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COURT OF APPEALS
DIVISION II

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NO. 37444-7-II

STATE OF WASHINGTON
BY *[Signature]*

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

JERRY L. DARRAH,

Appellant,

v.

STATE OF WASHINGTON
EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

**BRIEF OF RESPONDENT EMPLOYMENT SECURITY
DEPARTMENT**

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I. INTRODUCTION AND COUNTERSTATEMENT OF THE ISSUE

The Washington Administrative Procedure Act (APA) authorizes the presiding officer at an administrative hearing to enter a default order if a party fails to appear as directed. RCW 34.05.440(2). As stated on the default order, an aggrieved party may file a petition for review of the default order, but it must be received by the Agency Records Center within thirty days of the date the default order was mailed. RCW 50.32.070; WAC 192-04-060(2). The Commissioner may waive the thirty day time limit for “good cause.” RCW 50.32.075. This case presents one issue concerning these procedural provisions:

Whether the Commissioner properly exercised her discretion when she denied Jerry L. Darrah’s (Darrah) petition for review because no good cause existed in the petition to justify a 23-day delay in filing his petition.

II. COUNTERSTATEMENT OF THE CASE

Darrah was discharged by his employer after failing to appear for a scheduled job. AR at 12, 15, 16.¹ The Employment Security Department

¹ The Administrative Record is referenced herein as “AR.” For the court’s convenience, copies of the relevant Commissioner’s orders are attached to this brief in Appendix 1 (default order, AR 19–20; order dismissing petition for review, AR 28–29; and order dismissing petition for reconsideration, AR 44–45).

denied unemployment benefits pursuant to RCW 50.20.060 because Darrah was fired for work-connected misconduct.² AR at 5–6.

Darrah timely requested a hearing on the Department’s decision. AR at 4. The Department mailed him a “Notice: Appeal Filed” which stated that the Office of Administrative Hearings (OAH) would mail a notice of hearing, date and time of hearing, name of assigned Administrative Law Judge (ALJ), copy of proposed exhibits, and a booklet titled “How to Prepare and Present Your Case” to the interested parties. AR at 3. The Notice stated, “If you have a name, address or telephone number change prior to the hearing date, please contact the OAH office listed on the next page and your TeleCenter.” AR at 3 (emphasis in original).

OAH mailed notice of a May 4, 2007, hearing to the interested parties on April 24, 2007. AR at 1. The OAH notice said, “**The appellant’s failure to appear will result in a Default.**” AR at 1 (emphasis in original). Darrah did not appear at the hearing and the ALJ issued a default order on May 4, 2007, affirming the Department’s decision to deny Darrah benefits. AR at 19.

² When determining whether a claimant has been discharged for gross misconduct, the Department uses the definition found in RCW 50.04.294(1)(d) which defines misconduct as including “repeated and inexcusable absences.”

Darrah's petition for review of the default order claimed he did not receive the notice of hearing until May 7, 2007, because a former landlord was withholding his mail. AR at 22. There is no indication in the record that Darrah notified the OAH of a change in address pursuant to the regulation requirement in WAC 192-04-070³ prior to the notice of hearing, and all correspondence in this appeal prior to the petition for review were mailed to the same address: 131 Craterview Dr., Silver Creek, WA 98585-9714. AR at 12 (discharge questionnaire, 2/15/07), 5 (Department's determination notice, 3/20/07), 4 (appeal of Department's decision, 4/2/07), 3 (Notice: Appeal Filed, 4/2/07), 2 (Notice of Hearing, 4/24/07), and 20 (default order, 5/4/07).

The last day a petition for review of the default order could be timely filed at the proper address was June 4, 2007.⁴ AR at 20. The default order clearly set forth the mailing address and date for filing the petition for review:

This Order is final unless a written Petition for Review is addressed and mailed to:

³ "Once an appeal or petition for hearing has been filed, any interested party must notify the [OAH] of any change of mailing address.... Any interested party who fails to comply with this regulation will not be deemed to have good cause for failure to appear at a hearing or for late filing of a petition for review[.]" WAC 192-04-070.

⁴ The record does not contain the date that the incorrectly addressed petition for review was postmarked.

**Agency Records Center
Employment Security Department
PO Box 9046
Olympia, Washington 98507-9046**

and postmarked on or before **June 4, 2007**.

...

Do not mail your Petition to any location other than the Agency Records Center.

AR at 20 (emphasis in original).

Darrah incorrectly mailed his petition for review to the ALJ in Spokane instead of the Agency Records Center in Olympia. AR at 25, 34. It was returned to Darrah⁵, mailed to the Agency Records Center with slight modifications, and received by the Agency Records Center on June 29, 2007, over 23 days after the thirty-day time limit. AR at 22, 28.

The petition received by the Agency Records Center includes no explanation for its late filing. AR at 22–24. Rather, it provides eleven reasons Darrah disagrees with his employer’s decision to discharge him. The Commissioner⁶ concluded there was no basis in the record for finding the 23-day delay was based on an excusable reason, and that she was

⁵ The incorrectly addressed petition has a handwritten “RET 6/20” on its face. AR at 25. The record does not indicate on what date OAH returned the petition to Darrah or what date Darrah received the petition.

⁶ The Commissioner has delegated decision-making authority to Commissioner Review Judges. WAC 192-40-060. For simplicity’s sake, this brief will refer throughout solely to the Commissioner.

required by RCW 50.32.075 to dismiss Darrah's petition as late filed without good cause.⁷ AR at 28.

Darrah's incorrectly addressed petition is stamped "RECEIVED" on June 5, 2007 by the OAH in Spokane, "RECEIVED" on July 2, 2007 by the Employment Security Department Commissioner's Review Office, and has a handwritten "COPY" and "RET 6/20" on its face. AR at 25.

Darrah's correctly addressed petition adds the proper address, makes minor changes to the salutation and subject lines, and makes small changes in the text.⁸ AR at 22. This petition is stamped "RECEIVED" by the Records Center on June 29, 2007, and "RECEIVED" by the Employment Security Department Commissioner's Review Office on July 2, 2007, and has handwriting on the bottom. This petition includes two pages explaining why Darrah disagrees with his employer's decision to discharge him, both stamped "RECEIVED" on July 2, 2007, by the Commissioner's Review Office. AR at 23–24. There is no change in the June 1 date of the document. The envelope for the correctly addressed

⁷ The record before the Commissioner at the time she made her decision on the petition for review consists of AR 1–26. AR 30–41 consists of materials included in the later petition for reconsideration. It is not clear from the record that the Commissioner was aware that Darrah originally mailed his petition to the ALJ in Spokane. AR at 28.

⁸ These changes include a signature on the incorrectly addressed petition, changes to the introduction and conclusion paragraphs, and changes to ¶¶ 1, 4, and 11. Compare AR 22–24 with AR 37–38. AR 37–38 was first presented to the Commissioner in the petition for reconsideration.

petition with a postmark date of June 27, 2007, is included in the record. AR at 26. However, there is no reason given for the late filing.

The Commissioner entered and served an Order of Dismissal on July 20, 2007. AR at 28. The basis of her dismissal was that although the deadline was clearly set forth on the default order, Darrah did not file his petition for review until 23 days after the due date. AR at 28. Although Darrah's petition was dated June 1, it was not timely because the postmark was June 27, which is the basis for the filing date. AR at 28. The petition contained no reason for the delay, and the Commissioner had no basis for finding the 23 day delay was based on an excusable reason, and thus, must be dismissed as late filed without good cause pursuant to RCW 50.32.075. AR at 28.

The entering of the Commissioner's order began the ten day time period to file a petition for reconsideration. AR at 28. Darrah obtained counsel who filed a petition for reconsideration but it was nine days late. AR at 30-41. The last day to file a petition for reconsideration was July 30, 2007. AR at 29. The postmark on the petition for reconsideration was August 8, 2007. AR at 41. The Commissioner concluded she did not have jurisdiction to reconsider because the petition was not timely filed, and she dismissed the petition for reconsideration pursuant to RCW 34.05.470. AR at 44.

Darrah sought judicial review of the Commissioner's decisions in Thurston County Superior Court. The court affirmed the Commissioner because the record before the Commissioner at the time the decisions were made provided no excusable reason for the delays in the filing of the petitions. FF 1.5, 1.6; CL 2.5. Darrah filed a petition for reconsideration which was denied. He now appeals to this Court.

III. STANDARD OF REVIEW

Judicial review of Commissioner's decisions are governed by the Washington Administrative Procedure Act (APA). RCW 34.05.570, 50.32.120; *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The Court of Appeals "sits in the same position as the superior court" on review of an agency action and applies the APA standards directly to the agency's administrative record. *Graves v. Empl. Sec. Dep't*, 144 Wn. App. 302, 308 ¶9, 182 P.3d 1004 (2008) (citations omitted); *Tapper*, 122 Wn.2d at 402 (citations omitted). On appeal, this court reviews the Commissioner's decision, rather than the ALJ's initial decision. *Graves*, 144 Wn. App. at 308 ¶8, citing *Tapper*, 122 Wn.2d at 404-06 (citing RCW 34.05.464(4)). The Commissioner's decision is considered *prima facie* correct and the party challenging it has the burden of proving otherwise. RCW 34.05.570(1)(a); RCW 50.32.150; *Graves*,

144 Wn. App. at 308 ¶8; *Employees of Intalco Aluminum Corp. v. Empl. Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005).

The APA directs the Court to affirm the Commissioner's decision if supported by substantial evidence and in accord with the law, provided that proper process was followed. RCW 34.05.570(3). Review is limited to the agency record. RCW 34.05.558. Because the Commissioner's decision "shall be *prima facie* correct," RCW 50.32.150, to obtain relief, Darrah must prove the invalidity of the decision and substantial prejudice. RCW 34.05.570(1)(a), (d).

Darrah correctly states that the standard of review is *de novo* regarding questions of law. However, he misinterprets application of the standard of review to the issues determined in the Commissioner's decision. The question of whether a claimant has shown good cause for an untimely appeal is a mixed question of law and fact, and the error of law standard applies. *Wells v. Empl. Sec. Dep't*, 61 Wn. App. 306, 310, 809 P.2d 1386 (1991) (citations omitted).

Under the APA, questions of law are reviewed under the *de novo* standard. *Graves*, 144 Wn. App. at 308 ¶10 (citations omitted); *Penick v. Empl. Sec. Dep't*, 82 Wn. App. 30, 37, 917 P.2d 136 (1996); *Tapper*, 122 Wn.2d at 403. Whether there was a procedural error is a question of law reviewed *de novo*. *Pub. Util. Dist. No. 2 of Grant Cy. v. North American*

Foreign Trade Zone Indus., LLC, 159 Wn.2d 555, 566, 151 P.3d 176 (2007). When an agency has expertise in a particular area, the court should accord substantial weight to the agency's decision. *W. Ports Transp., Inc., v. Empl. Sec. Dep't*, 110 Wn. App. 440, 449-50, 41 P.3d 510 (2002); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407, 914 P.2d 750 (1996).

The determination of whether good cause exists for a late filed petition of review is a mixed question of law and fact. Resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying that law to the facts. *Tapper*, 122 Wn.2d at 403.

When there is a factual question of good cause, this court reviews factual findings under the "substantial evidence" standard of RCW 34.05.570(3)(e). An agency's findings of fact must be upheld if supported by substantial evidence. *Wm. Dickson*, 81 Wn. App. at 411. Substantial evidence is "evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Id.* Under this standard, it does not matter if the court would make different findings as long as "any fair-minded person" could have ruled the way the agency ruled. *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997). The substantial evidence standard is deferential and

requires courts to view “the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371–72, 859 P.2d 610 (1993) (citation omitted); *Tapper*, 122 Wn.2d at 407.

Although there are no designated findings of fact because the case stems from a default order, the Commissioner relied on facts in the record in making her determination. Because Darrah does not challenge those findings, they are verities on appeal.⁹ *Tapper*, 122 Wn.2d at 407. Here, substantial evidence supports the finding that there was no basis for finding the delay of 23 days in the filing of the petition for review is based on an excusable reason. AR at 28. The June 4 deadline was clear; the petition for review was not filed until June 27, 23 days late; although it was dated June 1, it was not timely mailed because of the June 27 postmark; and there was no reason for delay alleged in the petition for review. AR at 28.

The Court of Appeals reviews the Commissioner’s decision based on the evidence of good cause for untimely filing before the

⁹ “When findings of fact are not explicitly delineated, or where those findings are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts have actually been found below.” *Delagrave v. Empl. Sec. Dep’t*, 127 Wn. App. 596, 608, 111 P.3d 879 (2005) (quoting *Tapper*, 122 Wn.2d at 406).

Commissioner at the time the decision was made. See RCW 34.05.570(3)(e); *Affordable Cabs, Inc. v. Empl. Sec. Dep't*, 124 Wn. App. 361, 366–67, 101 P.3d 440 (2004); *Okamoto v. Empl. Sec. Dep't*, 107 Wn. App. 490, 494, 27 P.3d 1203 (2001) (citing RCW 34.05.558). Darrah's argument relies on hindsight and would require a court to consider any new information or testimony presented when reviewing a Commissioner's decision. A claimant cannot present argument based on new evidence at the Superior Court or Court of Appeals without having moved to supplement the record. Darrah did not do so here. Moreover, the Superior Court would not abuse its discretion in declining to supplement the record because the evidence to which Darrah cites was not before the Commissioner. Therefore, it could not have formed the basis of any error of law on which the court could have reversed. *Okamoto*, 107 Wn. App. at 495.¹⁰ Evidence not before the Commissioner at the time a decision is made cannot constitute grounds for relief under the error of law standard of review. RCW 34.05.570(1)(b).

When reviewing matters within agency discretion, “the court shall limit its function to assuring that the agency has exercised its discretion in

¹⁰ The record supplementation is Darrah's hindsight explanation of why his petition was incorrectly addressed; information that was not before the Commissioner at the time she made her decision to deny the petition for review. The Superior Court may supplement the record “only if it relates to the validity of the agency action *at the time it was taken*.” RCW 34.05.562 (emphasis added); see also RCW 50.32.150. This provision was not met in this case.

accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency.” RCW 34.05.574(1); *Clausing v. State*, 90 Wn. App. 863, 870-71, 955 P.2d 394 (1998). As a general matter, abuse of discretion occurs when a decision or order is manifestly unreasonable or exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Here, the Commissioner’s decision not to remand for additional evidence not presented in the petition for review was reasonable because Darrah provided no basis in his petition to suggest that an evidentiary hearing was necessary.

IV. ARGUMENT

A. **The Commissioner Properly Exercised Her Discretion In Finding That Darrah Did Not Demonstrate Good Cause For Filing A Late Petition For Review**

The APA authorizes the presiding officer at an administrative hearing to enter a default order if a party fails to appear as directed. RCW 34.05.440. An aggrieved party may file a petition for review of the default order, but it must be received by the Agency Records Center within thirty days. RCW 50.32.070; WAC 192-04-060(2). The Commissioner may waive the thirty-day time limit for “good cause.” RCW 50.32.075.

After the ALJ issued a default order when Darrah failed to appear for his hearing, Darrah filed a petition for review of the default order. AR at 19, 22–24. However, Darrah failed to follow the instructions and mailed his petition to the wrong address. AR at 25. After Darrah’s incorrectly addressed petition was returned to him, he mailed it to the proper address. AR at 22. Darrah did not modify the petition to explain why it was 23 days overdue. The Commissioner was not able to find good cause pursuant to WAC 192-04-180 for the late filing because the evidence before her at the time of her decision did not explain why the petition was 23 days late. AR at 22–24, 28.

1. The ALJ’s Entry Of A Default Order For Darrah’s Failure To Appear For His Hearing Is The Procedural Decision Darrah Appealed

The APA authorizes an administrative law judge (ALJ) to enter a default judgment if a party fails to attend or participate in a hearing. *Graves*, 144 Wn. App. at 309 ¶11 (citing RCW 34.05.440(2)). When Darrah failed to appear at his hearing, the ALJ properly entered a default order against him. AR at 19. The issue before this Court is not whether the default order entered by the ALJ should have been set aside. Rather, the Commissioner dismissed Darrah’s petition for review of the default order because the petition for review was untimely, and there was no good cause shown for the untimeliness. Thus, the issue before this Court is

whether the decision of the Commissioner was based on substantial evidence, was a correct application of law, and was an appropriate exercise of discretion. *Graves*, 144 Wn. App. at 308, ¶8 (review is of Commissioner’s decision, not the decision of the ALJ).¹¹

2. The Commissioner Properly Dismissed Darrah’s Petition For Review For Lack Of Good Cause For Untimely Filing

The Commissioner properly dismissed Darrah’s petition for review because it was not timely filed. Darrah does not dispute that the correctly mailed petition was received by the Agency Records Center 23 days late. AR at 35, ¶5; Br. Appellant at 4, 8. RCW 50.32.070 requires a petition for review to be *received* by the Agency Records Center within thirty days “from the date of notification or mailing, whichever is the earlier.” *See also* WAC 192-04-060(2) (shall be *filed* within 30 days). When an appeal is mailed, the postmark date is the date a petition “shall be deemed filed and received.” RCW 50.32.025. When a petition is mailed but not received by the addressee, it is deemed filed and received on the date it was mailed “if the sender establishes by competent evidence that the appeal or petition was deposited in the ... mail on or before the date due

¹¹ The APA requires an appellant to exhaust administrative remedies. RCW 34.05.534. In the context of an Employment Security case, this means that an appellant must seek review by the Commissioner, as required by the APA. Thus, this court’s review is of the Commissioner’s decision denying the petition for review, not the underlying merits of the ALJ’s default order.

for filing.” RCW 50.32.025. However, “the appeal or petition must be properly addressed.” RCW 50.32.025.

The Commissioner may waive the thirty-day time limitation for an appeal if the appellant demonstrates good cause for the late-filed appeal. RCW 50.32.075. Whether good cause exists is a mixed question of law and fact. *Hanratty v. Empl. Sec. Dep’t*, 85 Wn. App. 503, 505, 933 P.2d 428 (1997) (citation omitted). However:

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.

WAC 192-04-170(6).

Under the heading “**PETITION FOR REVIEW RIGHTS**”, the default order notified Darrah that his petition must be “postmarked on or before **June 4, 2007**.” AR at 20 (emphasis in original). The mailing address for the petition is in bold. AR at 20. Additionally, the default order includes the following language: “Do not mail your Petition to any location other than the Agency Records Center.” AR at 20. Despite this unambiguous language, Darrah mailed his petition to the ALJ’s address on the first page of the default order. AR at 19, 25. The Agency Records Center did not receive his petition until June 29, 2007, 23 days late.

AR at 22, 28; RCW 50.32.025; WAC 192-04-170. Although the properly addressed petition was mailed well after the due date of June 4, it did not contain a single sentence explaining why it was untimely. AR at 22–24. Darrah did not submit competent evidence that the properly addressed petition was deposited in the mail on or before the due date for filing his petition for review, as required by RCW 50.32.025. Thus, the Commissioner properly dismissed his petition for review.

Once the court establishes the facts of the appellant's delay, the court's review is *de novo*. *Hanratty*, 85 Wn. App. at 505 (citation omitted). In determining whether good cause exists for the late filing of a petition for review, the Commissioner considers (a) the length of the delay, (b) whether there is any excuse for the late or erroneous filing, and (c) whether acceptance of the petition will prejudice an interested party or the Department. WAC 192-04-090(1); *Rasmussen v. Empl. Sec. Dep't*, 98 Wn.2d 846, 850, 658 P.2d 1240 (1983); *Hanratty*, 85 Wn. App. at 505; *Devine v. Empl. Sec. Dep't*, 26 Wn. App. 778, 781–82, 614 P.2d 231 (1980). A lack of good cause can be found solely due to the absence of an excuse for the late filing. *See Rasmussen*, 98 Wn.2d at 850–51. Here, Darrah failed to offer an explanation that excused his delay in filing his petition with the Commissioner.

Commissioner's precedential decisions¹² discuss "good cause" for failure to appear for hearings, untimely filing of appeals of the Department's decision, and untimely filing of petitions for review. These analogous decisions interpret "good cause" as circumstances which are external and apart from claimant's control. The analysis of good cause is based upon a sliding scale with regard to the shortness of the delay and whether there is any excuse justifying the error, with a short delay requiring a less compelling reason for the failure to file a timely appeal than a longer delay. *Hanratty*, 85 Wn. App. at 507. Each case requires a fact-specific determination. *Wells*, 61 Wn. App. at 314.

a. Darrah Did Not Establish Good Cause For The Length Of The Delay When He Filed His Untimely Petition

The first factor for the Commissioner to consider in determining whether a claimant has good cause is the length of the delay. Darrah argues that a 23-day delay does not cause harm. Br. Appellant at 10. Delays as short as 18 days can be too long. See *Hanratty*, 85 Wn. App. at 507 (six weeks too lengthy absent compelling reason); *In re Heilman*, Empl. Sec. Comm'r Dec.2d 830 at Conclusion V (1991) (18 day delay

¹² The commissioner may designate certain opinions as precedential. RCW 50.32.095. Although these are not binding on this court, they are valuable as persuasive authority. *Okamoto*, 107 Wn. App. at 498, citing *Martini v. Empl. Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000). The Commissioner's decisions cited in this brief are attached for the Court's reference in Appendix 2.

was long); *In re Beatty*, Empl. Sec. Comm'r Dec. 890 (2002) (143 day late filed petition for review untimely); *In re Bockman*, Empl. Sec. Comm'r Dec.2d 869 (1998) (29 day delay considered to be without good cause).

Darrah argues alternatively that the petition should not be considered untimely because the period of time between the incorrectly addressed petition and the correctly addressed petition should not be counted. Appellant's Brief at 8, 9, citing *Hanratty*, 85 Wn. App. at 506–07. *Hanratty* does not hold that the “clock” starts at the point when the claimant realizes his error, rather than the point where the claimant *makes* his error. Additionally, RCW 50.32.025 anticipates the claimant making an error by noting that in order to count an appeal as filed by the postmark date, it “must be properly addressed and have sufficient postage affixed thereto.”

The *Hanratty* court discusses the length of the delay intertwined with whether there is any excuse for the error in two cases where the court found the claimant had “good cause.” In the first, the Department mailed inconsistent notices, so the claimant was not aware he needed to appeal because he also received a benefit check. *Id.* In the second, the appeal was one day late and the claimant offered four reasons for the one-day delay. *Id.* at 507. For Darrah's case, the *Hanratty* court's analysis of the delay in the facts before it is more appropriate. The court found that “six

weeks is too lengthy a delay absent a compelling reason. [Appellant] offers none.”¹³ *Id.* at 507. Similarly, Darrah’s 23-day delay is too lengthy absent a compelling reason, and Darrah did not provide any reason to the Commissioner which would have permitted her to find good cause.

b. Darrah Did Not Provide An Excuse For His Late Or Erroneous Filing That Constitutes Good Cause

The second factor for the Commissioner to consider in determining whether good cause exists is whether there is any excuse for the late or erroneous filing. The Courts and Commissioner consider this factor entwined with the length of the delay. *Scully v. Empl. Sec. Dep’t*, 42 Wn. App. 596, 603, 712 P.2d 870 (1986). The Court of Appeals has determined that a claimant’s failure to correctly note the hearing date on his calendar does not constitute good cause for vacating a default judgment. *Graves*, 144 Wn. App. at 310 ¶16. The Court declined to address whether the Department has authority to specifically define “good cause” as used in its WACs, but acknowledges the deference due to an administrative agency’s interpretation of its rules when the agency has special knowledge or expertise. *Id.*

¹³ The Commissioner in *Hanratty* accepted the late filed petition for review based on “reasons constituting good cause.” *Hanratty*, 85 Wn. App. at 505. There, the Commissioner found good cause because the ALJ’s decision was not mailed to petitioner’s representative, and thus, the representative did not timely file an appeal. *Id.*

One Commissioner's decision which addressed good cause for an untimely petition for review found when "there is no explanation as to reason (sic) for delay in filing the petition ... [g]ood cause for a late filed petition has not been established." *In re Dyachkin*, Empl. Sec. Comm'r Dec.2d 873 (1999). Here, the record before the Commissioner at the time she denied the petition for review, AR 1-26, contained no reason for Darrah's delay in filing his untimely petition. On this basis alone, the Commissioner's decision was sound.

To be consistent with similar decisions, this court should not conclude an incorrectly addressed petition is a good cause excuse because the statute clearly provides that the "petition must be properly addressed." RCW 50.32.025. Failing to properly address a petition for review is not "beyond the reasonable control of the individual seeking relief." WAC 192-04-170(6). The default order and the WAC provide the mailing address for a claimant. AR at 20; WAC 192-04-170(1).

"To ameliorate the harshness of this rule [perfecting an appeal], the Legislature has vested the Commissioner with authority to waive this time limitation under certain circumstances." *Scully v. Empl. Sec. Dep't*, 42 Wn. App. at 601. The rules provide a claimant a second chance even when a petition is improperly addressed, uses improper postage, or is untimely filed. RCW 50.32.075. All a claimant has to do is explain *why*

his petition is late. Here, because no explanation was included, the Commissioner did not know that the petition was mailed to the ALJ in Spokane. When a party chooses to represent himself, he is held to the same standard as an attorney. *State v. Vermillion*, 112 Wn. App. 844, 858, 51 P.3d 188 (2002). Although his mistake is regrettable for Darrah, the Legislature's decision to place the burden of properly mailing a petition on the claimant and providing the Commissioner the opportunity to excuse a late petition for good cause ensures the ability of the Department to manage its high caseload efficiently and effectively.

The "good cause" standard has also been applied to non-appearances and untimely appeals of Department decisions. These decisions hold that a showing of good cause requires something more than mere neglect of one's affairs. *In re Jaiteh*, Empl. Sec. Comm'r Dec.2d 899 (2004), the Commissioner concluded that the claimant had good cause for failing to appear because OAH failed to send notice of the hearing to the claimant. OAH's failure to send notice was external and apart from the claimant's control, and thus he had good cause for his failure to timely file. *See also Scully v. Empl. Sec. Dep't*, 42 Wn. App. 596 (1986) (good cause when claimant received misleading advice from the Department); *Devine v. Empl. Sec. Dep't*, 26 Wn. App. 778 (1980) (good cause when claimant was waiting for legal advice); *In re Treadwell*, Empl. Sec.

Comm'r Dec.2d 739 (1983) (good cause for one day delay where secretary believed she mailed petition for review before mail pick-up); *In re Bowman*, Empl. Sec. Comm'r. Dec. 491 (1979) (good cause because mail delivery is a factor that is external and apart from a claimant's control); *In re Perry*, Empl. Sec. Comm'r. Dec. 502 (1979) (good cause because claimant's driver's decision to leave was external and apart from claimant's control).

The Commissioner has not found good cause in cases in which a claimant has control over his situation. *In re Herbert*, Empl. Sec. Comm'r. Dec. 544 (1963). The *Herbert* claimant did not retrieve registered mail from the post office after being advised by the Department that the Notice of Hearing was mailed to him by registered mail. The Commissioner found that his failure to check his mail was neglect of his own affairs and within his control, and therefore his failure to timely file was not excused. *Id.* The Commissioner did not find good cause when a claimant moved after she filed her appeal, but she did not provide the Department with a change of address. *In re Kelly*, Empl. Sec. Comm'r Dec. 714 (1962). In *Kelly*, the Commissioner found this was neglect of her affairs and within her control. *See also Rasmussen*, 98 Wn.2d at 851–52 (no good cause when claimant mistook working days for calendar days); *Hanratty*, 85 Wn. App. at 507 (no good cause when no compelling

reasons offered); *B & J Roofing v. Bd. of Indus. Ins. Appeals*, 66 Wn. App. 871, 876, 832 P.2d 1386 (1992) (no excusable neglect for secretary's error in addressing and mailing petition for review to wrong party); *In re Groves*, Empl. Sec. Comm'r. Dec. 374 (1978) (no good cause because mishandling of the hearing notice amounted to neglect of affairs); *In re McNally*, Empl. Sec. Comm'r Dec.2d 321 (1977) (no good cause for "forgetfulness"); *In re Braun*, Empl. Sec. Comm'r. Dec. 698 (1967) (no good cause for moving and failing to notify Department of change of address).

Here, although Darrah was experiencing problems with his former landlord, he did not notify the Department of a change in address. There is no indication in the record that Darrah attempted to contact the OAH after he received the Notice of Hearing on May 7 which informed him his hearing took place on May 4. AR at 22. Similarly, there is no indication that Darrah contacted the OAH when he received the default order mailed on May 4. AR at 19. In fact, there is no correspondence in the record between Darrah and the Department, OAH, ALJ, or Agency Records Center until June 5, when his incorrectly addressed petition for review was received by the OAH in Spokane. AR at 22.

In contrast to the cases where good cause has been found for an untimely filing, Darrah seeks to meet his burden with nothing: no

explanation, no reason, and no excuse. If this court permits Darrah to meet his burden of proving good cause by doing nothing, it will be a departure from decades of Commissioner's decisions as well as this court's.

The documents mailed by the OAH and Commissioner contained conspicuous instructions on how to file petitions for review and reconsideration. AR at 20, 29. Identical information is available in the WACs, including the time limitations and mailing addresses. WAC 192-04-060(2) (petition for review), 192-04-170(1) (same), 192-04-190 (petition for reconsideration). Although Darrah did not have counsel at the administrative level, when a party chooses to represent himself, he is held to the same standards of an attorney, including obeying procedural rules. *State v. Vermillion*, 112 Wn. App. at 858. These rules apply to all claimants who seek review.

Had Darrah remedied his error by providing an explanation for his untimely filing this case would be different. The fact remains that he did not. Sixty-six days after the notice of hearing was mailed, 56 days after the default order was mailed; and approximately 26 days after Darrah mailed his petition to the wrong location, Darrah finally communicated with the Agency Records Center. In that communication, Darrah reiterated a list of 11 reasons why his employer should not have

discharged him. The Commissioner was left to review a record offering no excuse for this significant untimeliness. The Commissioner did not abuse her discretion to deny hearing Darrah's petition to review the default order. Thus, this case properly ended with the ALJ's default order.

As the above-cited Court of Appeals' and Commissioner's decisions make clear, Darrah's failure to explain his untimely filing of his petition for review was without good cause because his untimely filing was due to his error, was entirely within his control, and he provided no explanation to the Commissioner to excuse his late filing.

c. The Commissioner's Acceptance Of The Petition Would Have Prejudiced The Department

The third element the Commissioner considers in determining whether a claimant has good cause for a late filing is whether acceptance of the petition will prejudice an interested party or the Department. Prejudice alone will not establish good cause for late filing if the other two parts of the test are not met, as is the case here.

Darrah argues that the Department has not shown prejudice. Br. Appellant at 10. Allowing claimants to make hindsight arguments to justify a late filing would create serious difficulties for the Department to administer its appeal docket, eliminating for all practical purposes the thirty day time limit adopted by the legislature in RCW 50.32.070. *See In*

re Beatty, Empl. Sec. Comm'r Dec. 890 (2002). When a time period for appealing a Board's decision or order is set by statute, the court cannot enlarge the time period. *B & J Roofing*, 66 Wn. App. at 876. Adoption of such a rule would prejudice the Department and be contrary to law.

In order to expedite the large number of claims processed by the Department, the Legislature and the Department have enacted procedures and deadlines that apply across the board to all claimants. See RCW Chapter 50.32, WAC Chapter 192-04. There is a strong public policy for the finality of judgments because it provides a procedural bar to unending review. See *Castillo v. Kincheloe*, 43 Wn. App. 137, 140, 715 P.2d 1358 (1986) (in context of criminal proceeding). An agency must apply and interpret its regulations consistently. See *Delagrave*, 127 Wn. App. 596, 610, 111 P.3d 879 (2005) (citation omitted). Although the legislative intent is to prevent involuntary unemployment, if an appeal is not prosecuted within the time fixed by statute, the appeal will not lie. *Johnson v. Comm'r of Unemployment Comp. and Placement*, 20 Wn.2d 730, 732, 149 P.2d 367 (1944) (citation omitted). It is important to the Department, as well as to claimants, that claims should be passed upon expeditiously and any relief granted paid promptly. *Id.* at 733. Thus, the Department would be prejudiced by the administrative costs and time involved with reexamining a case that was dismissed because of Darrah's

errors in missing his hearing, filing an untimely petition for review, and filing an untimely petition for reconsideration.

In the only published case which addresses prejudice the ALJ took testimony on the merits of the appeal *and* on the issue of untimeliness during the hearing. *Wells v. Empl. Sec. Dep't*, 61 Wn. App. at 311 (court found four excuses, although contradictory, met good cause for one day untimely filing). In contrast, here, there was no testimony on the merits of the appeal or on timeliness because Darrah did not appear for his hearing.

The Commissioner has discretion to remand a case for further fact finding or when she finds it necessary. RCW 50.32.080; *see In re Summers*, Empl. Sec. Comm'r. Dec.2d 884 (2001); *In re Bockman*, Empl. Sec. Comm'r. Dec.2d 869 (1998). Here, the Commissioner chose not to remand the case to the ALJ for a hearing on the merits. The Commissioner again chose not to remand the case when she received Darrah's petition for reconsideration. The Commissioner was aware of her authority to remand for evidence to determine whether entry of the default order was proper but did not believe it was necessary.

Although this court may remand after reviewing the legal conclusions *de novo*, this court gives substantial weight to the agency's interpretation of the statutes it administers. *Graves*, 144 Wn. App. at 308 ¶10. The Commissioner's decisions were supported by evidence

sufficient to uphold them and were not an abuse of the Commissioner's discretion. At most, the remedy from this court is a remand to address the merits of whether Darrah was appropriately denied benefits for misconduct. However, the record supports the ALJ's affirmation that there was no material error in the Department's decision to deny benefits. AR at 19. Thus, this court does not need to remand because the Commissioner's decision was supported by substantial evidence and was not an abuse of discretion.

The Court of Appeals recently determined that the Commissioner did not abuse her discretion in declining to vacate an ALJ's default judgment in *Graves*, where the claimant mismarked the hearing date on his calendar. *Graves*, 144 Wn. App. at 310 ¶16. This court should also find that the Commissioner here did not abuse her discretion, where Darrah did not appear for his hearing and did not offer an excuse for his untimely petition for review.

It was Darrah's burden to provide an explanation or excuse to the Commissioner in his petition for review that justified his untimely petition. Darrah did not provide an excuse at the time he filed his petition for review that would permit the Commissioner to waive the 30 day time limit. RCW 50.32.075; WAC 192-04-090(1). Thus, dismissal of the petition for review was appropriate. Even if this court were to find that

there was no prejudice to the Department, the fact that Darrah failed to offer a compelling reason for filing his petition 23 days late with the Commissioner supports the Commissioner's decision to dismiss his untimely petition for review.

3. The Commissioner Properly Denied Darrah's Petition For Reconsideration Because It Was Also Untimely

After properly denying the untimely petition that asked to reopen the default order, the Commissioner then properly dismissed Darrah's petition for reconsideration of that ruling because it was also not timely filed. Any decision of the Commissioner involving a review of an ALJ decision, including a petition for review, becomes final unless a petition is filed pursuant to RCW 34.05. RCW 50.32.090. The APA provides that a party may file a petition for reconsideration within ten days of the service of a final order. RCW 34.05.470. Department regulations also explain the process for appealing a petition for review:

A written petition for reconsideration and argument in support thereof must be filed within ten days of the date of mailing or delivery of the decision of the commissioner, whichever is the earlier. It shall be mailed to the Commissioner's Review Office, Employment Security Department, Post Office Box 9046, Olympia, WA 98507-9046, and to all other parties of record and their representatives.

WAC 192-04-190(1). Identical language is attached to the Commissioner's decision denying the petition for review. AR at 29.

Darrah hired counsel and submitted a petition for reconsideration of the Commissioner's decision denying his petition for review, which Darrah concedes was postmarked nine days late on the properly addressed envelope due to an error on the original mailing envelope.¹⁴ AR at 41; Br. Appellant at 12. The Commissioner properly denied Darrah's petition for reconsideration because there is a ten-day time limit to file a petition for reconsideration. AR at 44; WAC 192-04-190(1).

Additionally, a matter will not be reconsidered unless it clearly appears from the face of the petition for reconsideration and the argument submitted in support that there is an obvious error or the petitioner, through no fault of his own, was denied a reasonable opportunity to present argument. WAC 192-04-190(2). The petition for reconsideration did not present any argument that would have resulted in a modification of the administrative law judge's (ALJ) decision. AR at 34–35.

In his petition for reconsideration Darrah acknowledges that he mailed his petition for review to Spokane, rather than Olympia, and that it was returned to him. AR at 34, ¶¶3, 4. He argues that the 23-day delay was a result of OAH's failure to notify him that he mailed his petition to the wrong location. AR at 35, ¶7. There is no legal authority for this assertion, and it is contrary to the specific instructions provided to Darrah

¹⁴ The record contains the incorrectly addressed envelope with the "returned to sender" stamp at AR 31.

which included the address (in bold), the postmark date (bold and underlined), and the sentence, “Do not mail your Petition to any location other than the Agency Records Center.” AR at 20. Failure to cite relevant authority precludes appellate review of an issue, and does not provide a basis for reconsideration. *Johnson v. Mermis*, 91 Wn. App. 127, 136, 955 P.2d 826 (1998).

Additionally, Darrah did not assert the reason for his late filing in his petition for review, and a reviewing officer or court cannot consider it *post facto* as they are bound to review the decision solely on the record that was before the Commissioner, not on the basis of assertions made for the first time on appeal. *See* RAP 2.5(a); *Devine*, 26 Wn. App. at 781. Because Darrah is the petitioner, it was his burden to establish the delay was excusable and he failed to do so. *Jacobs v. Office of Unemployment Comp. and Placement*, 27 Wn.2d 641, 651, 179 P.2d 707 (1947) (claimant’s burden of proof to establish right to benefits never shifts).

In sum, the Commissioner properly exercised her discretion in finding that Darrah did not demonstrate good cause for failing to timely file his petition for review. It was a reasonable exercise of discretion, because it was done pursuant to regulation and informed by the Commissioner’s precedential decisions which reflect the Department’s expertise in administering the Employment Security Act.

B. Attorney's Fees Are Not Appropriate For A Non-Prevailing Party

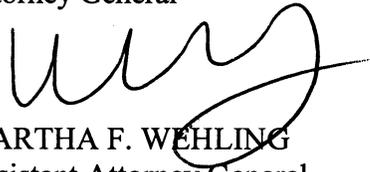
Darrah should not be awarded attorney's fees because he should not prevail and attorney's fees are only awardable under certain circumstances when a petitioner is successful in challenging a Commissioner's decision. RCW 50.32.160 (Commissioner's decision must be reversed or modified). If this court disagrees and remands, Darrah is not entitled to receive attorney's fees because a remand to the Department for further proceedings does not imply that the Superior Court modified or reversed the agency order. *State ex. Rel. Gunstone v. Washington State Highway Comm'n*, 72 Wn.2d 673, 675, 434 P.2d 734 (1967). The Court of Appeals has ruled that a remand to the Department does not constitute a reversal or modification of the Department's decision. *Hamel v. Empl. Sec. Dep't*, 93 Wn. App. 140, 144, 966 P.2d 1282 (1998).

V. CONCLUSION

Based on the foregoing argument, the Department respectfully requests this Court to affirm the Commissioner's Decision.

RESPECTFULLY SUBMITTED this 21st day of August, 2008.

ROBERT M. MCKENNA
Attorney General

A handwritten signature in black ink, appearing to read 'MFW', is written over the printed name of Martha F. Wehling.

MARTHA F. WEHLING
Assistant Attorney General
WSBA No. 36295
Attorneys for Respondent

**INDEX TO APPENDICES FOR
BRIEF OF RESPONDENT EMPLOYMENT SECURITY DEPARTMENT**

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

Appendix 1 Commissioner Orders

<u>LOCATION</u>	<u>DESCRIPTION</u>
Appendix 1-A	Default Order (AR 19-20)
Appendix 1-B	Order Dismissing Petition for Review (AR 28-29)
Appendix 1-C	Order Dismissing Petition for Reconsideration (AR 44-45)

Appendix 2 Commissioner's Decisions

<u>LOCATION</u>	<u>DESCRIPTION</u>
Appendix 2-A	<i>In re Jaiteh</i> , Empl. Sec. Comm'r. Dec. 2d 899 (2004)
Appendix 2- B	<i>In re Beatty</i> , Empl. Sec. Comm'r. Dec. 890 (2002)
Appendix 2-C	<i>In re Summers</i> , Empl. Sec. Comm'r. Dec. 2d 884 (2001)
Appendix 2- D	<i>In re Heilman</i> , Empl. Sec. Comm'r. Dec. 2d 830 (1991)
Appendix 2- E	<i>In re Dyachkin</i> , Empl. Sec. Comm'r. Dec. 2d 873 (1999)
Appendix 2-F	<i>In re Bockman</i> , Empl. Sec. Comm'r. Dec. 2d 869 (1998)
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Appendix 2- H	<i>In re Bowman</i> , Empl. Sec. Comm'r. Dec. 2d 491(1979)
Appendix 2- I	<i>In re Perry</i> , Empl. Sec. Comm'r. Dec. 2d 502 (1979)
Appendix 2-J	<i>In re Groves</i> , Empl. Sec. Comm'r. Dec. 2d 374 (1978)
Appendix 2-K	<i>In re McNally</i> , Empl. Sec. Comm'r. Dec. 2d 321(1977)
Appendix 2-L	<i>In re Braun</i> , Empl. Sec. Comm'r. Dec. 698 (1967)

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Appendix 2 Commissioner's Decisions (Continued)

LOCATION

DESCRIPTION

Appendix 2- M *In re Herbert*, Empl. Sec. Comm'r. Dec. 544 (1963)

Appendix 2- N *In re Kelly*, Empl. Sec. Comm'r. Dec. 714 (1962)

DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II

APPENDIX 1-A
Default Order (AR 19-20)

STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE EMPLOYMENT SECURITY DEPARTMENT

IN THE MATTER OF:

Jerry L Darrah

CLAIMANT

DOCKET NO: 04-2007-07943

DEFAULT ORDER

SSA: [REDACTED]

BYE: 12/15/2007

UIO: 790

The Appellant named herein was issued a Determination Notice on March 20, 2007 by the Employment Security Department which denied benefits to the claimant under RCW 50.04.294, RCW 50.20.066 and RCW 50.20.190 and RCW 50.20.190.

An appeal from the Determination Notice was filed on April 02, 2007, and the matter set for hearing on May 04, 2007 before an Administrative Law Judge at Spokane, Washington, pursuant to notice to all interested parties.

The Appellant failed to appear at the hearing and failed to make a timely request for a postponement showing good cause as required by WAC 192-04-120.

The Office of Administrative Hearings has reviewed the record of the appeal and has found that all interested parties have been afforded a reasonable opportunity for a fair hearing and has found no apparent material error in the Determination.

Now, therefore, IT IS ORDERED that the Appellant is in DEFAULT pursuant to RCW 34.05.440 and the Determination issued by the Department is AFFIRMED.

Dated and Mailed on May 04, 2007 at Spokane, Washington.


Judith L. McCarthy
Administrative Law Judge
Office of Administrative Hearings
Old City Hall Building 5th Floor
221 N. Wall Street Suite 540
Spokane, WA 99201-0826

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 1-B

Order Dismissing Petition for Review (AR 28-29)

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this decision to the wit-
named interested parties at their respective addresses,
postage prepaid, on July 20, 2007.

Gail Hansen
Representative, Commissioner's Review Office,
Employment Security Department

UIO: 790
BYE: 12/15/2007

**BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON**

Review No. 2007-1580

In re:

JERRY L. DARRAH
SSA No. [REDACTED]

Docket No. 04-2007-07943

ORDER OF DISMISSAL

JERRY L. DARRAH, the above-named claimant, filed a petition for review on June 27, 2007, from a default order issued by the Office of Administrative Hearings on May 4, 2007. The last day for filing a timely petition for review was June 4, 2007. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the case file, the undersigned enters the following.

The claimant's petition for review rights and the deadline date of June 4, 2007, for filing a timely petition for review were clearly set forth on the face of the default order of the Office of Administrative Hearings. However, the claimant did not file his petition for review until June 27, 2007, which was 23 days late. Although the claimant dated his petition for review June 1, 2007, it was not timely mailed as evidenced by the June 27, 2007 postmark date on the envelope in which it was mailed. The postmark date is deemed the filing date of the petition for review. RCW 50.32.025. No reason for this delay is alleged in the petition for review.

Under the circumstances, we have no basis for finding that the delay of 23 days in the filing of the petition for review is based on an excusable reason. Consequently, the petition for review must be dismissed as late filed without good cause pursuant to RCW 50.32.075.

Accordingly,

IT IS HEREBY ORDERED that said petition for review is **DISMISSED** pursuant to RCW 50.32.070 and RCW 50.32.075. The decision of the Office of Administrative Hearings entered in this matter on May 4, 2007, shall be deemed final.

DATED at Olympia, Washington, July 20, 2007.*

Paul R. Licker

Review Judge
Commissioner's Review Office

*Copies of this decision/order were mailed to all interested parties on this date.

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order 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 WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND
- b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 1-C

Order Dismissing Petition for Reconsideration (AR 44-45)

CERTIFICATE OF SERVICE

I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses, postage prepaid, on August 17, 2007.


Representative, Commissioner's Review Office,
Employment Security Department

UIO: 790
BYE: 12/15/2007

**BEFORE THE COMMISSIONER OF
THE EMPLOYMENT SECURITY DEPARTMENT
OF THE STATE OF WASHINGTON**

Review No. 2007-1580-RC

In re:

JERRY L. DARRAH
SSA No. 

Docket No. 04-2007-07943

ORDER DISMISSING PETITION
FOR RECONSIDERATION

On August 8, 2007, JERRY L. DARRAH filed a Petition for Reconsideration of a Decision of Commissioner issued on July 20, 2007, pursuant to RCW 34.05.470 and WAC 192-04-190.

The Decision of Commissioner was issued by the undersigned and mailed on July 20, 2007. The written request for reconsideration was postmarked August 8, 2007.

A Petition for Reconsideration must be filed within ten days of the mailing of the Decision of Commissioner, WAC 192-04-190. As it was not timely filed, this office has no jurisdiction to reconsider the matter. Now, therefore,

IT IS HEREBY ORDERED that the Petition for Reconsideration is **DISMISSED** pursuant to RCW 34.05.470.

DATED at Olympia, Washington, August 17, 2007.*

Paul R. Licker

Review Judge
Commissioner's Review Office

*Copies of this decision were mailed to all interested parties on this date.

JUDICIAL APPEAL

If you are a party aggrieved by the Decision of Commissioner issued on July 20, 2007, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty days from July 20, 2007. If no such appeal is filed, the Decision of Commissioner issued on July 20, 2007, will become final.

If you choose to file a judicial appeal, you must both:

- a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND**
- b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.**

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-A

In re Jaiteh, Empl. Sec. Comm'r. Dec. 2d 899 (2004)

Westlaw

Empl. Sec. Comm'r Dec.2d 899, 2004 WL 3543786 (WA)

Page 1

Empl. Sec. Comm'r Dec.2d 899, 2004 WL 3543786 (WA)

Commissioner of the Employment Security Department.
State of Washington.

IN RE: LAMIN B. JAITEH

Case No.

899

Review No. 2004-4475

Docket No. 02-2004-21007-R

December 17, 2004

ORDER REMANDING CAUSE FOR HEARING AND DECISION DE NOVO

On November 26, 2004, LAMIN B. JAITEH petitioned the Commissioner for review of an order reinstating previous initial order issued by the Office of Administrative Hearings on November 12, 2004. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. The undersigned does hereby remand this matter to the Office of Administrative Hearings for the following reason.

A hearing was originally held in this matter on September 13, 2004. The employer appeared and presented evidence. The claimant did not appear. The Office of Administrative Hearings issued a decision in the employer's favor on September 17, 2004. The claimant filed a timely petition for review from that decision and on October 15, 2004, we remanded this matter to the Office of Administrative Hearings for a hearing on the issue of whether the claimant had good cause for his non-appearance at the September 13, 2004 hearing. Pursuant to our remand order the Office of Administrative Hearings held a remand hearing on November 12, 2004. Thereafter, the Office of Administrative Hearings issued an order reinstating previous initial order, from which order the claimant has now filed a timely petition for review.

At the remand hearing the claimant's unrefuted testimony was that he did not receive the Office of Administrative Hearings' notice of hearing for the September 13, 2004, hearing. Nevertheless, the administrative law judge found that the claimant did not have good cause for his non-appearance at the September 13, 2004 hearing because a copy of the notice of hearing was contained in an exhibits packet sent to the claimant by the employer. We disagree. The claimant was entitled to notice of the hearing from the Office of Administrative Hearings. The claimant had no responsibility to obtain notice of the hearing from the employer. Accordingly,

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we find that the claimant has established good cause for his non-appearance at the September 13, 2004 hearing and is entitled to an opportunity to present his evidence on the merits of this matter.

In few of the foregoing, we remand this matter to the Office of Administrative Hearings for a hearing and decision de novo on the merits of the claimant's claim for benefits. A de novo hearing will result in a more cohesive record.

Now, therefore,

IT IS HEREBY ORDERED that this matter shall be REMANDED to the Office of Administrative Hearings for a hearing and decision de novo. Further rights of petition to the Commissioner shall be granted to any interested party aggrieved by such decision pursuant to RCW 50.32.070.

DATED at Olympia, Washington, December 17, 2004. [FNal]

Anthony J. Philippsen, Jr.
Review Judge Commissioner's Review Office

[FNal]. **Copies of this decision were mailed to all interested parties on this date.**

Empl. Sec. Comm'r Dec.2d 899, 2004 WL 3543786 (WA)
END OF DOCUMENT

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-B

***In re Beatty*, Empl. Sec. Comm'r. Dec. 890 (2002)**

Empl. Sec. Comm'r Dec. 890, 2002 WL 32891511 (WA)

Commissioner of the Employment Security Department.
State of Washington.

IN RE: LARRY B. BEATTY

Case No. 890
Review No. 2002-3287
Docket No. 01-2002-00939

September 27, 2002

ORDER OF DISMISSAL

LARRY B. BEATTY, the above-named claimant, filed a petition for review on August 29, 2002, from a decision issued by the Office of Administrative Hearings on March 8, 2002. The last day for filing a timely petition for review was April 8, 2002. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. The envelope in which the petition was mailed bears a United States postal service cancellation mark of August 29, 2002. Consequently, that is the date of filing. RCW 50.32.025. The petition for review was 143 days late filed.

RCW 50.32.075 provides for waiver of the time limitation for the filing of a petition for review where the delay in filing is with good cause. In determining whether good cause exists, we consider (1) the excusability of the error, (2) the length of the delay, and (3) whether acceptance of the petition will prejudice an interested party or the Department. WAC 192-04-090; Rasmussen v. Department of Empl. Sec., 98 Wn.2d 846, 658 P.2d 1240 (1983); Hanratty v. Employment Security Dep't, 85 Wn. App. 503, 933 P.2d 428 (1997); Wells v. Employment Security Dep't, 61 Wn. App. 306, 809 P.2d 1386 (1991); Devine v. Employment Security Dep't, 26 Wn. App. 778, 614 P.2d 231 (1980); In re Beaughan, Empl. Sec. Comm'r Dec. 1295 (1975).

The claimant's petition for review rights and deadline for filing a timely petition for review were clearly set forth on the face of the decision of the Office of Administrative Hearings. The claimant offers no reason for the late filing of the petition for review except that he would now like to have the decision of the Office of Administrative Hearings reviewed so that he may potentially be eligible for training benefits under RCW 50.22.150. Such does not constitute an excusable reason for the late filing of his petition for review. To hold otherwise would simply be allowing the claimant to exercise hindsight as a "good cause" reason for filing a late petition for review. The petition for review must be dismissed as untimely filed without good cause pursuant to RCW 50.32.070 and RCW 50.32.075.

Additionally, claimant is not a party aggrieved by the Office of Administrative Hearings'

decision, since that decision is in no way adverse to him regarding the issues decided therein. Pursuant to WAC 192-04-060 and WAC 192-04-063, a petition for review may only be filed by an interested party aggrieved by the decision of the Office of Administrative Hearings. Even if his petition for review had been timely filed, it would have been dismissed since he was not aggrieved.

Now, therefore,

IT IS HEREBY ORDERED that the petition for review is DISMISSED pursuant to RCW 50.32.070, RCW 50.32.075 and WAC 192-04-063. The decision of the Office of Administrative Hearing entered in this matter on March 8, 2002 shall be deemed final.

DATED at Olympia, Washington, September 27, 2002. [FNal]

Donald K. Westfall, III
Review Judge Commissioner's Review Office

[FNal]. Copies of this decision were mailed to all interested parties on this date.

RECONSIDERATION/JUDICIAL APPEAL

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this order/decision, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order 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 WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if this office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives.

The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review. (See attached letter for judicial appeal rights.)

Empl. Sec. Comm'r Dec. 890, 2002 WL 32891511 (WA)
END OF DOCUMENT

DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II

APPENDIX 2-C

***In re Summers*, Empl. Sec. Comm'r. Dec. 2d 884 (2001)**

Empl. Sec. Comm'r Dec.2d 884, 2001 WL 34401410 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE JOHN R. SUMMERS

April 30, 2001

Case No.
884

Review No.
2001-0858

Docket No.
02-2001-03702

ORDER REMANDING CAUSE FOR HEARING ONLY

By letter postmarked April 6, 2001, and mailed to the Office of Administrative Hearings, the UNITED STATES DEPARTMENT OF LABOR, Employment and Training Administration, Region 6, by and through Michael Brauser, Associate Regional Administrator, requested review of a decision issued by the Office of Administrative Hearings on February 23, 2001. That letter was forwarded to the Commissioner's Review Office as a petition for review. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. The last day for filing a timely petition for review was March 26, 2001. Having reviewed the case filed, we hereby enter the following.

This case arose as an appeal filed by the claimant, John R. Summers, from a determination notice issued by the Employment Security Department on November 20, 2000, denying him training benefits under the Trade Act of 1974 pursuant to 20 C.F.R. 617.22(a)(1). The claimant's appeal was heard by the Office of Administrative Hearings, an independent state agency, on February 22, 2001. On February 23, 2001, the Office of Administrative Hearings issued its decision setting aside the Employment Security Department's Determination Notice. The claimant was held not subject to denial of training benefits pursuant to 20 C.F.R. 617.22(a)(1), and the Department was directed to reconsider the claimant's eligibility for training benefits under the remaining eligibility requirements of 20 C.F.R. 617.22.

The United States Department of Labor, Employment and Training Administration (hereinafter DOL), submitted its request for review which has been considered as a petition for review under RCW 50.32.070, on April 6, 2001, 11 days after the final date for filing a timely petition for review. The petition for review does not contain an explanation of the reason for the delay, but the delay is said to have been unavoidable.

As noted in the decision of the Office of Administrative Hearings, the Trade Act of 1974

is a federal program administered by the state. The state is required to follow federal legislation and regulations in administering the program.

A federal regulation, 20 C.F.R. 617.52(c)(2), is applicable. It provides in pertinent part that if DOL believes any state agency's decision regarding eligibility for training benefits under the Trade Act of 1974 is inconsistent with DOL's interpretation of that Act, DOL may at anytime notify the state agency of DOL's view, and thereafter, the state agency shall issue an appeal, if possible, and shall not use or cite such decision as a precedent.

Thus, DOL has standing under the above-described regulation to seek review of the decision of the Office of Administrative Hearings, and the Employment Security Department is required to issue a review decision if possible.

Appeals and hearings procedures in cases arising under the Trade Act of 1974 are set forth at 20 C.F.R. 617.51. A determination under 20 C.F.R. 617 shall be subject to review in the same manner and to the same extent as determinations under applicable state law, and only in that manner and to that extent. 20 C.F.R. 617.51(a).

The applicable state law is RCW 50.32.070. It provides that a petition for review from a decision of the Office of Administrative Hearings shall be filed within 30 days from the date of notification or mailing of a decision of the Office of Administrative Hearings, whichever is the earlier. However, for good cause shown, the Commissioner may waive the time limit for filing a petition for review. RCW 50.32.075.

WAC 192-04-090 provides that in determining whether good cause exists under RCW 50.32.075 for the late filing of a petition for review three factors are to be considered. These factors are (1) the length of the delay; (2) the excusability of the delay; and (3) whether acceptance of the late-filed petition for review will result in prejudice to other interested parties, including the Employment Security Department.

Applying the foregoing to the instant case, it is first noted that the petition for review was filed 11 days late. Although that delay was acknowledged by DOL in its petition for review, and characterized as "unavoidable," no factual basis tending to show unavoidability of the delay is alleged. Under the circumstances, it is concluded that the issue of whether DOL has good cause for the 11-day delay in the filing of the petition for review cannot be fairly resolved without a hearing on the issue of the timeliness of the filing of the petition for review.

Finally, in accordance with 20 C.F.R. 617.52(c)(2), in any event, the decision of the Office of Administrative Hearings shall in no way be deemed or cited as precedent.

Accordingly,

IT IS HEREBY ORDERED that the record and file herein shall be REMANDED to the Office of Administrative Hearings for the purpose of scheduling a hearing on the issue of the timeliness of the petition for review. Having done this, the Office of Administrative Hearings shall return the record to the Commissioner's Review Office for a decision on the issue.

DATED at Olympia, Washington, April 30, 2001.

Paul R. Licker
Review Judge

Empl. Sec. Comm'r Dec.2d 884, 2001 WL 34401410 (WA)
END OF DOCUMENT

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-D

***In re Heilman*, Empl. Sec. Comm'r. Dec. 2d 830 (1991)**

Empl. Sec. Comm'r Dec.2d 830, 1991 WL 11040831 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE RAMONA HEILMAN

August 23, 1991

Case No.
830
Review No.
91-1424
Docket No.
1-04262

DECISION OF COMMISSIONER

On June 5, 1991, VALLEY FRUIT, by and through KATHLEEN M. MARUGG, Secretary, to WALTER G. MEYER, Attorney at Law, timely petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on May 6, 1991. Having reviewed the entire record, the undersigned enters the following.

STIPULATION

The parties stipulated that another case was similar, and extensive testimony of those witnesses would be used here. Angelina Ramos, Docket No. 1-04233, decided May 5, 1991. We so reviewed that case as part of this record.

FINDINGS OF FACT

I

The Determination Notice was mailed January 25, 1991. The top part advised of the "Right to Appeal", and how to do it by deadline of February 25, 1991. She filed the appeal on March 15, 1991, or eighteen days late. Exhibits 2 and 7.

II

She left early January 14, 1991, after sorting several hours under protest. After work hours, she discussed with the manager her re-hire in September, 1990, and her work solely as a packer for the next four months. He stated that it was a management prerogative to assign workers, and that she was the "last-hired" and had no rights. She asked to be "fired". He told her to report the next morning so as to be in a work status. Somewhere

in the same discussion, one or the other brought up her complaints made to Labor and Industries and the Human Rights Commission. It apparently also involved her tendinitis, seniority and alleged racial discrimination in "last-hire" assignments. The manager spoke of prerogatives, and that she had no rights. She reported on January 15, 1991, and after sorting for two hours, refused to sort. She was discharged and filed for unemployment compensation.

III

She testified her appeal was untimely because she believed the manager about prerogatives, and no seniority or appeal rights applied also to her unemployment compensation case. On cross-examination, she agreed that in this part of the discussion the manager was referring to Labor and Industries and Human Rights Commission. There is an unclear indication that she felt (rightly or wrongly) that the Human Rights Commission had not been able to aid her.

IV

We infer from the claimant's testimony and exhibit 7 (a fact finding statement), that one or two days prior to filing her appeal on March 15, 1991, she encountered former co-workers, Ramos and Lopez. (Ramos filed her appeal on March 11, 1991). They were discharged five weeks after claimant for refusing to sort under a much revised system. They had discussed their cases with Evergreen Legal Services. After that discussion, and apparently one with Evergreen Legal Services, she filed her appeal. No testimony was elicited on whether she read the top explanation on the Determination Notice when she received it.

V

Claimant was born in the United States, and completed 11th grade. The hearing discloses that she understands and speaks the English language. She has applied for unemployment compensation benefits in the past, but has never been denied before.

CONCLUSIONS

I

RCW 50.32.020, 50.32.025, 50.32.075, and WAC 192-04-080, 192-04-090 and the Preamble apply on the timeliness criteria. Cases include Devine v. Employment Security Department, 26 Wn. App. 778, 614 P.2d 231 (1980); Rasmussen v. Employment Security Department, 98 Wn. App. 846, 658 P.2d 1240 (1983); Scully v. Employment Security Department, 42 Wn. App. 596, 712 P.2d 870 (1986); Wells v. Employment Security Department, Wn. State Ct. App. Div. I, # 25496-1-1, filed May 20, 1991.

II

The three-pronged test for "good cause" on a late filed appeal is: (1) length of delay, (2) excusability of the delay, and (3) absence of prejudice to parties and department. Devine, supra.

III

Each case stands on its own facts. A delay of 17 days can be long; however, if an appropriate person or entity misleads a claimant (party) that portion so attributable is excused. Scully. Waiting to seek advice from a co-worker is not good cause. Rasmussen. A reasonable delay due to seeking assistance from an attorney or union representative may be good cause. Devine. Seeking a former employer's advice on violations of secrecy matters might be good cause. Wells, footnote 6, dicta. The delay can be by factors external or internal to the claimant. Wells. Prejudice to the case may not be claimed, when the administrative law judge took the evidence on the merits in addition to the timeliness issue. Wells.

IV

The length of the delay tolerable will be inextricably intertwined with the excusability of the error. Scully. The evaluation of the three-pronged factors is based on a sliding scale in which a short delay requires a less compelling reason for the failure to timely file than does a longer delay. Wells.

V

There was no prejudice to the department since evidence was taken on the merits as well as the timeliness. However, the eighteen-day delay was long. Finally, as to the excusability of the error, claimant's appeal rights and deadline date of February 25, 1991, were clearly set forth on the face of the Determination Notice. The claimant, who has an eleventh grade education, reads and understands the English language. There was no misleading advice given to her by the Department. Nor was there any attempt to give misleading information about unemployment rights by the petitioner's manager in the January 14, 1991, discussion.

VI

After consideration of all the above, and the length of her delay (18 days), coupled with her explanation, we do not believe that she has established good cause for the untimely appeal. The claimant was discouraged in her own mind and equated her chances with an appeal from the Determination Notice to be nil, or not worth pursuing after her perceived experience with the Human Rights Commission. Good cause for the untimely delay was not established, especially in view of the fact that the claimant's appeal rights were clearly set forth on the face of the Determination Notice.

VII

In view of the above, we do not go into the merits of the termination under RCW 50.20.060 or RCW 50.20.050, nor availability under RCW 50.20.010(3).

Now, therefore,

IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on May 6, 1991, on the untimeliness issue shall be SET ASIDE. The claimant's appeal shall be DISMISSED as untimely filed without good cause pursuant to RCW 50.32.075. Claimant

is subject to disqualification as set forth in the Determination Notice pursuant to RCW 50.20.060 beginning January 13, 1991, and until she has obtained work and earned wages of not less than her suspended weekly benefit amount in each of five calendar weeks as set forth in the Determination Notice. Benefits paid to claimant during this period of disqualification constituted an overpayment and the matter is REMANDED to the Job Service Center for its determination of amount and liability therefor.

DATED at Olympia, Washington, August 23, 1991. [FNal]

Thomas J. Moran
Commissioner's Delegate

RECONSIDERATION/JUDICIAL APPEAL

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this order/decision, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order 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 WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if this office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Olympia, Washington 98504, and to all other parties of record and their representatives.

The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review. (See attached letter for judicial appeal rights.)

FNal. Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 830, 1991 WL 11040831 (WA)
END OF DOCUMENT

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-E

***In re Dyachkin*, Empl. Sec. Comm'r. Dec. 2d 873 (1999)**

Empl. Sec. Comm'r Dec.2d 873, 1999 WL 33757746 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE VLADISLAV P. DYACHKIN

April 9, 1999

Review No.
1999-0713
Docket No.
01-1998-16583-R

ORDER OF DISMISSAL

On November 25, 1998, the Office of Administrative Hearings issued a decision under Docket No. 01-1998-16583-R holding that the claimant in this matter was able to, available for, and actively seeking work pursuant to RCW 50.20.010(3).

By letter dated March 4, 1999, John Morrish of the National Electrical Contractors Association (NECA) requested a "redetermination pursuant to RCW 50.20.070 and RCW 50.20.080" with regards to the above named claimant. For the following reasons, that request is hereby dismissed.

Foremost, the Office of Administrative Hearings decision was mailed on November 25, 1998. RCW 50.32.070 provides for a 30-day petition period. The last day of the petition period was December 21, 1998. Since the "request for redetermination" was mailed on March 4, 1999, it can not be considered a timely filed petition for review.

RCW 50.32.075 provides for waiver of the time limitation for the filing of an appeal or petition where the delay in filing is with good cause. In determining whether good cause exists, we consider (1) the excusability of the error, (2) the length of the delay, and (3) whether acceptance of the appeal or petition will prejudice any interested party or the Department. WAC 192-04-090; Rasmussen v. Department of Empl. Sec., 98 Wn.2d 846, 658 P.2d 1240 (1983); Hanratty v. Employment Security Dep't, 85 Wn. App. 503, 933 P.2d 428 (1997); Wells v. Employment Security Dep't, 61 Wn. App. 306, 809 P.2d 1386 (1991); Devine v. Employment Security Dep't, 26 Wn. App. 778, 614 P.2d 231 (1980); In re Beaughan, Empl. Sec. Comm'r Dec. 1295 (1975). Here, there is no explanation as to reason for delay in filing the petition. Good cause for a late filed petition has not been established.

Next, NECA is not an employer. It is an employer representative. NECA's letter of March 4, 1999, does not identify an employer it represents. As such, NECA is neither an interested party nor an aggrieved party in this matter and has no right to request any type of further review. See WAC 192-04-040; WAC 192-04-060; WAC 192-04-063.

Accordingly,

IT IS HEREBY ORDERED that said petition for review is DISMISSED pursuant to RCW 50.32.070 and RCW 50.32.075. The decision of the Office of Administrative Hearings entered in this matter on November 25, 1998, shall be deemed final.

DATED at Olympia, Washington, April 9, 1999. [FNal]

Donald K. Westfall III
Commissioner's Delegate

RECONSIDERATION/JUDICIAL APPEAL

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this order/decision, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order 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 WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if this office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives.

The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review. (See attached letter for judicial appeal rights.)

FNal. Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 873, 1999 WL 33757746 (WA)
END OF DOCUMENT

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-F

In re Bockman, Empl. Sec. Comm'r. Dec. 2d 869 (1998)

Empl. Sec. Comm'r Dec.2d 869, 1998 WL 34202814 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE DAVID J. BOCKMAN

August 14, 1998

Case No.
869

Review No.
1998-1717

Docket No.
04-1998-04333-H

ORDER OF DISMISSAL

On June 24, 1998, DAVID J. BOCKMAN, by and through Frances R. Alexander, Paralegal/Advocate, for the Unemployment Law Project, petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on April 24, 1998. The last day for filing a timely Petition for Review was May 26, 1998. By order issued on June 30, 1998, the undersigned remanded this matter to the Office of Administrative Hearings for a hearing on the issue of whether the petition was late filed for reasons constituting good cause. The Office of Administrative Hearings held the remand hearing on August 4, 1998, upon due and proper notice to the parties. The claimant appeared with his representative, Frances Alexander, and both gave testimony. The employer did not appear. The record has been sent to the undersigned for decision in accordance with the terms of the remand order. Having now reviewed the record of the remand hearing, the undersigned hereby enters the following.

The decision of the Office of Administrative Hearings was issued on April 24, 1998. The claimant's Petition for Review rights and the deadline date of May 26, 1998, for filing a timely Petition for Review were clearly set forth on the face of the decision of the Office of Administrative Hearings. The decision of the Office of Administrative Hearings was mailed to the claimant, the employer, and the employer representative. Although the Unemployment Law Project represented the claimant at the hearing, no copy of the decision of the Office of Administrative Hearings was mailed to the Unemployment Law Project. The Unemployment Law Project is not listed on the statement on the face of the Office of Administrative Hearings decision where the parties to whom it was mailed is set forth.

Frances Alexander, who represented the claimant at the hearing, contacted Senior Administrative Law Judge Jan Grant on June 3, 1998, and requested a decision in this matter. On June 12, 1998, Ms. Alexander spoke with Administrative Law Judge John Loreen, and he told her a decision had been mailed and on that date, he mailed a copy of the

decision to the Unemployment Law Project. It was received there on June 15, 1998, and the Petition for Review was filed by mail on June 24, 1998, which was 29 days late.

The claimant received his copy of the decision of the Office of Administrative Hearings in due course. He did not contact the Unemployment Law Project upon receipt. On the day of the hearing, April 16, 1998, the claimant discussed the issue of an adverse ruling by the Office of Administrative Hearings with his representative. He was told to wait until he received the decision, and that "we would be in touch with each other." On the basis of this conversation the claimant assumed that the Unemployment Law Project would be in contact with him regarding the decision of the Office of Administrative Hearings. However, the Unemployment Law Project did not contact the claimant during the period for filing a timely Petition for Review. Contact was made after the Unemployment Law Project received a copy of the decision of the administrative law judge in June.

According to Frances Alexander, the Unemployment Law Project contacts the Office of Administrative Hearings 30 days after a hearing is held if no decision has been received by that time. In this case the hearing was held on April 16, 1998, but no contact was made by the Unemployment Law Project to the Office of Administrative Hearings until June 3, 1998.

This case is factually similar to Hanratty v. Employment Security Dep't, 85 Wn. App. 503, 933 P.2d 428 (1997). Upon remanding this matter to the Office of Administrative Hearings we requested that argument be presented concerning the applicability of Hanratty, supra, to the present case. However, no mention of that decision was made by Ms. Alexander in her presentation on remand.

In Hanratty, supra, the claimant was determined to be entitled to receive unemployment benefits by an administrative law judge. The claimant's former employer, Noel Foods, was represented by Employers Unity, Inc. The decision issued by the Office of Administrative Hearings in that matter was mailed to Mr. Hanratty and Noel Foods, but no copy was mailed by the Office of Administrative Hearings to Employers Unity. Eight months after the hearing was held, Employers Unity discovered upon a routine review of its files that it did not receive a copy of a decision from the Office of Administrative Hearings and then requested a copy. Ultimately, six weeks after it received the decision of the Office of Administrative Hearings, a Petition for Review was filed. The Petition for Review was approximately nine months late. No reason was offered for the six week delay between the receipt of the decision by Employers Unity and the filing of the Petition for Review.

In reviewing Hanratty, the Commissioner's Delegate held that because the representative who would ordinarily file the Petition for Review on behalf of the employer did not timely receive a copy, the delay should be measured from the date of receipt, and that the delay was not lengthy. However, the Court of Appeals disagreed.

The court noted that the factors to be considered in determining whether a **delay** in the filing of a Petition for Review is with **good cause** are (1) the **length** of the **delay**, (2) the prejudice to the parties, and (3) the excusability of the error. Hanratty, supra at page 429. The court went on to review a number of decisions involving the issue of timeliness of appeals, and then concluded that the delay in the filing of the Petition for Review in the case before it was without **good cause**. Primarily, it was the failure of the employer to contact its own representative to ensure a timely appeal being filed

that caused the error to be deemed inexcusable. Moreover, the court noted that even if the delay in filing was measured from the time that the representative became aware that an appeal needed to be filed, that six weeks was too lengthy a delay absent a compelling reason for the delay.

In the instant case, the claimant, like Noel Foods, failed to contact his own representative to ensure that a timely Petition for Review would be filed. The claimant conceded that he had discussed the potential for filing a Petition for Review with his representative on the date of the hearing, and that they would be in touch if the need arose. Moreover, the deadline date for filing a timely Petition for Review was set forth on the decision of the Office of Administrative Hearings, and the claimant should have noted that his representative was omitted from the list of parties and persons to whom that decision was mailed. Nevertheless, the claimant did not make any effort to contact his representative to ensure a timely Petition for Review was filed, and he did not take any steps on his own behalf to file a timely Petition for Review. It is also noted that the Unemployment Law Project delayed in contacting the Office of Administrative Hearings regarding issuance of the decision in this case beyond the 30 days that it routinely waits after a hearing to make such contact. Had contact been made at the end of the 30 day period, there would have been adequate time available to the Unemployment Law Project to perfect a timely Petition for Review. All things considered, the substantial delay of 29 days in the filing of the Petition for Review must be considered to be without good cause pursuant to RCW 50.32.075, and for that reason the Petition for Review will be dismissed.

Accordingly,

IT IS HEREBY ORDERED that said Petition for Review is DISMISSED pursuant to RCW 50.32.070 and RCW 50.32.075. The decision of the Office of Administrative Hearings entered in this matter on April 24, 1998, shall be deemed final and, in accordance therewith, benefits shall be denied claimant pursuant to the provisions of RCW 50.20.060.

DATED at Olympia, Washington, August 14, 1998. [FNa1]

Paul R. Licker
Commissioner's Delegate
Employment Security Department

RECONSIDERATION/JUDICIAL APPEAL

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this order/decision, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order 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 WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if this office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties

of record and their representatives.

The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review. (See attached letter for judicial appeal rights.)

FN1. Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 869, 1998 WL 34202814 (WA)
END OF DOCUMENT

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-G

In re Treadwell, Empl. Sec. Comm'r. Dec. 2d 739 (1983)

Empl. Sec. Comm'r Dec.2d 739, 1983 WL 492326 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE CURTISS G. TREADWELL

August 19, 1983

Case No.

739

Review No.

2-43890

Docket No.

2-13656-R

DECISION OF COMMISSIONER

BACKGROUND

On September 28, 1982, the Office of Administrative Hearings issued its decision in this matter, holding that claimant was not subject to disqualification pursuant to either RCW 50.20.-050 or RCW 50.20.060. The interested employer filed a Petition for Review, and on January 7, 1983, we issued a decision on the merits in petitioner's favor. Subsequently, we were informed by claimant's attorney, Patricia D. Rourke, that claimant had received no notice that the decision of the Office of Administrative Hearings was under review. Consequently, on February 10, 1983, we issued an order vacating our January 7 decision. Further, on March 25 we remanded the case to the Office of Administrative Hearings for a hearing on the issue of whether good cause existed for petitioner's delayed petition. A hearing on this issue was conducted on June 10, 1983.

Having carefully reviewed the entire record, thereby being fully advised in the premises, the undersigned does hereby enter the following:

FINDINGS OF FACT

Pursuant to RCW 50.32.070, a timely Petition for Review from the Office of Administrative Hearings' September 28, 1982, decision would have to have been postmarked no later than October 8, 1982. A secretary for petitioner typed the Petition for Review on October 8 and processed it through petitioner's metering machine, which stamped the date of October 8, 1982, on the envelope in which the Petition was mailed. The secretary deposited the Petition in a mailbox near petitioner's plant in Kent at approximately 4:35 p.m. on October 8, believing that mail from that box was picked up at 5:30 p.m. The envelope bears an October 9, 1982, Seattle postmark.

II

Prior to filing the claim here contested, claimant last worked for petitioner, which employment commenced February 12, 1979. He was a full-time employee and was paid \$10.97 per hour.

III

On the morning of July 20, 1982, claimant's foreman instructed him to operate a crane. Claimant responded that he would not because he did not believe he could safely do so. Crane operation is within claimant's job qualifications. He was then told to either operate the crane or leave. He consulted his shop steward. The steward advised him to operate the crane, at which point claimant left the premises. He did not return to work that day nor on July 21 and 22. On July 22 he was notified that he was discharged. Petitioner considered him as having quit his job.

IV

During the weekend of July 17-18, 1982, claimant had injured his back and neck to an undetermined extent in a motorcycle accident. He believed this would affect his ability to operate the crane. There is no indication that he missed any work due to his injuries, or that he mentioned them at the time he refused to operate the crane. He operated the crane on July 19, 1982. He did not see a doctor regarding his injuries until after his separation from employment.

V

Further contributing to claimant's refusal to operate the crane was his fear of harassment from his lead man. On July 19, 1982, the lead man had directed vulgar criticism at claimant regarding his performance as a crane operator.

From the foregoing Findings of Fact the undersigned frames the following

ISSUES

I

Was the Petition for Review late with good cause?

II

Did claimant quit his job or was he discharged?

III

Was claimant separated from employment under circumstances which subject him to disqualification from unemployment compensation?

From the Issues framed the undersigned draws the following

CONCLUSIONS

I

We may accept an untimely Petition for Review if **good cause** for the late filing is shown. RCW 50.32.075. In determining whether **good cause** exists, we consider the **length** of the **delay**, the presence or absence of prejudice to the parties, and whether the **delay** was excusable. Devine v. Department of Employment Security, 26 Wn. App. 778, 614 P.2d 231 (1980). In the present case, there was but a one-day delay, and there is no indication that this delay prejudiced either party. Petitioner's secretary believed there was a mail pick-up on October 8 after she mailed the Petition. The October 9 Seattle postmark does not necessarily contradict her. Under these circumstances, we believe the delay was excusable. **Good cause** for the delay has been established.

II

On July 20, claimant was given the option of either operating the crane or leaving. He voluntarily chose to leave. He did not return to work that day, and did not report for work either of the next two days. Based on these facts, we conclude that he quit his employment. The cause is therefore properly adjudicable pursuant to RCW 50.20.050.

III

Rcw 50.20.050 essentially provides that one who quits work without good cause shall be disqualified from unemployment benefits. Section (3) of the statute states that the Commissioner, in determining whether good cause exists, shall only consider work-connected factors such as the degree of risk involved to the individual's health, safety, and morals, the individual's physical fitness for the work, the individual's ability to perform the work, and such other work-connected factors which the Commissioner may deem pertinent. WAC 192-16-009 is an explanatory regulation pertaining to RCW 50.20.050. For our purposes here, it provides as follows:

"(1) General Rule. Except as provided in WAC 192-16-011 and 192-16-013, in order for an individual to establish good cause within the meaning of RCW 50.20.050(1) for leaving work voluntarily, it must be satisfactorily demonstrated:

- (a) that he or she left work primarily because of a work connected factor(s); and
- (b) that said work-connected factor(s) was (were) of such a compelling nature as to cause a reasonably prudent person to leave his or her employment; and
- (c) that he or she first exhausted all reasonable alternatives prior to termination: Provided, That the individual asserting 'good cause' may establish in certain instances that pursuit of the otherwise reasonable alternatives would have been a futile act, thereby excusing the failure to exhaust such reasonable alternatives."

The burden of proof to establish one's entitlement to benefits rests upon the claimant. Jacobs v. Unemployment Comp. & Placement, 27 Wn. 2d 641, 179 P.2d 707 (1947).

IV

Within the context of RCW 50.20.050(3), we are here concerned with the degree of risk to which claimant would have been subjected had he operated the crane on July 20. In his effort to establish that the risk to his health or safety was sufficient to constitute good cause for leaving work, claimant asserts that his weekend injuries would have rendered the work hazardous. We have no other evidence tending to establish good cause. Against claimant's assertion, we see that he missed no work due to his injuries, that he operated the crane on July 19 despite the injuries, that he did not mention the injuries as the basis for his refusals to operate the crane, that he did not consult a doctor regarding the injuries until after his separation from employment, and that both his foreman and shop steward were of the opinion that he should operate the crane. Faced with these considerations, we conclude that his injuries were not so extreme as to render his operation of the crane hazardous. It follows that good cause on the basis of his injuries has not been shown.

V

Nor can we conclude that claimant's fear of criticism and harassment from his lead man provided him with good cause for leaving work. While such conduct need not be tolerated, claimant had courses of action available to him short of quitting. WAC 192-16-009, set forth in part above, requires that a claimant exhaust reasonable alternative courses of action before quitting. At the very least, claimant could have brought the problem with his lead man to the attention of his foreman or shop steward. As he did not do this, he did not satisfy the regulation's requirement. Now, therefore,

IT IS HEREBY ORDERED that the Decision of the Office of Administrative Hearings entered in this matter on the 28th day of September, 1982, shall be SET ASIDE. Claimant is disqualified from benefits pursuant to RCW 50.20.050(1) beginning July 18, 1982 and until he has obtained work and earned wages of not less than his suspended weekly benefit amount in each of five calendar weeks. Benefits, if any, paid claimant during the period of disqualification hereby imposed constitute an overpayment, and the cause is REMANDED to the Job Service Center for a determination, if necessary, of issues relating to RCW 50.20.190.

DATED at Olympia, Washington, August 19, 1983.

David J. Freeman
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 739, 1983 WL 492326 (WA)
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**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-H

***In re Bowman*, Empl. Sec. Comm'r. Dec. 2d 491(1979)**



Empl. Sec. Comm'r Dec.2d 491, 1979 WL 202634 (WA)

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Empl. Sec. Comm'r Dec.2d 491, 1979 WL 202634 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE FRANK C.
BOWMAN

February 15, 1979

Case No.

491

Review No.

32583

Docket No.

8-11206

ORDER REMANDING CAUSE FOR HEARING AND DECISION

INLAND EMPIRE GOODWILL INDUSTRIES, the former and interested employer herein, by and through THE GIBBENS COMPANY, INC., Paul A. Fountain, Account Manager, duly petitioned the Commissioner for a review of an Order of Default entered in this matter by the Appeal Tribunal on the 20th day of December, 1978.

A review of the record herein reveals the fact that following the issuance of a Determination Notice dated November 29, 1978, allowing benefits to the above-named claimant, the interested employer filed a timely appeal therefrom on the 8th day of December, 1978. Thereafter, a Notice of Hearing was mailed to all interested parties on the 13th day of December, 1978, advising that a hearing would be held on identified issues in dispute at 10:30 a.m., Wednesday, December 20, 1978, at West 55 Mission, Spokane, Washington.

At the time and place scheduled for hearing, the employerappellant failed to enter an appearance, resulting in the issuance of the Default Order of December 20, 1978, here under petition. In explanation of its failure to appear, the petitioner-employer asserts that the Notice of Hearing was not received until after the scheduled date and time for appearance. Under the circumstances, we conclude that good cause has been established for the petitioner's nonappearance, requiring our remanding this matter to the Appeal Tribunal for further hearing and the issuance of a decision on the merits of the issue(s) in controversy.

Due to the nature of the Notice of Hearing issued in this matter, we feel the following comments and observations are warranted. Notice of Hearing, including notice of the issues to be decided, is a fundamental requirement of "due process".

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In re Klein, Comm. Dec. 441 (1960); it is not, however, deemed jurisdictional. In re Shriver, Comm. Dec. (2nd) 298 (1977). The timing of the service (mailing) of a Notice of Hearing vis-a-vis the date on which the hearing is held is governed by the provisions of RCW 50.32.040, stating, in relevant part, as follows:

" . . . In any proceeding before an appeal tribunal involving an individual's right to benefits, all parties shall be afforded an opportunity for hearing after not less than seven days' notice. This provision supersedes the twenty-days' notice provision of RCW 34.04.090 as to such cases. . . ." (Emphasis supplied).

Of related importance are pertinent portions of WAC 192-09-100, as set forth below:

" . . . the appeal tribunal shall cause to be served a notice of hearing on all interested parties at least seven days before the date set for hearing. . . ." (Emphasis supplied).

Reading the above-quoted statutory and regulatory language in pari materia, it appears evident that not less than seven calendar days should intervene between the date of service (mailing) of the Notice of Hearing and the date scheduled for hearing. Such was not done in the instant matter, thereby rendering the Notice of Hearing suspect as a matter of "due process".

It should be borne in mind that the foregoing comments are directed to principles of procedural, rather than substantive, due process. Nevertheless, we are of the opinion that a technical denial of procedural due process will not necessarily taint the proceedings to the extent that reversible error inevitably results. Though a party may establish a technical denial of due process, it remains essential to show that the defect has resulted in substantial prejudice. Thus, a party who receives a Notice of Hearing well before the scheduled date of hearing, and is without good cause for failing to appear on the designated date or, alternatively, fails to timely request a continuance, will not necessarily be entitled to a new hearing upon a mere showing that the Notice of Hearing was technically defective (less than seven days). In this respect, each case must be resolved upon its own facts. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 20th day of December, 1978, shall be SET ASIDE. The record and files herein shall be remanded to the Appeal Tribunal for the purpose of rescheduling this matter for hearing. When the record is complete, the Appeal Tribunal shall issue its decision on the merits of the claimant's claim for benefits, and further rights of appeal to the Commissioner shall be granted to any interested party aggrieved by such decision.

DATED at Olympia, Washington, FEB 15 1979

Empl. Sec. Comm'r Dec.2d 491, 1979 WL 202634 (WA)

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Thomas W. Hillier
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 491, 1979 WL 202634 (WA)
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**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-I

***In re Perry*, Empl. Sec. Comm'r. Dec. 2d 502 (1979)**

Westlaw

Empl. Sec. Comm'r Dec.2d 502, 1979 WL 202645 (WA)

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Empl. Sec. Comm'r Dec.2d 502, 1979 WL 202645 (WA)

Commissioner of the Employment Security Department
State of WashingtonIN RE WILLIAM R.
PERRY
PETITIONER

April 13, 1979

Case No.

502

Review No.

32945

Docket No.

8-13709-R

DECISION OF COMMISSIONER

WILLIAM R. **PERRY** duly petitioned the Commissioner for a review of an Order of Default entered in this matter by an Appeal Tribunal on the 28th day of February, 1979. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the undersigned hereby enters the following:

FINDINGS OF FACT ON PROCEDURAL ISSUE**I**

On November 1, 1978, the petitioner was issued a Determination Notice holding that he had been discharged for misconduct connected with his work, thereby subjecting him to disqualification pursuant to the provisions of RCW 50.20.060. The petitioner duly filed a timely Notice of Appeal, resulting in a hearing being scheduled for his benefit at Port Angeles, Washington, on November 28, 1978, at the hour of 2:45 p.m.

II

On December 4, 1978, Appeal Examiner Gebhardt entered an Order of Default holding that the petitioner failed to appear for his scheduled hearing on November 28, 1978, and had also failed to make a timely request for postponement thereof.

III

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Following receipt of the Default Order of December 4, 1978, the petitioner duly filed a Petition for Review, stating, in pertinent part, as follows:

"I was in the J.S.C. and talked to receptionist then sat down and waited 50 minutes for the hearing. No one called me. I didn't see anyone from the Tribal Council either. . . ." As a result of the foregoing, the undersigned issued an Order of Remand on January 31, 1979, requesting the Appeal Tribunal to schedule a second hearing to take testimony and evidence on the issue of good cause for the petitioner's nonappearance at the November 28, 1978, hearing and, if good cause was established, to decide the merits of the petitioner's claim for unemployment insurance benefits.

IV

Pursuant to the above-mentioned Remand Order of January 31, 1979, the Appeal Tribunal rescheduled this matter for hearing in Port Angeles, Washington, on February 22, 1979, at the hour of 8:45 a.m. The petitioner duly entered an appearance, together with Messrs. Golding (Intake Supervisor) and Zindel (Interviewer), representatives of the Job Service Center. Testimony and evidence were received from all individuals named concerning the events surrounding the alleged nonappearance of the petitioner at the originally scheduled hearing on November 28, 1978, the essentials of which are summarized as follows:

TESTIMONY OF PETITIONER

On November 28, 1978, the petitioner appeared at the Port Angeles Job Service Center at the hour of 2:30 p.m., in response to his Notice of Hearing scheduling a hearing for 2:45 p.m. The petitioner engaged Mr. Golding in a conversation concerning a food stamp problem, the conversation concluding at approximately 2:45 p.m. The petitioner was advised there would be a delay in the commencement hour of his hearing due to the previous hearing taking more time than anticipated. The petitioner became vocally upset over the delay but took a seat in the reception area for approximately ten minutes, at which time he went outside the building to smoke, such practice being prohibited in the reception area. The petitioner again checked with the receptionist at 3:10 p.m. and was advised there was still a delay. The petitioner thought he might have had one additional cigarette outside the building, following which he returned to the reception area. Not having been called for a hearing, the petitioner departed the Job Service Center at 3:35 p.m., in response to the insistence of the party who had driven him to the hearing from their respective residences in Neah Bay, Washington, some 67 miles from the Port Angeles Job Service Center. The petitioner did not make his departure known to the receptionist, feeling he had waited an appropriate length of time beyond his scheduled 2:45 p.m. appointment.

TESTIMONY OF MR. GOLDING

Mr. Golding requested, and was permitted, to enter into the record a recapitula-

tion of the events surrounding his encounter with the petitioner on November 28, 1978, this recapitulation having been written by Mr. Golding on the aforementioned date and accepted into evidence as Exhibit No. 7:

"Mr. **Perry** arrived about 2:30 p.m. and talked to Dick Golding regarding a food stamp certification problem. The discussion was completed by 2:45, his scheduled hearing time. "At 2:55, Mr. **Perry** went to the Reception counter and complained about having to wait, became loud and abusive in his language, and walked out cursing.

"He had been advised twice that he would be called as soon as the hearing in progress was over. (At 2:45 and a few minutes later.) "Mr. Zindel and Mr. Golding both observed the smell of liquor on his (**Perry's**) breath." In addition to the foregoing, Mr. Golding confirmed the fact that the reception area was posted "No Smoking", that he did not see Mr. **Perry** after the latter's departure at approximately 2:55 p.m., and that he thought Ms. Gebhardt concluded the prior hearing about 3:00 p.m.

TESTIMONY OF MR. ZINDEL

Mr. Zindel was acting as the receptionist on November 28, 1978, in the Port Angeles Job Service Center, a portion of his duties including the checking in of individuals scheduled for appeal hearings. Mr. Zindel recalled checking in Mr. **Perry**, but could not recall the time. He further recalled that there was a delay in the commencement hour of Mr. **Perry's** hearing and so advised the latter. Mr. **Perry** became vocally irritated, hostile and departed. Mr. Zindel recalled that Mr. **Perry** returned to the reception area but could not identify the time. Upon being asked by the Appeal Examiner as to the physical condition of Mr. **Perry**, Mr. Zindel could recall nothing untoward in this respect.

FINDINGS OF FACT ON MERITS

I

The petitioner was employed as a Fisheries Patrolman for the Makah Tribal Council of Neah Bay, Washington, from September, 1977, to August 27, 1978.

II

On or about August 27, 1978, the petitioner confronted his supervisor, Mr. Joseph Martin, pointing out an internal operational problem apparently involving another employee, and requested Mr. Martin's assistance in ameliorating the problem. Mr. Martin acknowledged awareness of the problem, whereupon the petitioner stated that following the next two days (which were his scheduled days off), he would remain at home and await a call from Mr. Martin advising settlement of the problem under discussion. Mr. Martin agreed to the petitioner's proposal.

III

After waiting approximately one week and having heard nothing further from Mr. Martin, the petitioner made inquiries concerning the situation. He learned from an unidentified source that he had been dismissed from employment. A few days later, he encountered Mr. Martin, whereupon the latter confirmed the fact that the petitioner had been separated from his employment. When asked the reason for this action, Mr. Martin responded that the petitioner had been laid off for lack of funds.

IV

Following application for unemployment compensation, at which time the petitioner advised the Job Service Center that he had been laid off for lack of funds, the employer indicated in writing to the Job Service Center that the petitioner had been "discharged due to nonattendance." (See Exhibit No. 5).

V

By a Determination Notice dated November 1, 1978, the Job Service Center held that the petitioner was discharged for misconduct connected with his work and therefore disqualified from the receipt of benefits pursuant to the provisions of RCW 50.20.060.

VI

At the hearing on February 22, 1979, the petitioner offered into evidence a letter over the signature of Donna Parker, Acting Employment Officer of the Makah Tribal Council, said letter being dated December 5, 1978, and accepted without objection as Exhibit No. 8. (It is to be noted that the Appeal Examiner discovered a copy of this letter in the Job Service Center's file maintained for the petitioner):

"Employment Security Department P.O. Box 992 Port Angeles, WA 98362 "Attention: Adjustor

"Re: William R. **Perry** "Gentlemen:

"Our department has inadvertently made an error during my absence on a claimant, William R. **Perry**. We would like to make a correction in the reason for his separation.

"Mr. **Perry** was separated due to lack of funds in the program in which he was employed.

"We would appreciate your earliest effort to process his unemployment check.
"Thank you for your cooperation in rectifying this error.

"Sincerely,

/s/ Donna Parker

Acting Employment Officer"

From the foregoing Findings of Fact, the undersigned frames the following:

ISSUES

I

Did the petitioner establish good cause for his alleged nonappearance at the hearing scheduled for his benefit on November 28, 1978?

II

Was the petitioner discharged for misconduct connected with his work, thereby incurring disqualification pursuant to the provisions of RCW 50.20.060?

From the Issues as framed, the undersigned draws the following:

CONCLUSIONS

I

WAC 192-09-310 provides, in pertinent part, as follows:

"Upon approval of the appeal examiner, disposition may also be made of any hearing by stipulation, consent order or default. Any party deeming himself aggrieved by the entry of an order of default may petition the commissioner to review such order by complying with filing requirements set forth in WAC 192-09-315; Provided, however, That the default of such party shall be set aside by the commissioner only upon showing made of good and sufficient cause for such failure to appear or to request a postponement prior to the scheduled time for hearing. . . ." The Default Order issued by the Appeal Tribunal on February 28, 1979, states that,

". . . The appellant failed to appear at the hearing scheduled for November 28, 1978 and failed to make timely request for postponement in the matter, and the matter was rescheduled for February 22, 1979. Testimony taken at that time failed to establish good cause for the claimant's failure to appear at the first scheduled hearing; . . ." (Emphasis mine). Because the above-emphasized language of the Appeal Tribunal's Default Order of February 28, 1979, fails to enlighten the reader as to the basis for the Tribunal's conclusion concerning a lack of good cause for the petitioner's failure to appear at the initial hearing scheduled in these proceedings, we have taken some pains to detail the evidence presented on the issue of "good cause" in our "Findings of Fact on Procedural Issue" above. We now proceed to an analysis of same.

All parties appearing and testifying at the hearing on February 22, 1979, are in

agreement that the petitioner was present in the Port Angeles Job Service Center on November 28, 1978, at, or immediately prior to, the hour scheduled for his appeal hearing. Likewise, all parties are in agreement that the petitioner was notified there would be a delay in the commencement of his hearing due to the prior hearing running overtime. Additionally, all parties are in agreement that the petitioner reacted adversely to the news of the delay and departed the building at approximately 2:55 p.m. At this juncture, subsequent events become somewhat uncertain.

Mr. Golding's recapitulation of the events following the hour of 2:55 p.m. on November 28, 1978 (Exhibit No. 7), as further corroborated by his live testimony, indicate that he never again saw the petitioner following the latter's departure from the building at the referenced hour. It is important to note that Mr. Golding did not testify that the petitioner did not return; he only testified that he did not see him (the petitioner) after 2:55 p.m. on November 28, 1978.

Mr. Zindel recalled the petitioner's initial appearance in the Job Service Center on the day in question and knew the petitioner was reporting for his appeal hearing. Like Mr. Golding, Mr. Zindel recalls the angry departure of the petitioner from the reception area of the Job Service Center. However, unlike Mr. Golding, Mr. Zindel recalled that the petitioner returned to the reception area, although the exact time of the petitioner's return could not be established by this witness.

The balance of evidence bearing upon the events of the day in question comes solely from the testimony of the petitioner. This testimony stands unrefuted, and we have no reason whatsoever to doubt the veracity of the petitioner. Accordingly, we conclude that the petitioner appeared in the Job Service Center initially at 2:30 p.m. on the day in question; that he was advised of the delay of the commencement of his hearing; that he departed the Job Service Center at approximately 2:55 p.m. to have a cigarette, returning to the reception area shortly thereafter; that he again checked with the receptionist at approximately 3:10 p.m. and was again advised of a delay; that he may have left the building for an additional cigarette but returned to the reception area once again; and that the petitioner finally departed the premises at approximately 3:35 p.m., at the behest of his driver, his final departure not being announced to anyone within the Job Service Center.

We conclude from the foregoing that the petitioner cannot be held in default for nonappearance at the time and place scheduled for his hearing on November 28, 1978. We are satisfied that the petitioner overstayed the scheduled hour for his hearing for an appropriate period of time, and though we note a degree of negligence on the petitioner's part for absenting the building on one or two brief occasions, his reappearance within the building was noted by at least one witness to these proceedings. Again, we must observe an element of negligence practiced by the petitioner when he finally departed the Job Service Center without notifying a

responsible departmental official of his intentions. We consider this element of negligence excusable in view of the petitioner's driver's insistence that the two commence their return journey to Neah Bay, some 67 miles distant from Port Angeles. Accordingly, the Default Order is hereby set aside for good cause shown.

II

As to the merits of the disqualification of the petitioner pursuant to the provisions of RCW 50.20.060, we need only observe the fact that the interested employer's initial report of the reason for the petitioner's unemployment was completely rescinded by the introduction of Exhibit No. 8 into the record without objection, the contents of which are wholly unrefuted and fully corroborate the petitioner's un rebutted testimony on this issue. In short, the petitioner's unemployment was due to a layoff for lack of funds to finance a continuation of his position, such termination being for a nondisqualifying reason. Accordingly,

IT IS HEREBY ORDERED that the Default Order entered in this matter by the Appeal Tribunal on the 28th day of February, 1979, is hereby SET ASIDE.

IT IS FURTHER ORDERED that the petitioner is not subject to disqualification from benefits pursuant to the provisions of RCW 50.20.060. Waiting period credit or benefits shall be allowed the petitioner commencing with the week ending September 3, 1978, provided he is otherwise qualified and eligible therefor.

DATED at Olympia, Washington, APR 13 1979

Thomas W. Hillier
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 502, 1979 WL 202645 (WA)
END OF DOCUMENT

DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II

APPENDIX 2-J

***In re Groves*, Empl. Sec. Comm'r. Dec. 2d 374 (1978)**

Westlaw

Empl. Sec. Comm'r Dec.2d 374, 1978 WL 209148 (WA)

Page 1

Empl. Sec. Comm'r Dec.2d 374, 1978 WL 209148 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE NELLIE R. GROVES

January 13, 1978

Case No.

374

Review No.

29245

Docket No.

7-01035-R

DECISION OF COMMISSIONER

On the 8th day of September, 1977, the undersigned issued an Order taking the above-entitled matter under advisement for the purpose of reviewing a Decision of an Appeal Tribunal entered with respect thereto on the 29th day of August, 1977. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the undersigned does hereby enter the following:

FINDINGS OF FACT**I**

Peninsula College, the interested employer in this matter, duly appealed a Determination Notice of the Job Service Center which held that claimant "did not refuse an offer of suitable work" and which allowed claimant benefits "beginning with the calendar week ending December 18, 1976 (50/76), if otherwise eligible."

II

The Determination Notice was issued January 13, 1977, and was addressed to Floyd Young, Peninsula College, Lauridsen Blvd., Port Angeles, Washington, 98362. It apparently was delivered in due course.

III

By letter dated January 17, 1977, and postmarked January 18, 1977, the interested employer appealed. The letter of appeal was over the signature of Lucille Mealey. Nothing in that letter indicated that mail should be directed to Mrs. Mealey, or

to any other particular person.

IV

On February 8, 1977, a Notice of Hearing was mailed to the interested employer, calling for the matter to be heard on Tuesday, February 15, 1977, at 1:15 P.M.. That notice was addressed as follows: Peninsula College, 1502 East Lauridsen Blvd., Port Angeles, Washington, 98362.

V

Mail from the Employment Security Department is routinely routed by the interested employer, unopened, to the business office, also described as the payroll office. The Notice of Hearing was handled in this fashion. Mrs. Mealey was unaware of the date or time of the hearing until the actual date of the hearing when she received inquiry with respect to its outcome. Upon so receiving inquiry, she investigated and discovered that the Notice of hearing had been placed in the personnel office's file respecting the claimant. She promptly telephoned the local office and received a telephone reply from the hearing examiner on the following day, February 16, 1977. She explained the difficulty at that time.

VI

On February 18, 1977, the hearing examiner issued an "Order of Default" wherein he found "that all interested parties have been afforded a reasonable opportunity for fair hearing, and that there is no apparent material error in the determination" and "ORDERED, ADJUDGED AND DECREED that the appellant has failed to show good cause for failing to appear at the scheduled hearing and that the appellant be and is in default; and the determination by the Department is hereby AFFIRMED".

VII

The interested employer duly petitioned the Commissioner to review the Order of Default. On April 27, 1977, having reviewed the record and file, the Commissioner entered an Order which remanded the case to the Appeal Tribunal:

".... for the purpose of rescheduling this matter for hearing to afford the employer, as well as the claimant, an opportunity for hearing. Testimony and evidence shall be obtained for the record on the issue of good cause for the employer's non-appearance at the original hearing scheduled in this matter, and on the merits of the claimant's claim for unemployment benefits. Following the hearing, the Appeal Tribunal shall issue a new decision on the issue of the employer's failure to appear, and if it determines that good cause was shown therefore, it shall incorporate in said decision its resolution of the merits of the claimant's claim for unemployment benefits. Any interested party feeling aggrieved by the Appeal Tribunal's decision herein ordered to be issued shall have further rights of appeal to the Commissioner, pursuant to the provisions of RCW 50.32.070."

VIII

Pursuant to the remand order, a hearing was held on July 28, 1977, at which time all of the interested parties appeared and offered testimony. Following the hearing the Appeal Tribunal issued a decision holding that the interested employer had failed to establish good cause for its failure to appear at the initial hearing, but that from the face of the determination notice, without regard to the testimony, it appeared that claimant had failed without good cause to accept an offer of suitable work and that pursuant to RCW 50.20.080 she was disqualified from benefits beginning with the calendar week ending December 18, 1976, and until she obtained work and earned wages of not less than her suspended weekly benefit amount in each of five weeks.

From the foregoing Findings of Fact, the undersigned frames the following:

ISSUES**I**

Did the interested employer establish good and sufficient cause for failing to appear at the initial hearing in this matter?

II

If the interested employer has failed to establish good and sufficient cause, was the Appeal Tribunal authorized to deny claimant benefits?

From the Issues as framed, the undersigned frames the following:

CONCLUSIONS

As to whether the interested employer had good and sufficient cause for failing to appear at the initial hearing in this matter, we agree with the Appeal Tribunal that it did not. We adopt the Appeal Tribunal's Conclusions in this regard, which are as follows:

"2. The notice calling for the matter to be heard on February 15, 1977, satisfied the requirements of WAC 192-09-100.

"3. Nothing in the letter of January 17, 1977, over the signature of Lucille Mealey designated the signator or any other person as an 'agent' within the meaning of WAC 192-09-125. So far as this Tribunal is aware, by signing a letter of appeal, one does not, by necessary inference, become an agent for service of further notices. Accordingly, WAC 192-09-125 was not violated by the failure to note Mrs. Mealey's name upon the Notice of Hearing sent February 8, 1977.

"4. The interested employer received the notice in due course; it was initially handled by the receptionist who transmitted it to the personnel or payroll office.

There, after being opened, it was negligently placed in the claimant's personnel file rather than being forwarded to a suitable administrator. Accordingly, the interested employer was not represented at the hearing set for February 15, 1977. That failure can only be attributed to the negligence of the interested employer's agents which must necessarily be imputed to the interested employer. Accordingly, 'good and sufficient cause' within the meaning of WAC 192-09-310 has not been shown."

II

Having concluded that good and sufficient cause did not exist for the employer's non-appearance, the Appeal Tribunal lacked authority to set aside the allowance of benefits to the claimant on the basis that the Determination Notice was erroneous on its face. The initial appeal decision had already found that "there is no apparent material error in the determination". Further, the Order of Remand specifically directed that "the Appeal Tribunal shall issue a new decision on the issue of the employer's failure to appear, and if it determines that good cause was shown therefor, it shall incorporate in said decision its resolution of the merits of the claimant's claim for unemployment benefits..." (emphasis added). And finally the denial of benefits to the claimant is in contradiction to WAC 192-09-310 which says:

"WAC 192-09-310 Decisions--Disposition by other than decision on the merits-- Petition from. Upon approval of the appeal examiner, disposition may also be made of any hearing by stipulation, consent order or default. Any party deeming himself aggrieved by the entry of an order of default may petition the Commissioner to review such order by complying with filing requirements set forth in WAC 192-09-315; PROVIDED, HOWEVER, that the default of such party shall be set aside by the Commissioner only upon showing made of good and sufficient cause for such failure to appear to request a postponement prior to the scheduled time for hearing. In the event such order of default is set aside, all interested parties shall be so notified in writing and the matter restored to the hearing calendar. (Order 2602, Sec. 192-09-310, filed 4/24/70.)"

Here the case was before the Commissioner by virtue of the employer's petition from a default order which had affirmed the local Determination Notice. That default order was to be set aside "only upon showing made of good and sufficient cause for such failure to appear or to request a postponement prior to the scheduled time for hearing". Since "good and sufficient cause" was not shown the default order was to be affirmed. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 29th day of August, 1977, shall be MODIFIED. The interested employer was in default for its failure to attend the hearing of February 15, 1977, and the Determination Notice of January 13, 1977, allowing the claimant benefits, if otherwise eligible, is affirmed.

Empl. Sec. Comm'r Dec.2d 374, 1978 WL 209148 (WA)

Page 5

DATED at Olympia, Washington, JAN 13 1978

David J. Freeman
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 374, 1978 WL 209148 (WA)
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**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-K

***In re McNally*, Empl. Sec. Comm'r. Dec. 2d 321(1977)**

Westlaw.

Empl. Sec. Comm'r Dec.2d 321, 1977 WL 191864 (WA)

Page 1

Empl. Sec. Comm'r Dec.2d 321, 1977 WL 191864 (WA)

Commissioner of the Employment Security Department
State of WashingtonIN RE MICHAEL P.
MCNALLY

June 7, 1977

Case No.

321

Review No.

28232-X

Docket No.

7-03746-X

DECISION OF COMMISSIONER

On the 18th day of April, 1977, the undersigned issued an order taking the above-entitled matter under advisement on his own motion for the purpose of reviewing a Decision of an Appeal Tribunal entered with respect thereto on the 6th day of April, 1977. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the undersigned hereby adopts the Findings of Fact which, for purposes of clarity, are hereinafter set forth in their entirety.

FINDINGS OF FACT

"1. On or about November 12, 1976, the claimant filed a claim for unemployment insurance benefits and was advised of the eligibility requirements and regulations for filing claims by mail. The claimant was placed on a biweekly claiming sequence. Claims would be filed during even numbered weeks on an official claim calendar. Claims were filed without incident until the calendar weeks ending February 12 and February 19, 1977.

"2. The claimant was aware that the above mentioned weeks should be claimed during the week ending February 26, 1977. The claimant entrusted his claim record cards to his wife who offered to bring the cards to the unemployment office on February 22, 1977. At the end of the day, the claimant asked his wife whether she had dropped off the cards and she responded in the affirmative.

The claimant was unaware that his cards were late filed until he received notice from the unemployment office. The claimant's wife misled him and filed the claims

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on Monday, February 28, 1977."

From the foregoing Findings of Fact, the undersigned frames the following:

ISSUE

Did the claimant, for good cause shown, fail to file his claims for the calendar weeks ending February 12 and 19, 1977, in accordance with the provisions of RCW 50.20.010(2) and WAC 192-12-141?

From the Issue as framed, the undersigned draws the following:

CONCLUSIONS

It is apparent from a reading of WAC 192-12-141 that claims for benefits were intended to be perfected by the individual claimant within scheduled time parameters unless noncompliance was for reasons constituting good cause. We have generally held that "good cause" is limited to circumstances beyond the control of the claimant.

In the instant case, the claimant, though having previously delivered his continued claims to his local office personally, saw fit to assign his wife as his agent for the purpose of insuring personal delivery of his claims for the weeks in question to his local office not later than February 22, 1977. Though we do not necessarily question claimant's judgment in requesting his wife to assume his personal obligation of delivering the claim cards to the local office in timely fashion, we are compelled to determine whether the wife's failure to comply with her husband's request was for a reason or reasons constituting "good cause." The only evidence of record concerning the reason for the wife's failure to comply with claimant's request, was that she forgot. We are not prepared to characterize "forgetfulness" as a circumstance beyond the control of claimant's wife who was acting as his agent for the purpose of timely filing the claims in question. Under the circumstances shown, we are obliged to hold claimant responsible for the negligence of his wife, no good cause having been established for her dereliction. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 6th day of April, 1977, shall be SET ASIDE. Benefits shall be denied the claimant for the calendar weeks ending February 12 and 19, 1977, pursuant to the provisions of RCW 50.20.010(2) and WAC 192-12-141. Any issue of possible overpayment and liability therefor, shall be remanded to the local office for appropriate consideration and disposition.

DATED at Olympia, Washington, JUN 7 1977

Thomas W. Hillier
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 321, 1977 WL 191864 (WA)

Page 3

Empl. Sec. Comm'r Dec.2d 321, 1977 WL 191864 (WA)
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**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-L

***In re Braun*, Empl. Sec. Comm'r. Dec. 698 (1967)**

Westlaw.

Empl. Sec. Comm'r Dec. 698, 1967 WL 94804 (WA)

Page 1

Empl. Sec. Comm'r Dec. 698, 1967 WL 94804 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE EUGENE P. BRAUN PETITIONER

June 8, 1967

Case No.

698

Review No.

7696

Docket No.

A-59840

DECISION OF COMMISSIONER

EUGENE P. BRAUN duly petitioned the undersigned Commissioner to review an Order of Default issued by the Appeal Tribunal in this matter on the 8th day of May, 1967.

The record establishes that the petitioner filed timely Notice of Appeal from a determination mailed April 3, 1967, finding the petitioner to have been discharged from his former employment for reasons constituting misconduct connected with his work. Pursuant to Section 74 of the Act, the petitioner was disqualified for benefits for the week ending March 11, 1967, through the week ending April 15, 1967. At the time of filing his Notice of Appeal, the petitioner provided the Local Office with a mailing address of 14521 Pacific Avenue, Tacoma, Washington. A Notice of Hearing was communicated by registered mail to the petitioner at the address indicated above. This Notice of Hearing advised the petitioner that his appeal was scheduled for hearing at 10:00 a.m. on Wednesday, May 3, 1967, in the Tacoma Local Office of this Department. At the time and place scheduled for hearing, the petitioner failed to enter an appearance nor did he, prior to the scheduled date of hearing, request a continuance from the Appeal Tribunal. As a consequence of the foregoing, the Appeal Tribunal issued their Order of Default on the 8th day of May, 1967, which Order is presently on petition to the undersigned.

In conjunction with his Petition for Review (filed by the petitioner on May 15, 1967) the petitioner stated as follows:

"I desire that the Order of Default be set aside and that I be afforded an appeal hearing. The Notice of Hearing was not received by me until May 5, 1967, two days after the scheduled date of the hearing."

On the date of filing the Petition for Review, the petitioner advised the Local Office that he had changed his address and that his present mailing address was General Delivery, Tacoma, Washington. It appears that this change of address occurred between the time the petitioner filed his Notice of Appeal and the date on which the Notice of Hearing was mailed to the petitioner.

In determining whether or not the petitioner has established good cause for his failure to appear at his appeal hearing, we note initially the responsibility of the Appeal Tribunal to notify all interested parties of the time and place of the hearing. This Notice of Hearing must be mailed, insofar as the claimant is concerned, to his last known mailing address. Necessarily, there is a correlative responsibility on the part of the claimant to provide this Department with his current mailing address, thereby assisting the Appeal Tribunal in fulfilling its responsibility of notification. We are satisfied that the record in this matter will support a finding that the petitioner failed to notify this Department in timely fashion of a change of mailing address. As a direct result of this failure, the petitioner did not receive timely Notice of his Appeal Hearing. Under the circumstances, we are unable to find good cause for petitioner's request to have the Order of Default set aside and the matter restored to the hearing calendar. In accordance with the foregoing, now therefore,

IT IS HEREBY ORDERED that the Order of Default entered in this matter by the Appeal Tribunal on the 8th day of May, 1967, shall be AFFIRMED. Benefits are denied the petitioner for the calendar week ending March 11, 1967, through the calendar week ending April 15, 1967, pursuant to the provisions of Section 74 of the Act.

DATED at Olympia, Washington, June 8, 1967.

MAXINE E. DALY
Commissioner
Employment Security Department

Empl. Sec. Comm'r Dec. 698, 1967 WL 94804 (WA)
END OF DOCUMENT

**DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II**

APPENDIX 2-M

***In re Herbert*, Empl. Sec. Comm'r. Dec. 544 (1963)**

Westlaw.

Empl. Sec. Comm'r Dec. 544, 1963 WL 67413 (WA)

Page 1

Empl. Sec. Comm'r Dec. 544, 1963 WL 67413 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE JOSEPH HERBERT PETITIONER

June 10, 1963

Case No.

544

Review No.

6393

Docket No.

A-49272

DECISION OF COMMISSIONER

JOSEPH HERBERT duly petitioned the undersigned Commissioner to review a Decision of an Appeal Tribunal entered in this matter on the 15th day of May, 1963, which decision dismissed the appeal of the petitioner on the grounds that he failed to enter an appearance at the time and place scheduled for hearing.

In his Petition for Review, the petitioner asserts that he received no Notice of Hearing, although he was advised by the local office that such was mailed to him by registered mail on May 7, 1963. The file before the undersigned contains the Notice of Hearing which was mailed to the petitioner by the Appeal Tribunal on May 7, 1963, through the medium of registered mail. The envelop containing the Notice of Hearing indicates that the letter reached the Riverton Heights Branch Post Office in Seattle, Washington, on May 8, 1963. On May 9, 1963, the mail carrier indicates that he left a notice of registered mail at the petitioner's home address indicating that a registered letter awaited the petitioner at the Riverton Heights Branch Post Office. The petitioner failed to respond to this notice, and a second notice was left at his home address on May 14, 1963, no action being taken by the petitioner. The Seattle postal authorities returned the unclaimed registered letter to this Department on May 22, 1963.

Based upon the foregoing evidence, we conclude that the Department fulfilled its responsibility in communicating a timely Notice of Hearing to the petitioner. There is no basis for concluding that the postal authorities were derelict in their responsibilities of notifying the petitioner that a registered letter awaited him at the branch Post Office serving the area of his residence. The petitioner's failure to claim his registered mail is responsible for his nonappear-

ance, and we find no element of good cause prompting the petitioner's inaction in this respect. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 15th day of May, 1963, shall be AFFIRMED. Benefits shall be denied the petitioner commencing with the calendar week ending March 30, 1963, through the calendar week ending May 4, 1963, pursuant to the provisions of Section 73 of the Act.

DATED at Olympia, Washington, June 10, 1963.

OTTO S. JOHNSON
Acting Commissioner
Employment Security Department

Empl. Sec. Comm'r Dec. 544, 1963 WL 67413 (WA)
END OF DOCUMENT

DARRAH V. ESD
COURT OF APPEALS NO. 37444-7-II

APPENDIX 2-N

***In re Kelly*, Empl. Sec. Comm'r. Dec. 714 (1962)**

Westlaw.

Empl. Sec. Comm'r Dec. 714, 1962 WL 76395 (WA)

Page 1

Empl. Sec. Comm'r Dec. 714, 1962 WL 76395 (WA)

Commissioner of the Employment Security Department
State of Washington

IN RE GRACE I. KELLY PETITIONER

October 11, 1962

Case No.

714

Review No.

6072

Docket No.

A-47549

DECISION OF COMMISSIONER

GRACE I. KELLY duly petitioned the undersigned Commissioner to review a Decision of an Appeal Tribunal entered in this matter on the 26th day of September, 1962. A cursory examination of the Tribunal's Decision discloses that a determination of denial of benefits under Section 73 of the Act was affirmed by that body on the grounds that the petitioner failed to enter an appearance at the time and place scheduled for hearing. Having now examined the record and files herein, thereby being fully advised in the premises, the Commissioner hereby enters the following:

FINDINGS OF FACT**I**

On August 30, 1962, the Tacoma Local Office of this Department mailed a Determination Notice to the petitioner's last-known address of 1209 E. 29th Street, Tacoma, Washington. The Determination Notice disqualified the petitioner for benefits for having left work voluntarily without good cause pursuant to Section 73 of the Act. Benefits were denied for the statutory period commencing with the calendar week ending August 18, 1962, through the calendar week ending September 22, 1962.

II

Within the statutory ten-day period for filing a timely notice of appeal, the petitioner appeared in the local office on the 6th day of September, 1962, for the purpose of filing such an appeal. On this date, the petitioner filed a Notice of Appeal form which bore her then current mailing address of 1209 E. 29th Street, Tacoma, Washington.

III

On the 14th day of September, 1962, the Appeal Tribunal of this Department issued by registered mail a Notice of Hearing to the petitioner at 1209 E. 29th Street, Tacoma, Washington, advising her that a hearing would be scheduled at the Tacoma Local Office at 2 p.m. on Friday, September 21, 1962.

IV

At the time and place scheduled for hearing, the petitioner failed to enter an appearance, resulting in the Appeal Tribunal's decision of denial as set forth above.

V

On September 28, 1962, the petitioner appeared at the Tacoma Local Office for the purpose of filing a timely Petition for Review. At this time, the petitioner indicated that she did not receive her Notice of Hearing until September 25, 1962, four days subsequent to the date she was scheduled to appear. Further, the petitioner alleged that she had moved from 1209 E. 29th Street to 904 South Mullen, Tacoma, Washington, during the month of August. The petitioner contends that notification of this move was given to local office personnel during the month of August, 1962. An examination of local office records fails to indicate notification of a change of address prior to September 28, 1962, when the petitioner appeared to file her Petition for Review.

From the foregoing Findings of Fact, the Commissioner frames the following:

ISSUE Did the petitioner establish good cause for her failure to appear at the time and place scheduled for her appeal hearing?

From the Issue as framed, the Commissioner draws the following:

CONCLUSION

Commissioner's Regulation 16, paragraph 2, provides in part as follows:

". . . If any interested party is unable to appear on the day set for hearing, he may request a continuance by so notifying the examiner assigned to the matter not later than the date fixed for such hearing. If such request is not made, and the party requesting the hearing makes no appearance, the default of such party may be set aside by the Commissioner only upon showing made, within a reasonable time not to exceed ten days from the date of the entry of the order of default, of good and sufficient cause for such failure to appear and to request a continuance prior to the scheduled date of hearing. . ."

It is a statutory obligation of the Appeal Tribunal to issue a Notice of Hearing to all interested parties to an appeal. Such notice must be mailed not later than

seven days prior to the scheduled date of hearing. It is the further obligation of the Appeal Tribunal to direct the Notice of Hearing to the interested parties' last known addresses. By direct implication, a claimant appealing from an adverse determination has a responsibility for supplying the local office with his or her current mailing address particularly at the time of filing the Notice of Appeal.

The record conclusively establishes that upon filing her Notice of Appeal on September 6, 1962, the petitioner gave her then current mailing address as 1209 East 29th Street, Tacoma, Washington. It was to this address that the Notice of Hearing was directed by the Appeal Tribunal. Although we are aware of the petitioner's contention that she had removed from the address mentioned above to 904 South Mullen, Tacoma, Washington, during the month of August, 1962, and that she had conveyed this information to the local office during August, 1962, the records contained in this file fail to support such an allegation. Under such circumstances, we do not feel that "good cause" has been established by the petitioner for her failure to appear at the time and place scheduled for her appeal hearing as that term appears in Regulation 16 quoted hereinabove. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 26th day of September, 1962, shall be AFFIRMED. Benefits shall be denied the petitioner commencing with the calendar week ending August 18, 1962, through the calendar week ending September 22, 1962, pursuant to the provisions of Section 73 of the Act.

DATED at Olympia, Washington, October 11, 1962.

OTTO S. JOHNSON
Acting Commissioner
Employment Security Department

Empl. Sec. Comm'r Dec. 714, 1962 WL 76395 (WA)
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FILED
COURT OF APPEALS
DIVISION II

NO. 37444-7-II

08 AUG 25 AM 9:47

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON
BY [Signature]
DEPUTY

JERRY L. DARRAH,

Appellant,

v.

STATE OF WASHINGTON
EMPLOYMENT SECURITY
DEPARTMENT,

Respondent.

CERTIFICATE OF
SERVICE

On August 22, 2008, I served the attached **BRIEF OF RESPONDENT EMPLOYMENT SECURITY DEPARTMENT** with Appendices by placing it in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system for mailing via U.S. Mail at the Office of the Attorney General at 1125 Washington Street SE, P.O. Box 40110, Olympia, Washington 98504-0110, for mailing via U.S. Mail addressed as follows:

WASHINGTON STATE COURT OF APPEALS, DIVISION II
CLERK OF THE COURT
950 BROADWAY, STE 300
TACOMA, WA 98402-4454

ORIGINAL + ONE COPY

TOMOTHY R. SOUTH, ATTORNEY AT LAW
P.O. BOX 759
1717 OLYMPIA WAY, SUITE 206
LONGVIEW, WA 98632

COPY

RESPECTFULLY SUBMITTED this 22nd day of August, 2008.


Bibi Shairulla, Legal Assistant