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No. 67865-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

AARIN MORRIS,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF
EMPLOYMENT SECURITY

Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF ISSUES.....	2
III.	STATEMENT OF THE CASE.....	3
	A. There were two ESD cases involving Ms. Morris.....	3
	B. The first ESD case.....	3
	C. The second ESD case.....	4
	D. The ESD did not timely provide Ms. Morris with its March 23, 2010 “Overpayment Advice of Rights” notice in the second ESD case.....	5
	E. The ESD did not timely provide Ms. Morris with its April 7, 2010 determination notice in the second ESD case	7
	F. ESD began collection actions on July 12, 2010	9
	G. Ms. Morris received her first notice of overpayment assessment on July 16, 2010	10
	H. The ESD would not provide Ms. Morris with a deadline for her “late appeal”	13
	I. The ESD continued with its collection actions	13
	J. Ms. Morris filed her appeal on September 3, 2010	14
	K. The appeal was dismissed on November 2, 2010.....	14
	L. Exhaustion of administrative remedies.....	14

M.	Judicial review in the Superior Court and appeal to Court of Appeals	15
IV.	ARGUMENT	15
A.	APPELLATE REVIEW OF THE SUPERIOR COURT'S FINAL ORDER AFFIRMING THE COMMISSIONER'S DECISION REQUIRES APPLICATION OF THE STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT TO THE RECORD BEFORE THE AGENCY.....	15
B.	THE COMMISSIONER'S DECISION SHOULD BE REVERSED BECAUES THE ESD FAILED TO AFFORD MS. MORRIS HER RIGHT TO TELL HER SIDE OF THE STORY IN AN INVESTIGATIVE INTERVIEW PRIOR TO ISSUING ITS DETERMINATION NOTICE	16
1.	The Commissioner's decision should be reversed because the ESD'S failure to follow its own prescribed procedure resulted in an unlawful decision-making process.....	18
2.	The Commissioner's decision should be reversed because the ESD's failure to afford Ms. Morris an investigatory interview was a denial of her right to due process of law.....	19
C.	THE COMMISSIONER'S DECISION SHOULD BE REVERSED BECAUSE THE DETERMINATION NOTICE THAT ESD BELATEDLY ISSUED TO MS. MORRIS WAS NOT REASONABLY CALCULATED, UNDER ALL THE CIRCUMSTANCES, TO APPRISE HER OF A DEADLINE FOR FILING A "LATE APPEAL"	23

D.	THE COMMISSIONER'S DECISION SHOULD BE REVERSED BECAUSE MS. MORRIS' REASONS FOR FILING HER APPEAL 46 DAYS AFTER THE JULY 19, 2010 MAILING OF THE DEFECTIVE DETERMINATION NOTICE ARE COMPELLING REASONS TO EXCUSE ANY DELAY UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.....	26
E.	THE COURT SHOULD ORDER THE ESD TO REFUND TO MS. MORRIS ALL OF THE FUNDS IT HAS OBTAINED FROM HER THROUGH ITS COLLECTION ACTIONS.....	26
V.	CONCLUSION	27

TABLE OF AUTHORITIES

WASHINGTON CASES

<u>Honesty in Environmental Analysis & Legislation v. Central Puget Sound Growth Management Hearings Board</u> , 96 Wn. App. 522, 979 P.2d 864 (1999).....	15, 16
<u>Kustura v. Dept. of Labor & Industries</u> , 142 Wn. App. 655, 175 P.3d 1117 (2008).....	23, 24
<u>Verizon Northwest, Inc. v. Washington Employment Security Dept.</u> , 164 Wn.2d 909, 194 P.3d 255 (2008).....	15, 16
<u>Wells v. Employment Security Dep't</u> , 61 Wn. App. 306, 809 P.2d 1386 (1991).....	17
<u>William Dickson Co. v. Puget Sound Air Pollution Control Agency</u> , 81 Wn. App. 403, 914 P.2d 750 (1996).....	16

U.S. SUPREME COURT CASES

<u>Cleveland Board of Education v. Loudermill</u> , 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985).....	22
<u>Goldberg v. Kelly</u> , 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970).....	20, 22
<u>Mathews v. Eldridge</u> , 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976)	19, 20, 21, 22

CONSTITUTIONAL PROVISIONS

U.S. Const., Amendment 5	19, 20
U.S. Const., Amendment 14	1, 2, 19, 20, 23, 26

WASHINGTON STATE STATUTES

RCW 34.05.570(3)(a) 23

RCW 34.05.570(3)(c).....19

RCW 50.36.010(1)..... 8

RCW 50.36.010(2) 8

I. INTRODUCTION

Appellant Aarin Morris seeks appellate court review of a final decision of the Commissioner of the Washington State Employment Security Department (“ESD”) issued on December 30, 2010. The Commissioner (actually the Commissioner’s delegate) ruled: (1) that Ms. Morris’ appeal of a determination notice that was prepared on April 7, 2010 but not provided to Ms. Morris until July 20, 2010 was untimely because it wasn’t filed by August 18, 2010; and (2) that her reasons for filing late were not so compelling as to excuse her delay.

Ms. Morris asks the Court of Appeals to reverse the Commissioner’s decision for four reasons. First, the ESD failed to follow its own prescribed procedure and the failure resulted in an unlawful decision making process. Second, the ESD’s failure to afford Ms. Morris an investigatory interview constituted a denial of her right to procedural due process of law under the Fourteenth Amendment. Third, the determination notice issued to Ms. Morris was not “reasonably calculated” to afford her with notice of a deadline for filing her appeal and therefore denied Ms. Morris of her due process rights under the Fourteenth Amendment. Finally,

under the circumstances of this case, Mr. Morris was not required to file her appeal by August 18, 2010.

Ms. Morris asks the Court to remand the case to the ESD with a directive to the agency to provide her with the rights that it provides to other claimants prior to issuing determination notices. In the alternative, Ms. Morris asks the Court to remand the case to the ESD with a directive to afford her an administrative hearing on the merits of the case. Finally, Ms. Morris requests an order directing the ESD to reimburse her for all funds that it has collected from her since August 21, 2010.

The citations in this brief to the administrative agency record are abbreviated "CR" for "Commissioner's Record." The citations to the Superior Court record uses the "CP" abbreviation for "Clerk's Papers."

II. STATEMENT OF ISSUES

A. Did the ESD fail to follow its own prescribed procedure that required it to afford Ms. Morris an opportunity to participate in an investigatory interview prior to the issuance of a determination notice?

B. Did the ESD deny Ms. Morris her constitutional right to procedural due process when it failed to provide her with an

opportunity to participate in an investigatory interview prior to issuing its determination notice?

C. Was the determination notice issued to Ms. Morris on July 20, 2010 reasonably calculated to inform her of the deadline for filing an appeal?

D. Was Ms. Morris required to file her appeal of the ESD's determination notice by August 18, 2010?

E. Should the Court order the ESD to reimburse Ms. Morris for the money it has collected from her?

III. STATEMENT OF THE CASE

A. There were two ESD cases involving Ms. Morris. The Washington State Employment Security Department issued determination notices to Aarin Morris in two separate cases.

B. The first ESD case. The first case was commenced when the ESD issued a March 24, 2010 determination notice that denied unemployment benefits to Ms. Morris based upon alleged "misconduct" on her job at Pacific Pro Audio. (DR 94). Ms. Morris filed a timely appeal on April 6, 2010. (CR 101-116; CR 94). She notified the ESD that she had moved, provided the ESD with her new address and notified the U.S. Postal Service of her address change. (CR 94). The April 6, 2012 appeal plainly set forth her

new residential address at 1802 N.E. 199th Street, Shoreline, WA 98155. (CR 101).

A hearing in the first ESD case was scheduled by the Office of Administrative Hearings (“OAH”) for May 3, 2010, but the OAH erroneously sent the notice of the hearing to Ms. Morris’ old address. (CR 95). Having not received the notice, Ms. Morris did not appear for the May 3, 2010 hearing. (CR 94-95).

The first case was rescheduled for an August 19, 2010 hearing. In a written Initial Order dated the same day as the hearing, Administrative Law Judge Joan Tierney first concluded that Ms. Morris had established good cause for not appearing at the May 3, 2010 hearing due to not receiving notice of the hearing. (CR 95). ALJ Tierney then concluded that the evidence did “not support a finding of disqualifying misconduct,” set aside the ESD’s initial decision and granted unemployment benefits to Ms. Morris. (CR 97).

C. The second ESD case. The second ESD case is the one that is now before the Court of Appeals. The second case was

opened by an ESD fraud investigator on March 18, 2010, but Ms. Morris never received notice of it until July 16, 2010.¹ (CR 150).

D. The ESD did not timely provide Ms. Morris with its March 23, 2010 "Overpayment Advice of Rights" notice in the second ESD case. On March 23, 2010, the Washington State Employment Security Department prepared a notice entitled "Overpayment Advice of Rights" addressed to Aarin Morris. (CR 46-47). The March 23rd notice provided in pertinent part as follows:

Our records show we may have paid you too much in unemployment benefits. The information you provided differs from information provided by your employer or other sources for the same period. You may not be eligible for any benefits for the weeks shown on the attached Schedule of Claims Report. If you make a false statement or withhold information about your claim it is considered fraud. If you commit fraud, we may deny benefits for future weeks, you may have to pay back benefits you have received, and you may have to pay a penalty.

You have the right to an interview by telephone or in person before the Department makes a decision. If you want an interview, call or fax using the numbers listed below. You may someone including an attorney help you at the interview. [. . . .]

¹ What is referred to in this brief as "the second ESD case" was commenced on March 18, 2010, which was 6 days prior to the March 24, 2010 commencement of what is referred to here as "the first ESD case." However, Ms. Morris learned of the March 24th case four months prior to receiving notice of the March 18th case. The cases are here referred to as the "first ESD case" and the "second ESD case" on the basis of the sequence in which the ESD provided Ms. Morris with notice of the two cases.

If you do not respond by 04/02/2010, we will make a decision based on available information. We will send you our decision and tell you how much you must repay. [emphases supplied].

(CR 46).

Ms. Morris did not timely receive the March 23rd notice. (CR 23). The ESD knew that it did not provide Ms. Morris with the March 23rd Overpayment Advice of Rights as shown by an entry made in the ESD's internal computer comments log. This computer log entry states that that ESD mailed the notice to Ms. Morris on March 27, 2010 and that it was returned undelivered to the ESD on April 2, 2010. (CR 150). The April 2, 2010 log entry and an accompanying handwritten note state as follows:

AOR MAILED 3/27/10 RETURNED,
PLSE CONFIRM ADDRESS-----> *The Dept. sent clmt
Advice of Rights, but it
was returned. Client did
not inform department of
change of address as
recommended in UI
Claims Kit.*

(CR 150).

The fraud investigator, whose name is "Chris," closed the investigation of the second ESD case on April 5, 2010. (CR 118; CR 149). This was one day before Ms. Morris filed her appeal in the first ESD case. (CR 118; CR 149). There is no entry in the

ESD comment log, or any other evidence adduced at the administrative hearing in the second ESD case, indicating that the agency made any effort to confirm Ms. Morris' mailing address despite the admonition to do so in the April 2, 2010 computer log entry.² (CR 149-150).

Having not received the March 23, 2010 "Overpayment Advice of Rights" notice, Ms. Morris was not afforded her right to tell her side of the story in the second ESD case at a telephone or in person interview prior to the agency's subsequent determination that she committed fraud, owed the ESD \$6,373.00 in overpaid past benefits and was disqualified from receiving 6 months of future benefits. (CR 41-45).

E. The ESD did not timely provide Ms. Morris with its April 7, 2010 determination notice in the second ESD case. On April 7, 2010, the day after the investigator closed the fraud investigation, the ESD Office of Special Investigations prepared a determination notice finding that Ms. Morris committed fraud by

² The ESD had both Ms. Morris' phone number and her e-mail address, which did not change after her residential move. (CR 153).

“knowingly with[holding] material facts to obtain or attempt to obtain benefits to which [she] was not entitled.”³ (CR 41-45).

The determination notice directed Ms. Morris to repay \$6,373.00 in previously paid benefits she received between July and November 2009 and disqualified Ms. Morris from receiving future benefits for the 26 week period from April 4, 2010 to October 2, 2010. (CR 42-42). The determination notice described the right to appeal and the May 7, 2010 deadline for filing an appeal as follows:

YOUR RIGHT TO APPEAL: If you disagree with this decision, you have the right to appeal. An appeal is a written statement that you disagree with this decision. *You have 30 days to file your appeal. Your appeal must be received or postmarked by 05/07/2010.* An appeal is a request for a hearing with an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH). *If you miss the deadline to appeal, tell us why this appeal is late.* The ALJ will decide if you have “good cause” for a late appeal. [emphases supplied].

(CR 43).

The original April 7, 2010 determination notice was addressed to Ms. Morris’ old address and was never delivered to her. It was returned to the ESD by the U.S. Postal Service on a

³ It is a misdemeanor for “any person to knowingly give false information or withhold any material information” under RCW Title 50. RCW 50.36.010(1), (2).

date that is not reflected in the administrative agency record.⁴ (CR 149).

Having not received the April 7, 2010 determination notice in the second ESD case, Ms. Morris was not afforded her right to appeal the determination of which she was unaware at the same time she was pursuing her appeal of the March 24, 2010 agency determination in the first ESD case.

F. ESD began collection actions on July 12, 2010. On July 12, 2010, the ESD mailed a "Notice of Past Due Account" to Ms. Morris at her old address. (CR 84-85). This July 12th notice stated in pertinent part as follows:

We have not received your minimum monthly payment on your unemployment insurance overpayment. Your account is now three months past due. Your current balance is \$6,547.32. Send

⁴ The ESD Fraud Office of Special Investigations ("OSI"), also known as the Fraud Investigation Unit, waited until July 13, 2010 to note in its internal computer log that the determination notice mailed to Ms. Morris on April 7, 2010 had been returned to the agency as undeliverable. (CR 149). On July 15, 2010, the OSI made another belated entry to document that the Overpayment Advisement of Rights ("AOR") notice mailed to Ms. Morris on March 23, 2010 had also been returned to the agency as undeliverable. ("OSI"), states, "AOR RET'D/UNABLE TO FWD TO CURRENT ADDRS." (CR 149). The administrative record does not disclose the reason why OSI would have made the July 15, 2010 entry, since the entry made on April 2, 2010 already showed that the Overpayment Advisement of Rights had been returned to the ESD. (CR 150).

\$856.32 within 20 days of the date of this letter to bring your account current and avoid legal costs and further collection action. [....]

(CR 84).

G. Ms. Morris received her first notice of an overpayment assessment on July 16, 2010. The U.S. Postal Service forwarded and delivered the July 12th notice to Ms. Morris at her new address on July 16, 2010. (CR 23; CR 55). This was the first notice that Ms. Morris received regarding the overpayment assessment that the ESD had levied against her without prior notice and an opportunity to be heard. (CR 55-56).

Late in the business day on July 16th (a Friday), Ms. Morris called the ESD Benefit Payment Control/Collection Unit at the number provided in the July 12th notice. The woman who answered the phone told Ms. Morris that an investigation had determined she was at fault for overpayment and that she had to call the Fraud Investigation Unit. (CR 55; 59). Ms. Morris called the Fraud Investigations Unit, but it was closed for the day. (CR 59).

On July 19, 2010 (the following Monday), Ms. Morris called ESD Benefit Payment Control number again and was told that she had to make a payment, that nothing else was up for discussion and that it was "too late." (CR 59). Ms. Morris then called the

Fraud Investigation Unit. (CR 23-24; CR 59). She spoke to a woman named "Chris." (CR 55; CR 59). "Chris" was the investigator who had conducted the fraud investigation in the second ESD case from March 18 to April 5, 2018. (CR 59; CR 117; CR 118). "Chris" said that she was the investigator who had done an investigation that showed Ms. Morris was overpaid and that she would mail her "the information on it." (CR 59). "Chris" made the following notes from this July 19, 2010 phone conversation:

12:10 Rec'd t/c from Clmnt. Stated she just found out about her op. Stated she was on shared work and her Empl told her how to file unemployment and to get herself a second job. Explained to her she was on shared work only 3 weeks. *Send her a new copy of the AOR and Det. Told her to look it over and file for late appeal.*⁵ [emphasis supplied].

(CR 117).

On July 20, 2010, Ms. Morris received a manila envelope that "Chris" had mailed to her containing the July 23, 2010 Overpayment Advice of Rights and the April 7, 2010 determination notice from the second ESD case. (CR 59-60). On July 21, 2010, Ms. Morris called the Fraud Investigation Unit and spoke to "Chris" a second time. "Chris" made a handwritten note that during this

⁵ Appellant submits that "op" is an abbreviation for "overpayment," that "AOR" is an abbreviation for the March 23, 2010 Overpayment Advice of Rights notice and "Det" is an abbreviation for the April 7, 2010 determination notice.

conversation she “[e]xplained to her that she has to file a late appeal.” (CR 117). “Chris” had again failed to inform Ms. Morris of the deadline for filing the “Late Appeal.”

Ms. Morris had never seen these documents prior to July 20, 2010. (CR 60). The March 23, 2010 Overpayment Advice of Rights notice that she received from “Chris” on July 20, 2010 contained no explanation as to how Ms. Morris could avail herself of her right to a telephone or in person interview – the April 2, 2010 “deadline” to exercise this right had long since passed. (CR 46). There was no explanation provided to Ms. Morris as to what the deadline would be for filing what “Chris” termed a “Late Appeal.”⁶ The April 7, 2010 determination notice that Ms. Morris received from Chris on July 20, 2010 stated that an “appeal” had to be filed within 30 days of the April 7, 2010 determination notice with the deadline expressly stated to be the long passed date of “05/07/10.” (CR 43). The notice said nothing about the time period or deadline for filing what “Chris” had denominated a “Late Appeal.” (CR 41).

⁶ The only difference between the determination notice that Ms. Morris received on July 20, 2010 and the one that was mailed to her at the wrong address on April 7, 2010 is that the notice received on July 20, 2010 had a handwritten legend at the top of the first page stating “Late Appeal.”

H. The ESD would not provide Ms. Morris with a deadline for her "late appeal." Ms. Morris made a number of unsuccessful phone calls to ESD trying to find out how and when to file a "late appeal."⁷ (CR 60). Ms. Morris was utterly confused by the process, which was further complicated by the paperwork she was receiving in conjunction with the August 19, 2010 hearing on her appeal in the first ESD case. (CR 55-57).

I. The ESD continued with its collection efforts. Ms. Morris received a letter from the ESD dated August 21, 2010, stating that she owed the ESD \$8,957.28, demanding payment of \$1,284.28 within 20 days, and threatening to file a warrant in the Superior Court.⁸ (CR 85).

⁷ On August 4, 2010, someone in the Fraud Investigation Unit told Ms. Morris that the information had already been sent and that she "could only file a late appeal and state why it was late." (CR 60). On August 9, 2010, someone in Benefit Payment Control would not answer questions about how to file an appeal and said that she would make a note of the phone call. (CR 60). On August 23, 2010, "DeeDee" in Benefit Payment Control told her to call the Telecenter because there was nothing that they could do about it and that collections would continue in full force. (CR 60). On August 23, 2010, the Telecenter told her she could try to file a "late appeal," but that the overpayment amount was still late and that the collection efforts would continue. (CR 60).

⁸ The EDS filed a warrant in the King County Superior Court in Cause No. 11-9-33568-9 on November 17, 2011. Ms. Morris asks this Court to take judicial notice of this collection action.

J. Ms. Morris filed her appeal on September 3, 2010.

Ms. Morris filed her *pro se* appeal on September 3, 2010. (CR 50-61).

K. The appeal was dismissed on November 2, 2010.

Administrative Law Judge Kathleen O'Shea Senecal conducted a telephonic administrative hearing on November 2, 2012. The ALJ concluded that Ms. Morris did not show good cause for "her failure to appeal in July" and ordered the dismissal of the appeal as being untimely. (CR 174).

L. Exhaustion of administrative remedies. Ms. Morris

filed a timely petition for review to the Commissioner. (CR 194-195). The Commissioner's delegate found that Ms. Morris received the determination notice in the second ESD case on July 20, 2010 and filed her appeal on September 7, 2010. The Commissioner's delegate held that this was a substantial delay without compelling reasons that would excuse the delay and affirmed in a decision dated December 2, 2010. (CR 194-195).

A timely petition for reconsideration was filed on January 7, 2011 and denied by the Commissioner's delegate on January 28, 2011. (CR 206).

M. Judicial review in the Superior Court and appeal to Court of Appeals. Ms. Morris timely petitioned for judicial review in the King County Superior Court, where Judge Joan DuBuque affirmed the Commissioner's decision by order dated September 30, 2011. (CP 1-7; CP 44-46).

This timely appeal was filed on October 28, 2011. (CP 19-53).

IV. ARGUMENT

A. APPELLATE REVIEW OF THE SUPERIOR COURT'S FINAL ORDER AFFIRMING THE COMMISSIONER'S DECISION REQUIRES APPLICATION OF THE STANDARDS OF THE ADMINISTRATIVE PROCEDURE ACT TO THE RECORD BEFORE THE AGENCY.

The Court of Appeals sits in the same position as the Superior Court in reviewing an Employment Security Department Commissioner's decision and applies "the standards of the Administrative Procedure Act ("APA") to the record before the agency." Honesty in Environmental Analysis & Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Board, 96 Wn. App. 522, 526, 979 P.2d 864 (1999). Only the Commissioner's decision is reviewed, not the administrative law judge's decision or the superior court ruling. Verizon Northwest, Inc. v. Washington

Employment Security Dept., 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

The Commissioner's legal determinations are judicially reviewed using the APA's "error of law" standard, which permits the Court "to substitute [its] view of the law for that of the Commissioner." Id., 164 Wn.2d at 915; RCW 34.05.570(3)(d). An agency's interpretation or application of the law is reviewed *de novo*. HEAL, *supra*. at 526. An agency's findings of fact are upheld if, when viewed in light of the whole record, substantial evidence supports them. William Dickson Co. v. Puget Sound Air Pollution Control Agency, 81 Wn. App. 403, 411, 914 P.2d 750 (1996).

B. THE COMMISSIONER'S DECISION SHOULD BE REVERSED BECAUES THE ESD FAILED TO AFFORD MS. MORRIS HER RIGHT TO TELL HER SIDE OF THE STORY IN AN INVESTIGATIVE INTERVIEW PRIOR TO ISSUING ITS DETERMINATION NOTICE.

The Commissioner's decision provides in pertinent part as follows:

Although the claimant did not timely receive the Determination Notice Issued on April 7, 2010, she was provided a copy of it after she called the Department in July and made inquiry. She received her copy of the Determination Notice on July 20,

2010. The claimant's appeal rights are set forth therein.... [....]

The claimant did not file her appeal until September 7, 2010, a month and one half after she received the Determination Notice. This delay is a substantial delay, and requires a compelling reason to be deemed excusable. Wells v. Employment Security Dep't, 61 Wn. App. 306, 809 P.2d 1386 (1991). The reasons put forth by the claimant for the substantial delay in the filing of her appeal are not so compelling as to excuse the delay of a month and a half.

(CR 194).

The Commissioner's decision ignores the undisputed fact that Ms. Morris also failed to timely receive the ESD's March 23, 2010 Overpayment Advice of Rights ("AOR") notice until July 20, 2012. (CR 23; 46-47; 59-60). The AOR notice affords claimants who the department believes to have been paid "too much in unemployment benefits" the right to an investigatory interview at which the claimant may present evidence to tell her side of the story prior to the ESD making a determination and issuing a determination notice. (CR 46). The March 23, 2010 AOR gave Ms. Morris until April 2, 2010 (*i.e.*, 10 days), to request an investigatory interview.

In response to Ms. Morris' July 19, 2010 phone call, "Chris" in the Special Investigations Unit mailed her *both* the March 23,

2010 AOR notice and the April 7, 2010 determination notice. (CR 59-60). There was no information provided to Ms. Morris as to when she could exercise her right to the investigatory interview to tell her side of the story prior *before* the ESD made a determination to include in its determination notice. Since both notices were received by Ms. Morris on July 20, 2010, Ms. Morris was effectively denied of her right to the required investigatory interview.⁹

1. The Commissioner's decision should be reversed because the ESD'S failure to follow its own prescribed procedure resulted in an unlawful decision-making process.

The ESD's AOR notice sets forth a procedure whereby a claimant who is suspected of receiving an overpayment of unemployment benefits has the right to request an investigatory interview so long as the interview is requested within 10 days of the date of the AOR. (CR 46). This procedure permits the ESD to consider the claimant's side of the story *before a determination is made and a determination notice issued*.

⁹ "Chris," the investigator who presumably would have the duty to provide Ms. Morris an investigatory interview, is the ESD employee who sent the AOR notice and the determination notice to Ms. Morris at the same time. She made no effort to afford Ms. Morris with a *meaningful* notice of her right to an interview, and instead told her that her only recourse was to file a "late appeal."

Aarin Morris was denied the right to an investigatory interview when the ESD issued the AOR on the same day that it issued the determination notice, viz. July 19, 2010. The ESD's failure to afford Ms Morris with the opportunity to tell her side of the story at an interview constituted an agency failure to follow its own established procedure and the failure in an unlawful decision-making process in her case. The Court should therefore reverse the Commissioner's decision pursuant to RCW 34.05.570(3)(c).¹⁰

2. The Commissioner's decision should be reversed because the ESD's failure to afford Ms. Morris an investigatory interview was a denial of her right to due process of law.

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. Mathews v. Eldridge, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). The interest of an individual in continued receipt of government benefits to which he is entitled is a statutorily created property interest protected by

¹⁰ RCW 34.05.570(3)(c) provides: "The Court shall grant relief from an agency order in an adjudicative proceeding ... if it determines that ... [t]he agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure.

the due process clauses of the Fifth and Fourteenth Amendments.

Id., 424 U.S. at 332.

In Mathews, the Supreme Court held that a full evidentiary hearing was not required prior to the termination of social security disability benefits because the fiscal and administrative burdens outweighed any countervailing benefits. The Court held that:

[P]rior decisions indicate that identification of the specific dictates of 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.

Id., at 334-35.

The pre-termination procedures that were afforded by the agency were described by the Mathews Court as follows:

All that is necessary is that the procedures be tailored, in light of the decision to be made, to "the capacities and circumstances of those who are to be heard," Goldberg v. Kelly, 397 U.S. at 268-269 (footnote omitted), to insure that they are given a meaningful opportunity to present their case. *In assessing what process is due in this case, substantial weight must be given to the good faith judgments of the individuals charged by Congress with the administration of social welfare programs that the procedures they have provided assure fair*

consideration of the entitlement claims of individuals. [citation omitted]. This is especially so where, as here, the prescribed procedures not only provide the claimant with an effective process for asserting his claim prior to any administrative action, but also assure a right to an evidentiary hearing, as well as to subsequent judicial review, before the denial of his claim becomes final. [citation omitted].

Mathews, 424 U.S. at 339 (emphasis supplied).

The “prescribed procedures” that provided the claimant in Mathews “with an effective process for asserting his claim *prior to any administrative action*” were as follows:

The detailed questionnaire which the state agency periodically sends the recipient identifies with particularity the information relevant to the entitlement decision, and the recipient is invited to obtain assistance from the local SSA office in completing the questionnaire. More important, the information critical to the entitlement decision usually is derived from medical sources, such as the treating physician. Such sources are likely to be able to communicate more effectively through written documents than are welfare recipients or the lay witnesses supporting their cause. The conclusions of physicians often are supported by X-rays and the results of clinical or laboratory tests, information typically more amenable to written than to oral presentation. [citation omitted].

A further safeguard against mistake is the policy of allowing the disability recipient's representative full access to all information relied upon by the state agency. In addition, prior to the cutoff of benefits, the agency informs the recipient of its tentative assessment, the reasons therefor, and provides a summary of the evidence that it considers most relevant. *Opportunity is then afforded the recipient to*

submit additional evidence or arguments, enabling him to challenge directly the accuracy of information in his file, as well as the correctness of the agency's tentative conclusions. These procedures, again as contrasted with those before the Court in Goldberg, enable the recipient to "mold" his argument to respond to the precise issues which the decisionmaker regards as crucial.

Mathews, 424 U.S. at 345-46.

In general, under Mathews "something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." Cleveland Board of Education v. Loudermill, 470 U.S. 532, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985). Loudermill held as follows:

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 a fundamental due process right.

Id., 470 U.S. at 546.

In the instant case, the only prescribed procedure that the Employment Security Department afforded to Ms. Morris and other claimants who ESD believes to have been overpaid is the right to an investigatory interview at which the claimant obtain copies of relevant ESD documents and present his or her own evidence. (CR 46). To be constitutionally meaningful, this procedure must

precede the ESD's determination and its issuance of a determination letter.

Here the ESD failed to afford Ms. Morris the opportunity to participate in an investigatory interview. The ESD's procedure of depriving Ms. Morris of this constitutionally required pre-determination procedure violates the Due Process Clause of the Fourteenth Amendment and is unconstitutional as applied to her and to those who are similarly situated. The Court should therefore reverse the Commissioner's decision pursuant to the Fourteenth Amendment and RCW 34.05.570(3)(a).¹¹

C. THE COMMISSIONER'S DECISION SHOULD BE REVERSED BECAUSE THE DETERMINATION NOTICE THAT ESD BELATEDLY ISSUED TO MS. MORRIS WAS NOT REASONABLY CALCULATED, UNDER ALL THE CIRCUMSTANCES, TO APPRISE HER OF A DEADLINE FOR FILING HER "LATE APPEAL."

Due process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their

¹¹ RCW 34.05.570(3)(a) provides: "The Court shall grant relief from an agency order in an adjudicative proceeding ... if it determines that ... [t]he order ... or rule on which the order is based, is in violation of constitutional provisions or as applied.

objections." Kustura v. Dept. of Labor & Industries, 142 Wn. App. 655, 675-76, 175 P.3d 1109 (2008).

The determination notice that the ESD belatedly mailed to Ms. Morris on July 19, 2010 was not "reasonably calculated, under all of the circumstances" to afford her an opportunity to present her objections because it was not reasonably calculated to apprise Ms. Morris of the deadline date for filing an appeal. (CR 43). The notice, which was dated April 7, 2010, ambiguously stated that Ms. Morris had "30 days to file [her] appeal" but did not state the date when the 30 day period began to run. It further cryptically stated that Ms. Morris' appeal had to be "received or postmarked by 05/07/2010" – an impossibility given that this was 2 and ½ months prior to the date the ESD mailed the notice.

A notice may sometimes past constitutional muster under the Due Process Clause if it "would put a reasonable person on notice that further inquiry is required." Kustura, 142 Wn.2d at 676 (discussing cases holding that there is no due process right to unemployment notices in Spanish). The determination notice in the instant case was totally confusing to Ms. Morris and her confusion was exacerbated by the process entailed by the pending appeal August 19, 2010 hearing on her appeal in the first ESD case. (CR

55-57). The confusion caused by the notice prompted Ms. Morris to repeatedly contact various units of the ESD in an effort to find out *inter alia* the deadline date for filing her appeal. (CR 60).

Despite Ms. Morris' efforts, *no one* that she contacted at ESD would apprise her of the date that the agency considered to be deadline for the filing of the appeal. The fraud investigator named "Chris" who spoke to Ms. Morris on July 19 and 20, 2010 would only say that Ms. Morris should look over the AOR notice and the determination notice and file a "late appeal." The investigator not only failed to inform Ms. Morris of the deadline for filing a "late appeal," she created more confusion by writing "*Late Appeal*" on the April 7, 2010 determination notice that discussed only how to file an "appeal" that was not late. (CR 117; CR 41).

The determination notice that was belatedly mailed out on July 19, 2010 was not "reasonably calculated" to apprise Ms. Morris of the deadline for filing her appeal. The EDS routinely provides deadline dates to claimants within its notices, as evidenced by the July 23, 2010 AOR notice and the April 7, 2010 determination notice in this case. (CR 46; CR 43). The EDS refused to provide Ms. Morris with what it considered to be deadline for filing a "late appeal" despite her diligence in attempting to learn the deadline.

The notice provided to Ms. Morris was defective was insufficient to meet the standard required by the Fourteenth Amendment.

D. THE COMMISSIONER'S DECISION SHOULD BE REVERSED BECAUSE HER REASONS FOR FILING HER APPEAL 46 DAYS AFTER THE JULY 19, 2010 MAILING OF A DEFECTIVE DETERMINATION NOTICE ARE COMPELLING REASONS TO EXCUSE ANY DELAY UNDER THE UNIQUE CIRCUMSTANCES OF THIS CASE.

The Commissioner's decision should be reversed because Ms. Morris' reasons for filing her appeal 46 days after the July 19, 2010 mailing of a defective determination notice and the subsequent behavior of the agency in refusing to apprise Ms. Morris of the deadline date for filing her appeal (as it ostensibly does with other claimants) as discussed in subsection IV.C of this brief, *supra.*, are compelling reasons justifying any delay in filing the appeal on September 3, 2010.

E. THE COURT SHOULD ORDER THE ESD TO REFUND TO MS. MORRIS ALL OF THE FUNDS IT HAS OBTAINED FROM HER THROUGH ITS COLLECTION ACTIONS.

Ms. Morris submits that, in the event that she is successful on this appeal, the Court should order the ESD to refund all of the funds it has obtained from her through its collection efforts.

V. CONCLUSION

For all of the foregoing reasons, appellant Aarin Morris asks the Court to reverse the Employment Security Department Commissioner's decision dated December 30, 2010. She asks the Court to remand the case to the agency with a directive to provide Ms. Morris with the rights that it described in the July 23, 2010 AOR (CR 46) so that it will be able to consider her side of the story before making its preliminary determination in this matter. In the alternative, Ms. Morris asks the Court to remand the case to the ESD with a directive to issue Ms. Morris another determination notice that informs her of her appeal rights in a clear manner. Finally, Ms. Morris asks the Court to order the ESD to refund to her all of the money that it has collected from her at any time during the pendency of this case.

DATED this 14th day of September, 2012.



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Attorney for Appellant Aarin Morris

AARIN MORRIS,

Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF
EMPLOYMENT SECURITY,

Respondent

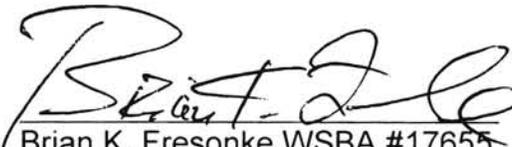
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DECLARATION OF SERVICE
OF BRIEF OF APPELLANT

I certify that I personally hand-delivered a copy of the Brief of Appellant to the Attorney General o the Washington, Licensing & Adminstrative Law Division and Assistant Attorney General April Benson Bishop, attorneys for respondent State of Washington Department of Employment Security, at 800 Fifth Aveune, Suite 2000, Seattle, WA 98104, on September 14, 2012.

I HEREBY CERTIFY under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 14th day of September, 2012.


Brian K. Fresonke WSBA #17655
Attorney for Appellant Aarin Morris

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