FYODOR DOSTOYEVSKY, *THE BROTHERS KARAMAZOV* (Constance Garnett trans., Random House 1945) (1880).

2. *Id.* at 294-95.

3. 29 *ENCYCLOPEDIA AMERICANA*, INTERNATIONAL EDITION *Witches* 84 (1995).

to "witch hunts" for persons holding or expressing nonconforming opinions, and in particular to activities associated with the late Senator Joseph McCarthy.⁴ As a result of these modern associations, the term "inquisitorial" continues to have a pejorative connotation.⁵

The courts have underscored this connotation by assuming, in certain cases, that activity so characterized violates the Constitution. For example, Justice Marshall commented that, "[b]ecause the court below failed to examine fully whether petitioner's confession was obtained by inquisitorial means condemned by the Due Process Clause, I would grant certiorari."⁶ In the 1896 Supreme Court case of *Brown v. Walker*,⁷ the Court observed that the maxim that no one shall be required to be a witness against himself "had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons."⁸ The most familiar case in this area is that of *Miranda v. Arizona*.⁹ The Supreme Court, speaking through Chief Justice Warren, found the evidence obtained to be inadmissible because it resulted from questioning which might be inquisitorial.¹⁰

A Respected Tradition

These modern characterizations overlook the fact that the inquisitorial process has a respected, as well as a discredited, tradition. The inquisitorial structure was an important part of Roman law. The classic Roman author, Cicero, used the term *inquisitio* to mean searching for evidence in matters of litigation.¹¹ In due course, *inquisitio* came to mean an "intense and detailed investigation by a magistrate who controlled the procedure of a legal dispute, whether civil or criminal, from its beginning to its end."¹²

4. *E.g.*, GRIFFIN FARIELLO, RED SCARE: MEMORIES OF THE AMERICAN INQUISITION; AN ORAL HISTORY (1995).

5. EDWARD PETERS, INQUISITION 314 (1988).

6. *Degraffenreid v. McKellar*, 494 U.S. 1071, 1071 (1990) *denying cert. to* 883 F.2d 68 (4th Cir. 1989) (Marshall, J., dissenting).

7. 161 U.S. 591 (1896).

8. *Id.* at 596.

9. 384 U.S. 436 (1966).

10. *Id.* at 442.

11. PETERS, *supra* note 5, at 12.

12. *Id.*

Roman law has been much admired through the centuries. A familiar example can be found in the New Testament where Festus, before whom the Apostle Paul stood, says, "It is not the manner of the Romans to deliver any man, that he should perish, before that he which is accused, have the accusers before him, and have licence to answer for himself, concerning the crime laid against him."¹³ Roman Law, as reflected in the Justinian Code, served as the foundation for the legal systems of France and Germany, along with most countries of Europe and Latin America.¹⁴ Thus the inquisitorial Roman structure has been legitimized in modern legal systems.

The European Inquisition, while an historical reality, has become mythologized in many ways. Professor Edward Peters of the University of Pennsylvania has written a book, *Inquisition*,¹⁵ which seeks to set the record straight as objectively as possible. Professor Peters chronicles the dark side of the Inquisition, but also observes that interrogations were conducted skillfully.¹⁶ He goes on to note that the "quality [of] witnesses was astutely assessed."¹⁷ The Inquisition's meticulous investigatory methods produced the largest and most important body of data for any society in modern Europe.¹⁸

The Federal Republic of Germany, in common with most continental systems, provides an example of a modern legal system that is inquisitorial in nature.

[C]ivil litigation in Germany . . . is characterised in practice by the dominant role of the judge. It is the judge who controls the progress of the action . . . and he is under a positive duty to ascertain the truth to his own satisfaction. If the evidence given in the documents admitted is not sufficient, the judge will direct the attendance of witnesses to give oral evidence. It is he who decides what parts of the evidence tendered by the parties will be given orally in support of the respective cases.¹⁹

13. *Acts* 25:16.

14. 23 *ENCYCLOPEDIA AMERICANA, INTERNATIONAL EDITION Roman Law* 649 (1995).

15. PETERS, *supra* note 5.

16. *Id.* at 101.

17. *Id.*

18. *Id.* at 87.

19. STEPHEN O'MALLEY & ALEXANDER LAYTON, *EUROPEAN CIVIL PRACTICE* 1297 (1989).

In criminal cases, when choosing between the adversarial and inquisitorial systems, the American courts have come down firmly on the side of the adversarial system. On the civil side, however, courts in the United States have adopted a different position. American courts do not view the inquisitorial style of fact finding to be unconstitutional. Juvenile courts provide an example. In the Ohio Supreme Court decision *State ex rel. Dispatch Printing Co. v. Solove*,²⁰ Justice Herbert Brown commented, “[J]uvenile courts have adopted unique methods of conducting their proceedings. Hearings are informal, and based on an inquisitorial model rather than an adversarial one.”²¹

A category even more relevant to the subject of this Essay is that of administrative hearings. In *United States v. Morton Salt Co.*,²² Justice Jackson observed that administrative agencies have a “power of inquisition, if one chooses to call it that, which is not derived from the judicial function.”²³ In practice many types of adjudicative procedures in the United States today are, to some extent, inquisitorial in nature. These procedures include many types of administrative hearings: arbitrations, coroners’ inquests, summary court martials, congressional hearings, and institutional hearings such as those conducted by universities.

My experience as chairman of the Ohio Unemployment Compensation Board of Review²⁴ has shown me the inquisitorial nature of appeals conducted under the authority of the Board of Review. The following elements of the system illustrate my point:

1. Hearings are controlled by the Hearing Officer rather than by the parties, and the Hearing Officer is permitted to question the witnesses.²⁵

20. 556 N.E.2d 439 (Ohio), *cert. denied*, 498 U.S. 958 (1990).

21. *Id.* at 448.

22. 338 U.S. 632 (1950).

23. *Id.* at 642.

24. The Ohio Unemployment Compensation Board of Review consists of three full-time members appointed by the governor. OHIO REV. CODE ANN. § 4141.06 (Anderson 1995). All hearing officers are attorneys; they consist of a chief and assistant chief hearing officer, five senior hearing officers, fourteen hearing officers, and three hearing officer trainees. State of Ohio Employee Position Roster (Oct. 14, 1995) (on file with the *University of Michigan Journal of Law Reform*).

25. See OHIO ADMIN. CODE § 4146-7-02 (1994).

2. The issues are defined by statute rather than by the pleadings.²⁶
3. While the Board of Review has its own procedures, they are not the same as the Rules of Civil Procedure.²⁷
4. There is no burden of proof.²⁸
5. There is no jury.²⁹
6. The Hearing Officer is not bound by the Rules of Evidence.³⁰
7. The Board of Review has statutory investigative authority.³¹
8. Representatives of parties are not required to be admitted to the practice of law.³²

I would argue that unemployment compensation (UC) hearings in Ohio are, to a substantial degree, inquisitorial in nature. Furthermore, although the inquisitorial system has both a respected and discredited history, the Ohio Unemployment Compensation Board of Review and comparable administrative hearing bodies share in the respected side of the inquisitorial tradition.

This system enjoys certain advantages over the adversarial system including economy of time and money. The inquisitorial system processes a large number of hearings within finite budgetary constraints. Its main advantage, perhaps, derives from greater expedition. The delay of justice is normally less in administrative hearings than in standard litigation.³³

26. See OHIO REV. CODE ANN. § 4141.28(J) (Anderson Supp. 1995).

27. OHIO ADMIN. CODE § 4146-7-02 (1994).

28. *Cunningham v. Jerry Spears Co.*, 197 N.E.2d 810, 814 (Ohio Ct. App. 1963).

29. See OHIO REV. CODE ANN. § 4141.28 (Anderson 1995).

30. OHIO ADMIN. CODE § 4146-7-02 (1994).

31. OHIO REV. CODE ANN. § 4141.06 (Anderson 1995).

32. *Henize v. Giles*, 490 N.E.2d 585, 587 (Ohio 1986).

33. Cf. 20 C.F.R. § 650.1(b) (1995) ("Sections 303(a)(1) and (3) of the Social Security Act require . . . that State laws include provisions for methods of administration reasonably calculated to insure full payment of unemployment compensation when due . . . The Secretary has construed these provisions to require . . . provisions for hearing and deciding appeals . . . with the greatest promptness that is administratively feasible."). Additionally, § 650.4 provides:

A State will be deemed to comply substantially with . . . requirements . . . with respect to first level appeals, if . . . the State has issued at least 60 percent of all first level benefit appeal decisions within 30 days of the date of appeal, and at least 80 percent of all first level benefit appeal decisions within 45 days.

20 C.F.R. § 650.4 (1995). Some question has been raised regarding these timeliness standards, especially regarding the 20% of first-level benefit appeal decisions that are

UC appeals are administrative hearings. But not all administrative proceedings are alike. There are both high-volume and low-volume administrative hearing systems, and the former tend to be more inquisitorial than the latter.

An example of low-volume hearings is those conducted by the Public Utilities Commission, while high-volume hearings include license revocations and UC appeals. Low-volume hearings tend to resemble traditional court proceedings: they are adversarial, parties are represented by counsel, discovery is allowed, and formal rules of procedure and evidence are applied. On the other hand, high-volume administrative hearings vary in certain ways from traditional adversarial proceedings. The Ohio Board of Review is an example of a high-volume administrative hearing system. Last year the Board of Review disposed of 21,159 cases,³⁴ and those hearings typically lasted no more than forty-five minutes each.³⁵

In the never-ending effort to balance efficiency with quality, the forty-five-minute hearing has become standard in Ohio. The Board's experience is that this amount of time provides ample time to conduct a fair hearing. The time required to prepare for hearings, to travel to hearing sites, and to write

not specifically covered. It also should be noted that the standards sometimes are not met. Nevertheless, they have remained in place since 1972, and constitute a valid indication of the time within which unemployment compensation appeals decisions normally are issued. By way of comparison, the Rules of Superintendence of the Supreme Court of Ohio recommend for common pleas courts Time Line Determinations of 24 months for tort cases and 12 months for other civil cases. The average time between receipt of appeals and first-level disposition is 39.38 days. OHIO UNEMPLOYMENT COMPENSATION BOARD OF REVIEW, REPORT FOR MARCH 1996 (Apr. 1, 1996).

34. LABOR MKT. INFO. UNIT, OHIO BUREAU OF EMPLOYMENT SERVS., MA 5-130 REPORT (Oct. 1, 1994–Sept. 30, 1995). The workload of 20,367 cases includes 13,653 lower-level dispositions, 4079 higher-level dispositions, as well as 2635 additional dispositions of other types.

35. A typical Board of Review Hearing Officers hearing schedule is this:

Monday:	8:30, 9:00, 9:45, 10:30, 11:15
Tuesday:	8:30, 9:00, 9:45, 10:30, 11:15, 1:00
Wednesday:	9:00, 9:45, 10:30, 11:15
Thursday:	8:30, 9:00, 9:45, 10:30, 11:15
Friday:	9:00, 9:45, 10:30, 11:15

See Board of Review Weekly Hearing Officer Assignments (listing the hearings scheduled for Hearing Officer Kevin W. Thornton for Oct. 30, 1995, through Nov. 3, 1995) (on file with the *University of Michigan Journal of Law Reform*). An attempt is also made to schedule hearings that might run longer than 45 minutes at the end of the day. This minimizes the necessity for continuances or inconvenience to parties who might have to wait for their hearing.

decisions are factored into the scheduling system. Other states and other administrative hearing systems will reach different resolutions to the issue of balance, but this is at least one concrete example of a high-volume system in operation.

Due Process in Administrative Hearings

The founding fathers included in the Bill of Rights the Fifth and Sixth Amendments, which provide respectively: “[n]o person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law”³⁶ and “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”³⁷ These requirements were initially applied only to actions of the federal government. Following the Civil War, the Fourteenth Amendment was adopted, providing that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.”³⁸ This amendment made due process applicable to state actions as well.

But what does “due process” mean? The case of *American Land Co. v. Zeiss*³⁹ offers an early explanation. Chief Justice White, writing for the Court, stated,

“Due process requires that the court . . . shall have jurisdiction . . . and that there shall be notice and opportunity for hearing given the parties Subject to these two fundamental conditions, which seem to be universally prescribed in all systems of law established by civilized countries, this court has, up to this time, sustained all state laws, statutory or judicially declared, regulating procedure, evidence and methods of trial, and held them to be consistent with due process of law.”⁴⁰

36. U.S. CONST. amend. V.

37. U.S. CONST. amend. VI.

38. U.S. CONST. amend. XIV, § 1.

39. 219 U.S. 47 (1911).

40. *Id.* at 71 (quoting *Twining v. New Jersey*, 211 U.S. 78, 110–11 (1908)).

The Supreme Court addressed the issue of due process in administrative hearings in the case of *Goldberg v. Kelly*.⁴¹ Justice Brennan's decision in *Goldberg* remains a significant authority in the administrative law field. *Goldberg* addresses three questions: (1) whether due process is required, (2) when due process is required, and (3) what procedure must be followed to satisfy due process.

There is no question that due process is required in UC appeals. Federal law, the United States Department of Labor (USDOL) regulations, and state law agree on this point. The relevant Ohio statute, for example, provides the following:

When an appeal from a decision . . . of the administrator . . . is taken, all interested parties shall be notified and the board . . . shall, after affording such parties reasonable opportunity for a fair hearing, affirm, modify, or reverse the findings of fact and the decision of the administrator . . . in the manner which appears just and proper.⁴²

The second issue, the question of when due process is required, played a crucial role in *Goldberg*. The Court held that a hearing must be held prior to the discontinuance of welfare benefits. Justice Black excoriated this holding in his dissent: "I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They should be left, as are other legislative determinations, to the Congress and the legislatures that the people elect to make our laws."⁴³ The question of whether a prior hearing is required does not occur at the Board of Review level because a prior determination, by definition, has already been made by the Administrator. Whether or not a prior hearing is required, however, the question of timeliness remains. The Court has

41. 397 U.S. 254 (1969).

42. OHIO REV. CODE ANN. § 4141.28(J) (Anderson 1995).

43. *Goldberg*, 397 U.S. at 279. Chief Justice Burger, joined by Justice Stewart, also disagreed with the *Goldberg* decision in a companion case, as follows:

I can share in the impatience of all who seek instant solutions; there is a great temptation in this area to frame remedies that seem fair and can be mandated forthwith as against administrative or congressional action that calls for careful and extended study. That is thought too slow. But, however cumbersome or glacial, this is the procedure the Constitution contemplated.

held that “[i]t is . . . fundamental that the right to notice and an opportunity to be heard ‘must be granted at a meaningful time.’”⁴⁴ Both hearings and decisions should happen as quickly as is administratively feasible.⁴⁵

Most relevant to this Essay is *Goldberg’s* final question of what procedures must be followed. Standing alone, *Goldberg* can be construed as requiring an adversarial judicial trial. Subsequent Court decisions, however, have consistently retreated from this position. A review of these later decisions demonstrates that the requirements of due process must necessarily vary with the circumstances presented.

*Goss v. Lopez*⁴⁶ goes furthest in defining minimum due process. Several students were temporarily suspended for disruptive behavior, without the benefit of a hearing.⁴⁷ The Supreme Court held that the students were entitled to constitutional due process.⁴⁸ The Court stated:

“Once it is determined that due process applies, the question remains what process is due.” We turn to that question, fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that “[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”⁴⁹

The Court further concluded that due process required “that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story.”⁵⁰ Justice White further noted that due process does not include the opportunity for a defendant to secure counsel, to confront and cross-examine witnesses, or to call witnesses to verify his version of the incident.⁵¹

44. *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

45. 20 C.F.R. § 650.1 (1995).

46. 419 U.S. 565 (1975).

47. *Id.* at 567.

48. *Id.* at 574.

49. *Id.* at 577–78 (citation omitted) (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) and *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895 (1961)).

50. *Id.* at 581.

51. *Id.* at 583.

Justice Stewart, writing for the Court in *Fuentes v. Shevin*,⁵² noted that the nature and form of hearings are open to many potential variations.⁵³ He observed that the subject was one for legislation, not adjudication.⁵⁴ In a footnote, the Court added that “[l]eeway remains to develop a form of hearing that will minimize unnecessary cost and delay while preserving the fairness and effectiveness of the hearing.”⁵⁵

In *Cleveland Board of Education v. Loudermill*⁵⁶ the Court held that “the pretermination ‘hearing,’ though necessary, need not be elaborate.”⁵⁷ The Court maintained that the “essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is . . . fundamental.”⁵⁸

The majority in *Wolff v. McDonnell*,⁵⁹ a prison disciplinary case, noted that due process entitled inmates to advance written notice of the claimed violation and a written statement by the fact finders as to the evidence relied upon and the reasons for the disciplinary action taken.⁶⁰ The Court rejected any right to confrontation and cross-examination, however, stating that they were “not rights universally applicable to all hearings.”⁶¹ The Court also rejected a right to counsel in this context, observing that “[t]he insertion of counsel into the disciplinary process would inevitably give the proceedings a more adversary cast and tend to reduce their utility as a means to further correctional goals.”⁶²

The Supreme Court again considered the due process requirements of an administrative hearing in *Richardson v. Perales*.⁶³ In *Perales*, the claimant applied for social security disability benefits and was turned down.⁶⁴ The claimant relied

52. 407 U.S. 67 (1972).

53. *Id.* at 96.

54. *Id.* at 96-97.

55. *Id.* at 97 n.33.

56. 470 U.S. 532 (1985).

57. *Id.* at 545.

58. *Id.* at 546.

59. 418 U.S. 539 (1974).

60. *Id.* at 563.

61. *Id.* at 567.

62. *Id.* at 570.

63. 402 U.S. 389 (1971).

64. *Id.* at 393.

heavily on *Goldberg* to the effect that due process requires an effective opportunity to defend by confronting adverse witnesses.⁶⁵ The Court, speaking through Justice Blackmun, concluded that

a written report by a licensed physician who has examined the claimant and who sets forth in his report his medical findings in his area of competence may be received as evidence in a disability hearing and, despite its hearsay character and an absence of cross-examination, and despite the presence of opposing direct medical testimony and testimony by the claimant himself, may constitute substantial evidence supportive of a finding by the hearing examiner adverse to the claimant.⁶⁶

In an attempt to provide overall guidance, the Supreme Court held in *Mathews v. Eldridge*⁶⁷ that “[d]ue process is flexible and calls for such procedural protection as the particular situation demands.”⁶⁸ The Supreme Court noted that “[i]n only one case, *Goldberg v. Kelly*, has the Court held that a hearing closely approximating a judicial trial is necessary.”⁶⁹ The Court went on to endorse a balancing test:

Due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁷⁰

65. *Id.* at 406.

66. *Id.* at 402.

67. 424 U.S. 319 (1976).

68. *Id.* at 334 (quoting *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)).

69. *Id.* at 333 (citation omitted).

70. *Id.* at 335. A number of lower court decisions have approved administrative hearing procedures which are different from the panoply set forth in *Goldberg*. *E.g.*, *Taylor v. Bowland*, No. C83-419 (N.D. Ohio Nov. 19, 1993) (setting forth details of Ohio’s notice, determination, and payment provisions).

Due Process Applied

Assuming that UC hearings are to some degree inquisitorial, do they meet the test of compliance with due process standards? The fundamental conditions set out in *Zeiss*⁷¹ are jurisdiction and notice and opportunity for hearing. UC appeals meet these conditions. Ohio law provides for jurisdiction and notice and opportunity for hearing.⁷² Beyond these fundamentals, the overview of due process requirements contained in *Cafeteria & Restaurant Workers Union v. McElroy*⁷³ is useful. In this case the Court observed that “[t]he Fifth Amendment does not require a trial-type hearing in every conceivable case of government impairment of private interest. . . . The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.”⁷⁴

With this approach to due process in mind, the circumstances of UC appeals are worth noting. The system is a unique blend of federal and state law, and its administration involves participation by both federal and state agencies.⁷⁵ This system has been conducting hearings in large numbers of cases for fifty-seven years.⁷⁶ Judge John J. Duffey provided a thoughtful analysis of current UC hearing procedure:

It is apparent that a hearing under the present law is not an adversary proceeding as in judicial actions. In the latter, a burden of proof is imposed, reliance is placed on the adversaries to develop the evidence, and the trier of fact generally does not participate in developing the case. The statute here does away with any burden of proof—at least as used in courts to impose an obligation to

71. *American Land Co. v. Zeiss*, 219 U.S. 47, 71 (1911).

72. OHIO REV. CODE ANN. § 4141.28(J) (Anderson Supp. 1995).

73. 367 U.S. 886 (1961).

74. *Id.* at 894–95.

75. 76 AM. JUR. 3d *Unemployment Compensation* § 1 (1992). For a discussion of the proper interaction between federal and state UC agencies, see Gerard Hildebrand, *Federal Law Requirements for the Federal-State Unemployment Compensation System: Interpretation and Application*, 29 U. MICH. J.L. REF. 527, 529–34 (1996).

76. See, e.g., 1938 Op. Ohio Att’y Gen. 1989 (1938). For a thoughtful analysis of current UC hearing procedure in Ohio, see *Cunningham v. Jerry Spears Co.*, 197 N.E.2d 810 (Ohio Ct. App. 1963).

proceed. . . . We think it apparent that neither party has any procedural obligation to present its side, nor is either subjected to the judicial requirement of a preponderance of the evidence. . . . Chapter 4141, Revised Code . . . now make[s] it clear that the referee or board need not, and perhaps frequently will not, rely upon the interested parties to produce the information necessary for a just decision. The board, in performing its public function of passing on claims, is to act to insure that an adequate basis for decision exists.⁷⁷

The question remains whether the system that prevails in UC hearings comports with constitutional due process requirements. *Goldberg* set forth the following procedural protections:

1. an opportunity to be heard at a meaningful time and in a meaningful manner;
2. timely and adequate notice;
3. presentation of one's own arguments and evidence;
4. decisions based on evidence adduced at the hearing;
5. an explicit written statement by the decision maker of the reasons for the determination; and
6. an impartial decision maker.⁷⁸

In an effort to ensure due process, the USDOL has adopted quality standards for UC hearings.⁷⁹ These appeals performance criteria generally reflect the due process elements included in *Goldberg* with adaptations required by the nature of UC appeals. Some of the key criteria correspond closely to the *Goldberg* provisions, including

1. an opportunity to present evidence and question one's own witnesses;⁸⁰

77. *Cunningham*, 197 N.E.2d at 813–14.

78. *Goldberg v. Kelly*, 397 U.S. 254, 268–71 (1969).

79. EMPLOYMENT AND TRAINING ADMIN., U.S. DEP'T OF LABOR, CRITERIA FOR MEASURING THE QUALITY OF LOWER AUTHORITY APPEALS HEARINGS AND DECISIONS, REVISED VERSION (Jan. 1995) (on file with the *University of Michigan Journal of Law Reform*).

80. Criterion 6: "The Hearing Officer must provide parties and representatives with a timely opportunity to question their *own* witnesses." *Id.*

2. an opportunity to confront and cross-examine opposing witnesses;⁸¹
3. a guarantee the hearing remain within the scope of the notice;⁸²
4. a guarantee of an impartial hearing officer;⁸³
5. findings of fact supported by the evidence;⁸⁴ and
6. a decision made for reasons which are logical and stated.⁸⁵

There are additional criteria aimed at ensuring hearing officers perform the unique responsibilities they have in this system, especially dealing with the duty of questioning.⁸⁶ The USDOL conducts an annual survey to determine how well states have attained the quality levels established.⁸⁷

Nevertheless, certain fundamental questions remain. These doubts stem from Justice Brennan's assumption that due process can be provided only in an adversarial context. This assumption explains the primacy the *Goldberg* decision gives to the right of confrontation, the right to counsel, and the right to cross-examine adverse witnesses. These rights become slender reeds in UC hearings. This is not to say that these rights are not valid, but the Unemployment Compensation Board cannot rely on such procedural safeguards to ensure a fair hearing to the extent that one would in a traditional

81. Criterion 10: "There must be an opportunity for confrontation of all opposing witnesses." *Id.* Criterion 11: "The Hearing Officer must afford a timely . . . opportunity to cross-examine, properly control cross-examination, and provide appropriate assistance where necessary." *Id.*

82. Criterion 19: "The Hearing Officer must conduct the hearing within the scope of the issues raised by the notice of hearing, and within the issues as finally developed at the hearing, giving proper notice of new issues." *Id.*

83. Criterion 22: "The Hearing Officer must conduct the hearing in an impartial manner." *Id.*

84. Criterion 25: "[T]he findings of fact must be supported by substantial evidence in the hearing record." *Id.* Criterion 26: "The Hearing Officer must make all of the findings of fact necessary to resolve the issues and support the conclusions of law included in the decision." *Id.*

85. Criterion 28: "The decision should state reasons and rationale that were logical." *Id.*

86. For example, the hearing officer should use clear language (Criterion 7), ask questions with a single point (Criterion 8), control interruptions (Criterion 14), refrain from making gratuitous comments (Criterion 20), and assist in cross-examination where necessary (Criterion 11). *See id.*

87. For example, the most recent Ohio evaluation resulted in 96% of its case passing USDOL's test for due process. UNEMPLOYMENT INS. SERV., U.S. DEP'T OF LABOR, UNEMPLOYMENT INSURANCE QUALITY APPRAISAL RESULTS FY 95, at 73 fig. 111-29 (1995).

adversarial hearing. The right of confrontation remains, but it is weakened by the rule that hearsay is admissible in administrative hearings.⁸⁸ The right of cross-examination is further weakened because no one is present and in a position to conduct an effective cross-examination. While parties may subpoena adverse witnesses, this option is not customarily exercised. The right to retain counsel continues, but counsel is not normally present. A recent study in Ohio, for example, indicated that both parties were represented in only nine percent of the cases.⁸⁹ From these facts, it is clear that the realities of the high-volume UC system demand that additional means of ensuring fair hearings need to be considered.

Board of Review

The Unemployment Compensation Board of Review's job is to provide the opportunity for a fair hearing in an informal context.⁹⁰ The requirements of due process present a continuing challenge. In a sense, a trial judge has a simpler job than the hearing officer. The judge is bound by rules, including evidentiary rules, which have been exhaustively interpreted over the years. The hearing officer is not bound by these rules in a technical sense, but still must give them appropriate effect and has much less precedential guidance in doing so.

It may be that Justice Brennan in *Goldberg* has suggested an agenda for hearing officers in his discussion of the services that could be provided by counsel.⁹¹ If the parties retained competent representatives, those representatives could be expected to carry out the *Goldberg* agenda. In the absence of such representation, however, the hearing officer is called upon to:

1. delineate the issues;
2. present factual contentions in an orderly manner;

88. *But cf.* *Euclid Manor Nursing Home v. Board of Review*, 501 N.E.2d 635, 638 (Ohio Ct. App. 1985) (finding harmless error where referee failed to admit hearsay evidence which ordinarily is admitted).

89. STATE OF OHIO UNEMPLOYMENT COMPENSATION APPEALS, OHIO UNEMPLOYMENT COMPENSATION APPEALS REPRESENTATION REPORT 8 (1995).

90. OHIO REV. CODE ANN. § 4141.28(J) (Anderson 1995).

91. *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1969).

3. conduct effective interrogation of witnesses in lieu of direct and cross-examination; and
4. generally safeguard the rights of the parties.

The nature of the hearing and the customary absence of counsel place unique burdens on hearing officers to insure that the parties receive due process. While due process remains critical, the method of achieving it in an inquisitorial system necessarily differs from that in an adversarial system.

Appellation

What should one call an administrative hearing that is inquisitorial in nature? I have considered several alternatives. One option would be to call them "inquisitorial hearings" but the phrase's sinister connotation precludes its use. The term "examination" is possible, but has too many other meanings to be useful. The best solution may be to use the title of "inquest." This term has the same meaning as "inquisition" but lacks its sinister overtones. While normally thought of in relation to coroners' inquests, the word has been used in connection with a number of other administrative proceedings.

Doubtless the most historically important inquest was instituted by William the Conqueror soon after his victory at the Battle of Hastings in 1066. William's inquest resulted in the Domesday Book, which inventoried substantially all the property then existing in England.⁹² An inquest was used to settle land titles in San Francisco following the 1906 earthquake.⁹³ Inquests are venerable proceedings in the United States, as illustrated by the case of *Levy Court v. Coroner*.⁹⁴ This case held that, based on an old Maryland statute passed in 1779, inquests had a fixed fee of 250 pounds of tobacco.⁹⁵ There are cases in which the proceeding was alternately referred to as an "inquest" or "inquisition."⁹⁶ In other cases inquests were utilized to determine whether real estate had

92. PETERS, *supra* note 5, at 38.

93. *American Land Co. v. Zeiss*, 219 U.S. 47, 62 (1911).

94. 69 U.S. (2 Wall.) 501 (1864).

95. *Id.* at 505-06.

96. *See Simon v. Craft*, 182 U.S. 427, 430 (1901); *Garrison v. City of New York*, 88 U.S. (21 Wall.) 196 (1874).

escheated to the public,⁹⁷ to determine the value of land taken for public use,⁹⁸ to investigate possible misconduct by a judge,⁹⁹ and to review promotion procedures at the Merchant Marine Academy.¹⁰⁰ A further reason for the use of “inquest” is that it does not preclude analysis of the high-volume administrative hearing as inquisitorial with a substantial adversarial component. Or perhaps “inquest” could be defined as combining elements of both traditions. In any event, “inquest” is a good term to describe the type of proceeding conducted by the Unemployment Compensation Board of Review and similarly situated decision making bodies.

Conclusion

The objective of the Unemployment Compensation Board of Review and its hearing officers should be to conduct first-class inquests rather than second-class trials. This can best be achieved by recognizing the special due process burdens placed on hearing officers by the unique nature of the UC system.

97. *Hamilton v. Brown*, 161 U.S. 256 (1895).

98. *Essex Pub. Rd. Bd. v. Skinkle*, 140 U.S. 334, 341 (1891).

99. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984).

100. *Jarrett v. United States*, 451 F.2d 623 (Cl. Ct. 1971).

