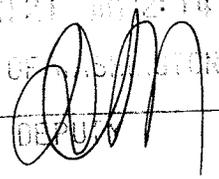


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STATE OF WASHINGTON
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No. 35749-6-II

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DEPARTMENT OF EMPLOYMENT SECURITY, ET AL

Respondent

v.

STEVEN P. GRAVES

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY

BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

A. Assignments of Error

- 1) The trial court erred when it failed to find that the determination of the designee of the Commissioner granted the claimant a fair hearing where default was entered against the claimant.
- 2) The trial court erred when it failed to find that the claimant obtained a property interest in the benefits he received which required compliance with procedural due process requirements for recapture of the benefits.
- 3) The trial court erred when it failed to find that the procedural regulations of the agency as interpreted by the designee of the Commissioner concerning fair hearings violated procedural due process afforded the claimant where benefits paid were sought to be recovered.

B. Issues on Appeal pertaining to Errors

- 1) Did the trial court err when it failed to find that the default determination of the designee of the Commissioner afforded the claimant an opportunity for fair hearing?
- 2) Does an individual claimant who has received unemployment compensation benefits paid under Chapter 50.20 RCW acquire a property interest in those benefits once paid?
- 3) Where an agency has adopted a regulation purporting to establish procedures for determining when a timely filing or appearance for appeal is made, may the agency interpret the regulation in a manner that violates due process protection clauses of the State and United States Constitution?

II. STATEMENT OF THE CASE

A. Procedural Development:

This appeal arises from the entry of an Order affirming the administrative decision of the Designee of the Commissioner of Employment Security by the Honorable Richard D. Hicks on 8 December 2006. [CP 49-51] Judge Hicks considered, in a hearing conducted on the 8th of December, 2006, the Petition for Review of Steven P. Graves, a recipient of unemployment compensation benefits. Judge Hicks denied the appeal of Mr. Graves from the administrative ruling that ended his quest for a fair hearing before the Commissioner of Employment Security of the State of Washington.

On 23 March 2006, Steven P. Graves, timely filed a Petition for Review [CP 4-18] to the Thurston County Superior Court from the determination made by the Review Judge of the Commissioner's Review Office that had been entered on 24 February 2006 in Review Nos. 2006-0516 and 2006-0517 (from an underlying decision by an Administrative Law Judge in Docket No. 04-2006-05005 and 04-2006-05045). [CP 8-10] The ruling by the Review Judge confirmed the underlying decision of the Administrative Law Judge entered on 8 February 2006. The Administrative Law Judge had entered a "default judgment" due to the failure of Mr. Graves to appear at the hearing scheduled to hear his appeal

and ordered Mr. Graves to repay Twelve Thousand, Four Hundred Dollars (\$ 12,400.00)¹ and to repay Four Hundred and Ninety Six Dollars (\$ 496.00)² in conditional benefits he had received as an overpayment as determined by the agency. Mr. Graves had filed an appeal from the agency determination that he should repay the listed sums as an overpayment of unemployment compensation benefits available to him under Chapter 50.20 RCW.

In his Petition to the Superior Court, Mr. Graves asserted that decision of the Administrative Law Judge, confirmed by the Review Judge acting as the designee of the Commissioner, was contrary to law and that his own conduct did not form the basis for disqualification under RCW 34.05.440(2). He further contended that it was error to determine that he did not show good cause for failing to appear for the hearing scheduled on the 8th of February 2006.

B. Facts Pertaining to Appeal

1) Docket No. 04-2006-05044:

A Determination Notice was issued to Mr. Graves on the 15th of August 2005 which retroactively denied benefits to him pursuant to RCW 50.20.010(1)(a) and RCW 50.20.190 in Docket No. 04-2006-05044. An appeal from the Determination Notice was filed on 13 January 2006 and it

¹ Docket No. 04-2006-05045 [CP 11-12]

² Docket No. 04-2006-05044 [CP 15-16]

was set for hearing on the 8th of February 2006 before an Administrative Law Judge in Spokane, Washington. [CP 13-14] The Determination Notice was sent to an address for Mr. Graves at Apartment 6102, 1400 SE Fones Road, Olympia, WA 98501-1686. Mr. Graves had moved from Olympia to the State of Alaska during the last week of July and first week of August 2005. He sent a letter to the agency on 6 September 2005 advising the agency of his new address.

2) Docket No. 04-2006-05045:

A Determination Notice was issued to Mr. Graves on the 24th of August 2005 which denied benefits to him pursuant to RCW 50.20.010(1)(c), 50.20.240 and RCW 50.20.190 in Docket No. 04-2006-05045. An appeal from the Determination Notice was filed on 13 January 2006 and it was set for hearing on the 8th of February 2006 before an Administrative Law Judge in Spokane, Washington. [CP 9]

3) The Hearing:

The hearing took place on 8 February 2006. The Administrative Law Judge noted that the Appellant (Mr. Graves) failed to appear at the hearing or to make a timely request for a postponement showing good cause as required by WAC 192-04-120. On that date, a Default Order was entered under the provisions of RCW 34.05.440 in Docket No. 04-2006-

05044. A similar Default Order was entered in Docket No. 04-2006-05045 for the same reason. [CP 8]

4) Actions by Appellant:

Thereafter, Mr. Graves issued a letter under date of 13 February 2006 [Agency Record. Pg. 40 of 45] which was received by the agency on 17 February 2006 and asserted that he had called on 9 February 2006 to the number identified in the Notice of Hearing as required only to learn that the hearing had been set for the previous day (the 8th of February 2006), and that he had mixed up the dates on his calendar. He requested the opportunity for rescheduling the hearing date for both Docket Numbers at issue. He issued a letter under date of 10 February 2006 which was received by the agency on 15 March or 16 March 2006³ requesting a reconsideration of his appeal of “Unemployment Benefits” he had received while living in Washington State. The letter under date of 10 February 2006 from Mr. Graves requested a “Reconsideration” of his appeal. [CP 39-42]

5) Review Judge Decision:

On the 24th of March 2006, the Review Judge issued an Order Dismissing the Petition for Reconsideration [CP 43-45] which indicated that the Decisions of the Commissioner issued by the Review Judge on 24

³ The face of the letter in question has two date stamps from the Commissioner’s Review Office.

February 2006 were not subject to a written request for reconsideration postmarked on 13 March 2006 and that because the request did not fall within the ten day period for filing of a Motion for Reconsideration, under WAC 192-04-190, it was not timely filed.

6) Petition to Superior Court:

The Petition for Review to the Superior Court was filed on 23 March 2006, twenty-seven days after the Order Dismissing the Petition for Reconsideration was issued. Mr. Graves did not have the opportunity to challenge the underlying determination of the agency on the merits since his appeal was dismissed on procedural grounds.

III. SUMMARY OF ARGUMENT

The Appellant contends that because the purpose of the Unemployment Benefits Program in the State of Washington is to temporarily help those persons financially unemployed through no fault of their own⁴ he should have been granted a postponement of his hearing. The unemployment benefits law is a remedial statute that should be interpreted liberally.⁵ The Appellant contends that he demonstrated good cause and because “default judgments” are not favored as a means of resolution of contested matters, the entry of the “default judgment” was

⁴ Wallace v. Department of Employment Security, 51 Wn.App. 787, 755 P.2d 815 (1988)

⁵ Peet v. Mills, 76 Wash. 437, 136 P. 685 (1913)

contrary to the public policy of the State of Washington and the purpose of the Unemployment Benefits Program.

The Appellant contends that because he was subjected to entry of a “default judgment” that precluded his ability to contest on the merits the recoupment of funds paid to him in benefits, he was denied his substantive procedural due process rights and that he was subjected to a lack of equal protection in the law. Here, the benefits had been paid for an extended period of time and it was not until a substantial sum had been paid that the agency made the unilateral determination that they had been paid unlawfully.

Second, the agency offered to the trial court a series of what is claimed was precedential determinations in an effort to overcome the onerous result of the “default judgment.” These decisions cited to the trial court were distinguishable on their facts although the result was the same. What the decisions actually demonstrate is that the agency had exercised broad discretion to interpret the administrative code regulation.

The Appellant contends that he gained a property interest in the benefits he received and that the agency was required to establish a procedural process for recoupment of benefits that permitted him to contest the unilateral determination of the agency on the merits. He

contends that the existing administrative process denied him his substantive due process.

The Appellant contends that he demonstrated good cause for failing to appear for the hearing and that the denial of his right to a hearing on the merits confounded his property rights without due process.

IV. ARGUMENT

1) Did the trial court err when it failed to find that the default determination of the designee of the Commissioner afforded the claimant an opportunity for fair hearing?

The Unemployment Benefits law of the State of Washington is a remedial statute that should be interpreted in a liberal fashion. The public policy of the State as set forth in RCW 50.01.010 was declared, in pertinent part, to be:

The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.

The operation of the statute should be applied in a liberal fashion to enhance the ability of disfavored persons who had been employed to obtain benefits. Here, the Appellant was initially qualified for the benefits

by agency action. When the legislature mandates liberal construction in favor of the worker, the court should not narrowly interpret provisions to the worker's disadvantage when the statutory language does not suggest that such a narrow interpretation was intended. Lighle v. Dep't of Labor & Indus., 68 Wn.2d. 507, 413 P.2d 814 (1966); Shoreline Community College Dist. No. 7 v. Employment Sec. Dep't, 120 Wn.2d 394, 406, 842 P.2d 938 (1992).

The interpretation of the statute requires that any doubt about the meaning of a statute should be resolved in favor of the type of claimant for whose benefit the law was passed. Towle v. Washington State Department of Fish and Wildlife, 94 Wn.App. 196, 971 P.2d 591 (1999). Rules and statutes governing procedure must be interpreted as requiring substance to prevail over form. First Federal Savings and Loan Association of Walla Walla v. Ekanger, 22 Wn. Appl 938, 593 P.2d 170 (1979). The Unemployment Compensation Statute, as adopted, requires that the title be “liberally construed for the purport of reducing involuntary unemployment and the suffering caused thereby to the minimum.” Ekanger, Supra. This means that the regulations adopted under the delegation of authority to the agency should be subject to the same liberal interpretation as would the statute. The Appellant was such a claimant and was entitled to resolution of any doubts in the regulations or law in his favor.

Here, the regulation relied upon by the agency to enter a default order that required the Appellant to reimburse the agency a total of approximately \$ 12,900.00 authorized the Administrative Law Judge to enter a default order. The default order could be set aside if a petition for review was filed and the claimant complied with WAC 192-04-170(1). Compliance is gained by filing a petition within thirty days of the date of mailing or delivery of the default and if there was good cause shown for failure to appear or to request a postponement prior to the scheduled time for hearing. WAC 192-04-170(1). The regulations also provide that a reconsideration may be requested if it is made in writing and filed within ten days of the entry of the Order ending the administrative proceeding before the Administrative Law Judge. WAC 192-04-190(1).

Here, the Appellant did send a letter explaining his failure to phone-in (appear) and requested a postponement that was issued by him on 13 February 2006 [Agency Record, Pg. 40 of 45] and received by the agency on the 16th of February 2006. This submission requesting – “I am writing to reschedule if I can please...” was not construed as a request for reconsideration. Indeed, the agency determined that the letter it allegedly received on the 16th of March 2006, one month later, was the actual “reconsideration” request or request for review. Certainly, within the March letter, there is specific reference to the requested “reconsideration”.

The Review Judge determined that the second letter arrived after the thirty day period had passed and denied the reconsideration and confirmed the Determination.

The Certificate of Service provided with the DEFAULT ORDER, does provide information about the ability to Petition for Review Rights and the date by which such a Petition for Review must be filed. However, it does not include any information concerning the procedure for a reconsideration request related to the decision. Further, the Certificate of Service while expressing time deadlines for the filing of a Petition for Review does not advise the recipient of the specific requirements for the form of the Petition set forth in WAC 192-04-170(4). There is no reference in the Certificate of Service to the administrative code provision. And, the last section of that code provision, subsection (5) provides:

Any argument in support of the petition for review or in reply thereto not submitted in accordance with the provisions of this regulation shall not be considered in the disposition of the case absent a showing that failure to comply with these provisions was beyond the reasonable control of the individual seeking relief.

This provision inhibits the ability of a *pro se* claimant to assist him or herself because it is unlikely that such a claimant would be sophisticated enough to know when they have complied with the provisions of the administrative code and filed in accord with that code.

The code provision authorizing a Petition for Review made within the thirty day period (WAC 192-04-190) provides in subsection (2) that no reconsideration will take place unless there was (a) clerical error, or (b) “the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant to WAC 192-04-170.”

There is no definition or standard set forth in either of the cited code provisions that informs a claimant what constitutes “good cause” where a Petition for Review or a Petition for Reconsideration is filed. WAC 192-04-180 provides, in pertinent part that:

Any interested party aggrieved by the entry of an order of default may file a petition for review from such order by complying with the filing requirements set forth in WAC 192-04-170: Provided, however, That the default of such party shall be set aside by the commissioner only upon a showing of good cause for failure to appear or to request a postponement prior to the scheduled time for hearing.

The agency has established a set of standards to be used where an untimely appeal is made; but, it has not done so for a Petition for Reconsideration. WAC 192-04-090 provides:

1) The following factors shall be considered in determining whether good cause exists under RCW 50.32.075⁶ for the late filing of an appeal, petition for hearing or petition for review:

- (a) The length of the delay,
- (b) The excusability of the delay, and

⁶ “ For good cause shown the appeal tribunal or the commissioner may waive the time limitations for administrative appeals or petitions set forth in the provisions of this title.”

(c) Whether acceptance of the late filed appeal, petition for hearing, or petition for review will result in prejudice to other interested parties, including the department.

The determination of whether good cause exists to excuse an untimely appeal is a mixed question of law and fact. Once the facts of delay are established, review is *de novo*, and the court considers (1) the length of the delay; (2) the prejudice to the parties and (3) the excusability of the error. Hanratty v. Employment Security, 85 Wn. App. 503, 933 P.2d 428 (1997). Here, the facts of delay are established, the Appellant mixed up the date for hearing on his calendar. Consequently, if the standard to determine “good cause” for late filing of an appeal is applied in this circumstance, one can see that 1) there was no lengthy delay, there was certainly no prejudice to the parties involved in the appeal (the Appellant and the Respondent) and there was a credible error committed by the Appellant.

In this instance, the Appellant was not afforded a fair hearing on the merits to challenge the retroactive denial of substantial benefits authorized under law. Due to a procedural standard, interpreted by the very agency seeking to recoup the funds, the Appellant was denied a fair hearing. While it is true that he did not appear by phoning in on the day scheduled for the hearing, it is not rebutted that he did phone in on the day following the scheduled hearing and that he sought an extension or a

newly scheduled hearing within a day of his phone call. That very request was received in writing by the agency approximately one week after the date schedule for the hearing.

The Appellant contends that the trial court erred when it found that the Appellant had been afforded an opportunity for a fair hearing. The opportunity for hearing must be actual and must meet the requirements of substantive due process. Here, the agency was disinclined to grant substantive due process although it apparently possessed the discretion at the hearing level or at the review level to do so. When hearings are required by administrative agencies, they must be adequate and fair. State ex rel. Hood v. Washington State Personnel Board, 6 Wn.App.872, 497 P.2d 187 (1972), opinion affirmed on appeal, 82 Wn.2d 396, 511 P.2d 52.

2) Does an individual claimant who has received unemployment compensation benefits paid under Chapter 50.20 RCW acquire a property interest in those benefits once paid?

Property rights are created by state law.⁷ "A protected property interest exists if there is a 'legitimate claim of entitlement' to a specific benefit." Goodisman v. Lytle, 724 F.2d 818, 820 (9th Cir. Wash. 1984) (quoting Bd. of Regents v. Roth, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L.

⁷ A due process property interest exists only if a person has a legitimate claim of entitlement to a benefit. Such claims may arise as a matter of law or by contract. Ritter v. Board of Commissioners, 96 Wn.2d 503, 509, 637 P.2d 940 (1981).

Ed. 2d 548 (1972)). Here, the agency initially authorized payments of unemployment compensation benefits to the Appellant because he demonstrated he was eligible. Indeed, the agency was seeking to recoup the monies paid to the Appellant through the determination notice process it instituted. In sum, it recognized that the Appellant had a property interest in the benefits he had received.

3). Where an agency has adopted a regulation purporting to establish procedures for determining when a timely filing or appearance for appeal is made, may the agency interpret the regulation in a manner that violates due process protection clauses of the State and United States Constitution and enter a default judgment?

The long held and overriding policy of the State of Washington is that default judgments are disfavored in the law because it is the policy of the law that controversies be determined on the merits rather than by default. Farmers Insurance Company of Washington v. Waxman Industries, Inc., 132 Wn.App. 142 130 P.3rd 874 (2006). A default judgment is one of the most drastic actions a court may take to punish disobedience to its commands. This policy is balanced against the necessity of having a responsive and responsible system which mandates compliance with judicial summons. Shepard Ambulance, Inc. v. Helsell, 95 Wn.App.231, 237-38, 974 P.2d 1275 (1999).

The fundamental principle in balancing these competing policies is whether or not justice has been done. “Justice will not be done if hurried defaults are allowed any more than if continued delays are permitted.” Griggs v. Averbach Realty, Inc, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979).

Here, the Appellant, Mr. Graves, contends that justice has not been done. He has yet to contest any determination by the agency on the merits. His failure to appear for the telephonic hearing on 8 February 2006 was mitigated by his contact with the same Office of Administrative Hearings on 9 February 2006 wherein he explained he had mixed up the date of the hearing on the merits. He followed that shortly by seeking a postponement and then reconsideration of the default determination made by the Administrative Law Judge and the Review Judge.

The agency responded in the written and oral argument at hearing before the trial court that good cause was not showed as was identified in other administrative hearings concerning a lack of appearance at a hearing on the merits. This argument was based upon its interpretation of the regulation it had adopted. However, there is no specific standard that operates to limit the discretion of the tribunal when it considers whether to conclude an appeal by entering a default judgment. There is no definition in the operative administrative regulation concerning entry of default.

The due process clause of the Fifth Amendment contains a substantive component, sometimes referred to as substantive due process, which bars certain arbitrary governmental actions, regardless of fairness procedures used to implement them, thus serving to prevent government power from being used for purposes of oppression. Watson v. Perry, 918 F.Supp. 1403, affirmed Holmes v. California Army National Guard, 124 F.3rd 1126 (1996). To show a denial of substantive due process, the claimant must show conduct that is arbitrary and unreasonable. Grader v. City of Lynnwood, 53 Wn.App. 431, 767 P.2d 952 (1989). Due process is a protection against arbitrary action by the State. If a person has his day in court, he has not been deprived of due process. State v. Malone, 9 Wn.App. 122, 511 P.2d 67 (1973). Due process of law is a flexible concept. At its core is a right to be meaningfully heard, but its minimum requirements depend upon what is fair in the particular context. In Re Detention of Stout, 159 Wn.2d 357, 370, ____ P.3d ____ (January 2007).

Here, the Appellant had no meaningful opportunity to be heard concerning the merits of the claim that he was not eligible for unemployment compensation. The agency initially approved the payment of benefits and then, unilaterally, concluded that the Appellant was not eligible for benefits and determined that all benefits paid to the Appellant should be repaid. The appellant contends that the action of the

Administrative Law Judge and the Review Judge were arbitrary and unreasonable.

In subjecting a regulation to substantive due process scrutiny for reasonableness, a three-prong test is applied. That inquiry includes a determination whether 1) the regulation aims to achieve a legitimate public purpose, 2) whether the means adopted are reasonably necessary to achieve that purpose, and 3) whether the regulation is unduly oppressive on the individual. If the regulation fails to meet any of the three tests, it is subject to invalidity. Robinson v. City of Seattle, 119 Wn.2d 34, 830 P.2d 318 (1992).

The Appellant challenges WAC 192-04-180⁸. The regulation in question is the regulation that authorizes the agency (through the Administrative Law Judge or the Review Judge) to enter a default order without any standards for determining when such an order may be entered, and at its discretion interpret what “good cause” may be where a Petition

⁸ The presiding administrative law judge may dispose of any appeal or petition for hearing by an order approving a withdrawal of appeal, an order approving a withdrawal of a petition for hearing, a consent order or an order of default. There shall be no petition for review rights from an order approving a withdrawal of appeal, an order approving a withdrawal of a petition for hearing or a consent order.

Any interested party aggrieved by the entry of an order of default may file a petition for review from such order by complying with the filing requirements set forth in WAC 192-04-170: Provided, however, That the default of such party shall be set aside by the commissioner only upon a showing of good cause for failure to appear or to request a postponement prior to the scheduled time for hearing. In the event such order of default is set aside, the commissioner shall remand the matter to the office of administrative hearings for hearing and decision.

for Review or Reconsideration from an order of default ending the opportunity for appeal on the merits is made. Further, the Appellant contends that WAC 192-04-170(5) while authorizing the filing for a Petition for Review does not likewise inform the claimant of what should be included in the provisions of the Petition to be acceptable. Each of these regulations fails the due process test and should be determined to be invalid.

WAC 192-04-180 may achieve compliance with the first prong of the test. It appears to establish a means of accomplishing a legitimate public purpose. That purpose is to bring administrative proceedings arising under the law related to unemployment compensation to a conclusion. However, the means that the regulation has adopted has conveyed to the agency discretion without a standard to determine when “good cause” has been showed or not. The only other test for “good cause” established in the regulatory scheme is the one related to filing of an appeal or petition for review in WAC 192-04-090⁹. That regulation gives some indication of the aspects to be reviewed in any instance where there is a question of “good cause”. It provides for consideration of the length of the delay, the excusability of the delay and whether acceptance of the late pleading would result in prejudice to other parties including the agency.

⁹ It does not address a petition for reconsideration

As was noted above, interpretation of “good cause” presents a mixed question of law and fact. Hanratty, *supra*. Where the due process issue arises comes from the “interpretation” made by the Review Judge that the letter issued by the Appellant on the 13th of February 2006, received on the 15th or 16th of February 2006 constituted a Petition for Review or Reconsideration or not. From the record, it is clear that the Review Judge declined to treat the letter of the Appellant sent under date of 10 February 2006 as a Petition at all. In fact, it appears that the Review Judge essentially ignored the letter. Since the regulation in question, WAC 192-04-180, fails to establish what constitutes or what does not constitute a “Petition” except for the procedural steps set forth in another code provision, the discretionary authority of the Review Judge is unfettered and without applicable standard for the court to test.

WAC 192-04-170, to which reference is made in the questioned administrative regulation, requires¹⁰ more elements for compliance than is

¹⁰ (1) The written petition for review shall be filed by mailing it to the Agency Records Center, Employment Security Department, Post Office Box 9046, Olympia, WA 98507-9046, within thirty days of the date of mailing or delivery of the decision of the office of administrative hearings, whichever is the earlier.

(2) Any written argument in support of the petition for review must be attached to the petition for review and be filed contemporaneously therewith. The commissioner's review office will acknowledge receipt of the petition for review by assigning a review number to the case, entering the review number on the face of the petition for review, and setting forth the acknowledgement date on the petition for review. The commissioner's review office will also mail copies of the acknowledged petition for review and attached argument in support thereof to the petitioning party, nonpetitioning party and their

set forth in the Certificate of Service, PETITION FOR REVIEW RIGHTS sent to each Claimant. The instruction set forth in the Certificate of Service does not even reference WAC 192-04-170 or the administrative code in any manner. Instead it directs that the pleading be sent to a specific address, that it include argument in support of the petition, that the Petition cannot exceed five pages, that the docket number must be included and a FAX transmission is not acceptable.

The one-page letter written by the Appellant on the 13th of February 2006 included all aspects of the direction save the docket number. Indeed, he sent the letter to the appropriate address, identified his

representatives of record, if any.

(3) Any reply to the petition for review and any argument in support thereof by the nonpetitioning party shall be mailed to the Commissioner's Review Office, Employment Security Department, Post Office Box 9046, Olympia, WA 98504-9046. The reply must be received by the commissioner's review office within fifteen days of the date of mailing of the acknowledged petition for review. An informational copy shall be mailed by the nonpetitioning party to all other parties of record and their representatives, if any.

(4) The petition for review and argument in support thereof and the reply to the petition for review and argument in support thereof shall:

(a) Be captioned as such, set forth the docket number of the decision of the office of administrative hearings, and be signed by the party submitting it or by his or her representative.

(b) Be legible, reproducible and five pages or less.

(5) Arrangements for representation and requests for copies of the hearing record and exhibits will not extend the period for the filing of a petition for review, argument in support thereof, or a reply to the petition for review.

(6) Any argument in support of the petition for review or in reply thereto not submitted in accordance with the provisions of this regulation shall not be considered in the disposition of the case absent a showing that failure to comply with these provisions was beyond the reasonable control of the individual seeking relief.

basic claim for consideration (his mix-up on the date) and he identified the result he desired as an outcome.

The Appellant also contends that the regulation did not comport with the third prong of the due process test. The means adopted by the agency were oppressive to the Appellant as a claimant because they did not either identify the administrative code provision that was sought to be enforced, nor did they establish a means for the court to test whether the discretion exercised by the Review Judge was arbitrary or not. Because this is true, the ability of the Appellant to receive due process was ended. Although the regulations do not prescribe the format to be used, the Appellant substantially complied with the requirements established in the regulation. It was for the Review Judge to decide whether the letter of 13 February 2006 would be considered a Petition or not. He made no determination.

The legislature may delegate legislative power if (1) it provides standards that in general terms define what is to be done and the administrative body that is to do it; and (2) procedural safeguards exist to control arbitrary administrative action and abuse of discretionary power. State v. Crown Zellerbach Corp., 92 Wn.2d 894, 900, 602 P.2d 1172 (1979) (citing Barry & Barry, Inc. v. Dep't of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (1972)).

In examining the second prong, the sufficiency of procedural safeguards, the court uses the three-part test set forth in Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976); Morris v. Blaker, 118 Wn.2d 133, 144-45, 821 P.2d 482 (1992) (concept of due process is flexible and calls for procedural protections). This test requires balancing (1) the private interest to be protected, (2) the risk of erroneous deprivation of that interest by the government's procedures, and (3) the government's interest in maintaining the procedures. Morris, 118 Wn.2d at 144-45.

Here, the administrative regulation has the risk of an erroneous deprivation of a claimant's interest through a unilateral discretionary decision made without sufficient procedural safeguards. Here, where the Appellant substantially complied with the Notice provision for Petition for Review, it cannot be gainsaid that the decision of the Review Judge to ignore the letter of 13 February 2006 was subject to the controls established by the regulation to avoid or inhibit arbitrary administrative action. That action denied to the Appellant the right he otherwise would have had to challenge the decision of the Administrative Law Judge to enter the Order on Default, and to establish the merits of his qualification for benefits that the agency, through this process has sought to recoup.

Appellant contends that his substantive due process rights were abridged by the actions of the agency. He was denied his right of Petition, his right to hearing and his right to a judgment on the merits by the application or interpretation of the administrative code provision in an arbitrary manner that denied him the interest in the property he had gained.

V. CONCLUSION

The appeal of Mr. Steven Graves, should be granted. The trial court erred when it determined that the procedure employed by the Administrative Law Judge and the Review Judge acting on the appeal of Mr. Graves before the Department of Employment Security granted him a fair hearing. Indeed, the facts demonstrate there was no actual hearing on the merits at all.

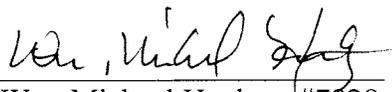
The administrative procedure employed by the agency does not comport with substantive due process. It fails to establish adequate standards for the exercise of discretion in decision making by the Administrative Judge or the Review Judge. The application of the administrative code provisions are oppressive to claimants and deny them their substantive due process under the rule in Mathews v. Eldridge, *supra*.

The appellant had a property interest in the unemployment benefits once they were paid to him. Goodisman v. Lytle, *supra*.

The use of a default judgment to end the appeal of the Appellant violates the basic principles of justice in our civil justice system which requires controversies be resolved on the merits and not by default. Farmers Insurance Company, *supra*. Under the rule in Hanratty, *supra*, there was no lengthy delay, the error of the Appellant was excusable and there would have been no prejudice to the agency if a reconsideration or an appeal hearing had been granted. The Appellant met the only standard of “good cause” established in the administrative code chapter for unemployment compensation appeals.

The Appellant requests that the Court enters judgment in his favor and remand the cause back to the Administrative Law Judge for a hearing on the merits of his contention that he was eligible for and entitled to receive unemployment compensation.

RESPECTFULLY SUBMITTED THIS 20th DAY OF JUNE
2007.


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CERTIFICATE OF SERVICE:

I, Kelsy Vincent, hereby certify that I caused the original and one copy of the Brief of Appellant to be filed with the Courts and copies served on all parties or their counsel of record as follows:

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

Dated this 20th day of June, 2007

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BY  DEPUTY


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