

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0577, Appeal of Hopkinton State Fair Association, the court on October 24, 2008, issued the following order:

Hopkinton State Fair Association (the Association) appeals an order of the New Hampshire Department of Labor (DOL) awarding the claimant back pay and benefits and attorney's fees. The Association argues that DOL violated the Association's due process rights in denying it an evidentiary hearing as to the amount of back wages owed to the claimant and the reasonableness of its reinstatement order. We vacate and remand.

The facts underlying this case are set forth in Appeal of Hardy, 154 N.H. 805 (2007). In Hardy, we reversed DOL's decision that it lacked authority to award reimbursement of attorney's fees under RSA chapter 275-E and remanded for further proceedings consistent with the opinion. *Id.* at 819. Upon remand, DOL issued a notice of hearing; the Association filed a motion to continue and request for prehearing conference, which was granted. After the prehearing conference, the hearing officer determined that no evidentiary hearing was required on the issue of back wages; instead, the claimant was ordered to file a sworn affidavit and his calculation of lost wages and benefits. The hearing officer then issued a decision in which he found that, although the issue of back wages was not included in this court's remand order, the figure was not calculated in the DOL order giving rise to our 2007 opinion. The hearing officer then found the claimant's affidavit of financial loss "valid, persuasive and compelling" and awarded the amount requested.

RSA 541-A:31, III (2007) provides that all parties shall be afforded an opportunity for an adjudicative proceeding in a contested case. A contested case is "a proceeding in which the legal rights, duties or privileges of a party are required by law to be determined by an agency after notice and an opportunity to be heard." RSA 541-A:1, IV (2007). RSA 541-A:31, III, requires that notice of an adjudicative proceeding must include a statement of the time, place and nature of the hearing. Although RSA 541-A:31, V authorizes the use of prehearing conferences, it does not provide that, in the absence of the parties' agreement, they take the place of a formal hearing. See RSA 541-A:31, V (b) (presiding officer may schedule one or more prehearing conferences prior to beginning formal proceedings); RSA 541-A:33, IV (2007) (party may conduct cross-examination required for a full and true disclosure of the facts). We therefore conclude that DOL erred in denying the Association's request for a hearing.

The Association also argues that DOL erred in denying its request for a hearing on the issue of the reasonableness of reinstatement. To the extent that the Association seeks to raise issues that could have been raised or were the subject of its earlier dismissed cross-appeal, they are barred. Cf. Merrimack Valley Wood Prods. v. Near, 152 N.H. 192, 201 (2005). If, however, there are circumstances that have arisen subsequent to our decision in Hardy, 154 N.H. 805 (2007) that are relevant to the issue of reinstatement, the Association should have an opportunity to present such evidence at the hearing.

Vacated and remanded.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**