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No. 67865-5-1

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

AARIN MORRIS,

Appellant,

v.

STATE OF WASHINGTON DEPARTMENT OF
EMPLOYMENT SECURITY

Respondent.

APPELLANT'S REPLY BRIEF

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JAN 3 PM 2:36

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I. INTRODUCTION

A. Appellant's assignments of error.

Aarin Morris assigns error on this appeal to the ESD Commissioner's: (1) failure to find that the ESD failed to follow its own prescribed procedure; and (2) failure to find that the ESD deprived Ms. Morris of due process of law.

With respect to her first claim of error, Ms. Morris agrees that she did not formally assign error to the Commissioner's failure to make findings. She submits that the Court should consider the claim pursuant to RAP 1.2(a), which permits a liberal interpretation of the Rules of Appellate Procedure in spite of technical violations where a proper assignment of error is lacking but the nature of the challenge is set forth in the brief.

With respect to her second claim of error, Ms. Morris clearly asserted her constitutional claims at all stages of the administrative process. Further, RAP 2.5(a) and Washington decisional law provide that a "manifest error involving a constitutional right" may be properly raised for the first time on appeal.

B. Appellant's statement of the case is consistent with the Commissioner's findings of fact.

Ms. Morris disagrees with the ESD's contention that the facts set forth in her opening brief conflict with the Commissioner's findings of fact. Ms. Morris notes that the Commissioner made no findings whatsoever with respect to whether she received the ESD's "Overpayment Advisement of Rights" notice that the agency is required to provide to a claimant before it issues a determination notice in an overpayment case. The undisputed evidence adduced

at the administrative hearing showed that Ms. Morris did not receive this notice until 4/20/2010, the same day that she first received the 4/7/2010 determination notice.

C. Appellant was not required to report address changes after the termination of her claim for benefits.

Ms. Morris last received unemployment benefits for the benefit week ending 3/27/2010. After the termination of her unemployment claim, Ms. Morris was not required to report her address changes to the ESD. Any requirements imposed upon claimants by WAC 192-120-001 and WAC 192-120-010 pertain only to claimants' responsibility for reporting and filing claims *for the duration of their claims* and do not purport to require claimants to be responsible for doing so when they stop making weekly claims for unemployment benefits.

D. Summary of Appellant's reply arguments.

The Commissioner erred by not finding that the ESD failed to follow its own prescribed procedure, WAC 192-220-110, when it did not timely provide her with the "advice of rights" notice prior to issuing its 4/7/2010 determination notice. The Commissioner made no finding or conclusion with respect to this issue. The

undisputed evidence adduced at the hearing showed that Ms. Morris did not receive the "advice of rights" notice until 4/20/2010.

The Commissioner's decision also deprived Ms. Morris of her constitutional right to due process of law by providing her with the 3/23/2010 "advice of rights" notice on 7/20/2010 and by failing to provide her with adequate notice of her appeal rights.

II. ARGUMENT

A. THE COURT OF APPEALS SHOULD REVIEW APPELLANT MORRIS' ASSIGNMENTS OF ERROR.

1. The nature of Morris' challenge to the Commissioner's failure to find that the ESD failed to follow its own procedure was clearly argued in Appellant's brief.

Appellant concedes that she did not formally assign error to the Commissioner's failure to make findings regarding the ESD's failure to follow its own prescribed procedure that required the agency to provide her with a timely "overpayment advice of rights" notice. However, RAP 1.2(a) "permits liberal interpretation of these rules and allows appellate review in spite of technical violations where proper assignment of error is lacking but the nature of the challenge is clear and the challenged findings are set

forth in the party's brief." Smith v. Employment Security Dept., 155 Wn. App. 24, 33, 226 P.3d 263 (2010).

Ms. Morris clearly set forth her challenge to the ESD's failure to follow its own rules in her opening brief. Brief of Appellant, p. 2; pp. 16-19. Ms. Morris did not set forth any findings in her opening brief because the Commissioner made no findings with respect to this issue. The Court should exercise its discretion to address the issue of whether the Commissioner erred by not finding that the ESD failed to follow its own procedure by failing to provide her with a timely "overpayment advice of rights" notice, a notice the ESD is required to provide to overpayment claimants pursuant to WAC 192-220-110.

2. Morris properly raised her due process claims at all stages of the administrative process.

The ESD erroneously contends that Ms. Morris failed to assert her claims that the agency violated her constitutional right to due process of law by failing to provide her adequate notice and a meaningful opportunity to be heard. The record reflects that Ms. Morris repeatedly asserted these claims at the 11/2/2010 administrative hearing (CR 50-61), in her 12/2/2010 petition for

review (CR 180-182) and in her 12/30/2010 petition for reconsideration. (CR 199-202).

The declaration that Ms. Morris submitted for the administrative hearing that was admitted into evidence at the administrative hearing was entitled "RIGHT TO DUE PROCESS APPEAL REQUEST" and she repeatedly asserted her due process claims in this declaration. (CR 50-61) The portions of Ms. Morris' declaration asserting these claims are set forth in **Appendix A** of this reply brief. Ms. Morris also testified at the administrative hearing that she did not receive any notices in time to file a timely appeal. (CR 33, l. 10).

Ms. Morris reasserted her due process claims in both her 12/2/2010 petition for review and in her 12/30/2010 petition for reconsideration. (CR 180-182; 199-202). The relevant portions of the petition for review are set forth in **Appendix B** of this reply brief and the relevant portions of the petition for reconsideration are set forth in **Appendix C** of this reply brief.

3. Morris may properly raise manifest errors involving her constitutional rights for the first time on appeal.

A claim of “manifest error involving a constitutional right” may be raised for the first time on appeal. RAP 2.5(a); see also, State Health Ins. Pool v. Health Care Authority, 129 Wn.2d 504, 511, 919 P.2d 62 (1996) (holding that “Constitutional issues may be raised for the first time on appeal”). A “manifest error involving a constitutional right” occurs when the error “caused actual prejudice or practical and identifiable consequences.” State v. Montgomery, 163 Wn.2d 577, 595, 163 Wn.2d 577 (2008).

Here, Ms. Morris was prejudiced by the error involving her due process rights because the error deprived her of an opportunity to be heard about very serious fraud allegations prior to the 4/7/2010 issuance of the determination notice or at any time thereafter. The Court of Appeals should therefore accept review of these issues even if the Court determines that Ms. Morris is raising them here for the first time.

B. THE FACTS ASSERTED BY APPELLANT MORRIS ARE CONSISTENT WITH THE COMMISSIONER'S FINDINGS OF FACT.

Appellant Morris did not assign error to any of the Employment Security Department Commissioner's findings of fact on this appeal. She agrees with the ESD that the unchallenged

findings are verities on appeal. Tapper v. Employment Security Dept., 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

In his December 30, 2010 decision, the Commissioner adopted the findings of fact and conclusions of law previously made by the Administrative Law Judge.¹ (CR 194). The Commissioner also made what he termed “additions, modifications and comments” to the ALJ’s findings and conclusions in his decision.² (CR 194).

The facts that Ms. Morris has cited to in her opening brief do not conflict with the Commissioner’s findings. Any other facts relied upon by Ms. Morris were undisputed during the administrative proceedings and are important for the Court to review in its consideration of the issues raised on this appeal. The Commissioner’s failure to make findings should not limit the Court

¹ The ALJ’s November 2, 2010 findings, conclusions and order are set forth in their entirety in **Appendix D** of this reply brief. See, CR 173-175 (copy of ALJ’s decision).

² The additional and modified findings and conclusions made by the Commissioner on December 30, 2012 are set forth in **Appendix E** of this reply brief. See also, CR 194-196 (copy of Commissioner’s decision). The Commissioner also issued an order denying Ms. Morris’ petition for reconsideration on January 28, 2011, the language of which is set forth in **Appendix F** of this reply brief. See also, CR 206 (copy of order denying petition for reconsideration). Appellant submits that there are no findings in the Commissioner’s order denying reconsideration that are relevant to this appeal.

of Appeals' consideration of facts relevant to the issues raised by Ms. Morris.

C. APPELLANT MORRIS WAS NOT REQUIRED TO REPORT HER ADDRESS CHANGE TO THE ESD AFTER THE TERMINATION OF HER CLAIM FOR BENEFITS.

Aarin Morris received unemployment benefits for 20 weeks starting with the week ending 7/18/2009 and ending with the week ending 12/5/2009. (CR 42; CR 226-228). These are the only benefits involved in the case that is now before the Court of Appeals.

Ms. Morris also received unemployment benefits for the 8 week period starting with week ending 12/26/2009 and ending with the week ending 2/13/2010. (CR 226). The benefits paid during this period of time are not at issue in the present case before the Court of Appeals because her entitlement to these benefits was decided in the first ESD case.³

³ Ms. Morris's entitlement to the unemployment benefits paid to her for the 8 week period from 12/26/2009 to 2/13/2010 were the subject of the first case commenced against her by the ESD. See, generally, Brief of Appellant, pp. 3-4. On 3/24/2010, the ESD issued a preliminary determination notice that denied benefits to Ms. Morris for this 8 week period based on an allegation that the interested employer (Pacific Pro Audio) had discharged her on 12/22/2009 for "misconduct." (CR 95; CR 64). On 8/19/2010, following a hearing before the OAH at which it was determined that the record did not establish disqualifying "misconduct," the ALJ set aside the preliminary determination and ordered that

Ms. Morris applied for emergency unemployment benefits on 3/4/2010, on a form that accurately set forth her address at the time, viz. 17911 10th Ave. N.E., Apt. LWR, Shoreline, WA 98155. (CR 82). She thereafter received \$25.00 per week in emergency benefits for the 4 week period starting with the week ending 3/6/2010 and ending with week ending 3/27/10. These benefits are also not at issue in the present case before the Court of Appeals.⁴

Ms. Morris returned to work part-time with a new employer "at the beginning of April, 2010" and secured full-time work with a second new employer in "mid-April 2010." (CR 53). There is no record that she submitted any weekly claims for unemployment benefits after the week ending 3/27/2010. (CR 226).

The ESD's contention that WAC 192-120-001, WAC 192-120-010 and the claimant information booklet required Ms. Morris to provide the ESD with her new address (i.e., her move from 17911 10th Ave. N.E., Apt. LWR, Shoreline, WA 98155 to 1802 N.E.

Ms. Morris was not required to repay the \$2,323.00 in benefits that had been paid to her between 12/26/09 and 2/13/10. (CR 94-95; CR 226).

⁴ It appears from the administrative record that that the \$25.00 per week emergency benefit paid to Ms. Morris during this 4 week period was from the Federal Additional Compensation Program ("FAC"). (CR 90).

199th Street, Shoreline, WA 98155) is misplaced.⁵ WAC 192-120-001 provides as follows:

WAC 192-120-001. Information for claimants

- (1) The department will provide you with information necessary for filing your weekly claims for benefits.
- (2) The department will provide assistance to any person who needs help in filing claims.
- (3) You will be responsible for following written information provided by the department *for the duration of your claim*, and will be presumed to understand the information unless you ask for help in understanding it. [Emphasis supplied].

This regulation imposes upon claimants the responsibility for following written information provided by the department *only for the duration of their claims*. WAC 192-120-001 does not purport to require claimants to be responsible for doing anything after they have stopped making weekly claims.

WAC 192-120-010 provides in pertinent part as follows:

WAC 192-120-010. Claimant information booklet

- (1) The department will publish an information for claimants booklet, form number EMS 8139, to provide basic information on the laws, rules and procedures about claims for unemployment insurance benefits.

⁵ WAC 192-120-001 and WAC 192-120-010 are set forth in their entirety in **Appendix G** of this reply brief.

Single copies of the booklet will be available to the public at no charge.

[. . . .]

(5) Each person who is mailed a booklet *is responsible for reporting and filing claims according to the information in the booklet for the duration of the claim* unless other specific information is given to the person in writing.

[. . . .]

(7) If you fail to ask for help in understanding the booklet, you will be presumed to understand its contents and held responsible for any failure to act as directed by the booklet. [Emphasis supplied].

This regulation notifies claimants that the ESD will mail them a claimant's information booklet and imposes responsibility upon each claimant *for reporting and filing claims according to the information in the booklet for the duration of the claim.*

These two rules pertain only to a claimant's responsibility for reporting and filing claims for the duration of the claim. The rules do not purport to require a claimant to report address changes that occur after the claimant stops claiming benefits. Ms. Morris stopped claiming benefits after benefit week ending 3/27/2010, which is *the same day* that the ESD purports to have mailed her the "overpayment advice of rights" notice dated 3/23/2010. (CR 150).

The ESD also incorrectly contends that Ms. Morris' notification of her address change on April 6, 2009 (CR 101) was

ineffective because it did not follow the procedures in the claimant information booklet. The booklet contains a section that states, "You can change your address and phone number by Internet or using the Automated Claims Line." (CR 119). The booklet does not state that these are the *exclusive* means for a claimant to change his or her address.⁶

D. THE COMMISSIONER ERRED BY FAILING TO AFFORD MORRIS WITH DUE PROCESS BY PROVIDING INADEQUATE NOTICE OF HER APPEAL RIGHTS AND BY DENYING HER A MEANINGFUL OPPORTUNITY TO BE HEARD.

1. The Commissioner's decision is based upon the determination notice that was received by Morris on 7/20/2010, not the undelivered determination notice that was mailed on 4/7/2010.

The Commissioner found that Ms. Morris did not receive the 4/7/2010 "Determination Notice" until 7/20/2010. (CR 194). He also found that she did not file her appeal until 9/7/2010, which was "a month and one half after she received the Determination Notice."

⁶ The Commissioner made no findings with respect to the sufficiency of the address change reflected at the top of the first page of Ms. Morris' 3/24/2010 appeal of the first ESD case. (CR 101-116). He found only that the Determination Notice was sent to the claimant at her correct address of record and that the claimant did not receive it. (CR 173-174; CR 194). Ms. Morris admitted at the hearing that this was her correct address on 4/7/2010. (CR 23).

(CR 194). He then found that the month and one-half delay between 7/20/2010 and 9/7/2010 was substantial and that Ms. Morris' reasons for the "substantial delay" were "not so compelling as to excuse the delay of a month and one half." (CR 194).

The Commissioner made no findings with respect to the excusability of the delay between 4/7/10 and 7/20/2010, and based the decision solely on the delay between 7/20/2010 and 9/7/2010. He also made no finding with respect to the amount of time that the ESD intended to afford Ms. Morris after it reissued its 4/7/2010 Determination Notice to her on 7/20/20. He only found that Ms. Morris' reasons for filing her appeal 48 days after her 7/20/2010 receipt of the Determination Notice did not excuse the "month and one half" delay.⁷

Although there is no finding by the Commissioner with respect to Ms. Morris' actual deadline for filing her appeal, his unchallenged finding of a "month and one half" delay can only be

⁷ The ALJ concluded that Ms. Morris had no excuse for her failure to file her appeal in "July 2010." July 2010 ended 11 days after Ms. Morris' actual receipt of the 4/7/2010 Determination Notice. (CR 174). The ALJ did not explain the discrepancy between his apparent finding that there was a "July 2010" deadline for Ms. Morris to file her appeal (i.e., within 11 days of her actual receipt the Determination Notice) and the deadline set forth in the Determination Notice itself (which was 5/7/2010 or 30 days from the date of 4/7/10 issuance of the Determination Notice).

referring to the time period between Ms. Morris' receipt of the reissued Determination Notice on 7/20/2010 and the filing of her appeal on 9/7/2010. This means that the time period between the first issuance of the Determination Notice on 4/7/2010 and the second issuance of the same notice on 7/20/2010 is not material to this Court's consideration of whether the Determination Notice provided to Ms. Morris on 7/20/2010 constituted adequate notice of her appeal rights under the Due Process Clause of the Fourteenth Amendment.

2. The ESD denied Morris her right to due process because the determination notice delivered to her by the ESD on 7/20/2010 and the verbal information provided to her by the ESD in July 2010 did not adequately apprise her of a deadline for filing an appeal.

The relevant determination notice in this case is the one that Ms. Morris received on 7/20/2010. This notice stated that Ms. Morris' right to appeal the adverse determination had to be "received or postmarked by 05/07/2010" (CR 43), a day that had long since passed. The notice also provided as follows:

"If you disagree with this decision you have the right to appeal. An appeal is a statement that you disagree with this decision. *You have 30 days to file your appeal.*" [Emphasis supplied]. (CR 43).

This provision is only meaningful if it is read in conjunction with the date of the notice, which is 04/07/2010 (CR 41), and with the related statement in the notice that the appeal had to be received or postmarked by 05/07/2010, which is 30 days from 04/07/2010. (CR 43). The notice that Ms. Morris received notified her that the deadline for her appeal was 2 and ½ months prior to her receipt of the notice.

The Commissioner contends on appeal that Ms. Morris “chose to wait significantly longer than 30 days” to file her appeal, thereby implying that the deadline was 8/19/2010 without admitting that there was a deadline. The 05/07/2010 deadline for the filing of an appeal as set forth in the determination notice obviously did not *change* just because the ESD elected to reissue the determination notice on 7/20/2010.

Instead of answering Ms. Morris’ verbal requests to apprise her of the date *in the future* for her appeal deadline, the ESD told her to file “as soon as you can” and thereby further obfuscated Ms. Morris’ due process right to be provided with notice “reasonably calculated, under all of the circumstances, to apprise [her] of the pendency of the action and afford [her] an opportunity to present

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

The ESD denied Ms. Morris of due process because the determination notice delivered to her on 7/20/2010 and the verbal information it provided to her in July 2010 did not adequately apprise her that the time within which to file her appeal was limited.

3. The ESD denied Morris her right to due process because it failed to provide her with timely actual notice that a potential overpayment existed and that she had a right to submit additional information for the ESD’s consideration prior to issuance of a determination notice.

An ESD regulation requires the ESD to provide claimants with written notice of potential benefit overpayments as follows:

(1) If a potential overpayment exists, *the department will provide you with a written overpayment advice of rights* explaining the following:

(a) The reasons you may have been overpaid;

(b) The amount of the possible overpayment as of the date the notice is mailed;

(c) The fact that the department will collect overpayments as provided in WAC 192-230-100;

(d) The fact that final overpayments are legally enforceable debts which must be repaid whether or not you are claiming unemployment benefits;

(e) The fact that these debts can be the basis for warrants which can result in liens, notices to withhold and deliver personal properties, possible sale of real and personal properties, and garnishment of salaries;

(f) An explanation that if you are not at fault, you may request a waiver of the overpayment; and

(g) *A statement that you have ten days to submit information about the possible overpayment and whether you are at fault.* If you do not provide the information within ten days, the department will make a decision based on available information about the overpayment and your eligibility for waiver.

WAC 192-220-010 (Emphases supplied).

The ESD notes that RCW 50.32.020 permits it to effectively mail a *determination notice* to a claimant's last known address. But there is no analogous statute that permits the ESD to mail an *overpayment advice of rights notice* to a claimant's last known address. The regulations pertaining to overpayments, assessments and fraud are set forth in WAC Chapter 192-220. WAC 192-220-010 by its terms imposes upon ESD the responsibility for *providing* a claimant it believes to have received an overpayment with actual notice that a problem exists.

It is undisputed that the ESD failed to timely provide Ms. Morris with the requisite overpayment advice of rights notice prior to the issuance of the 4/7/2010 determination notice. (CR 23, II. 6-

15). The ESD delayed providing Ms. Morris with the overpayment advice of rights notice until 7/20/2010 after mailing it to her on 7/19/2010. It was mailed to her *along with the determination notice*. The advice of rights notice that was provided to Ms. Morris stated that she had until 4/2/2010 to provide her side of the story to the ESD prior to the agency making a determination – a temporally impossible task.

The ESD's failure to *provide* actual notice of the alleged overpayment before issuing its 4/7/2010 determination notice was of constitutional magnitude. – not the mere trifle the ESD now contends the omission to have been. In Danielson v. City of Seattle, 108 Wn.2d 788, 742 P.2d 717 (1987), the Supreme Court held as follows:

[A]n agency's failure to follow its own rules does not *per se* violate procedural due process, but does so only when the agency's rules represent minimal due process requirements."

Id., 108 Wn.2d at 797, n. 3.

"State procedural protections create a federally protected interest only if they are intended to be a significant substantive restriction on the decisionmaker." Nieshe v. Concrete School Dist.,

129 Wn.2d 632, 127 P.3d 713 (2005), review denied, 156 Wn.2d 1036, 134 P.3d 1170 (2006).

In the instant case, WAC 192-220-010 provided Ms. Morris with interests (her property right to retain benefits paid to her by ESD and her liberty interest in her good name) protected by the Fourteenth Amendment⁸ because the regulation is intended to provide a significant restriction on the authority of the ESD's Fraud Investigations Unit to make an overpayment determination without first *providing* the claimant with notice of the charges and an opportunity to be heard. The regulation was intended to require the ESD to provide claimants with minimal due process protections *before* making determinations that deprive claimants of their protected property and liberty interests. Such constitutional protections are mandated even if a claimant is provided with a full post-deprivation hearing to challenge the ESD's actions.

⁸ The ESD apparently does not contest the threshold matter of whether Ms. Morris has established that she was deprived of a constitutionally protected liberty or property interest. A property interest is a legitimate claim to an entitlement that is created by state law. Nieshe v. Concrete School Dist., 129 Wn. App. 632, 642, 127 P.3d 713 (2005), *review denied*, 156 Wn.2d 1036, 134 P.3d 1170 (2006). A liberty right is implicated "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him." Nieshe, 129 Wn. App. at 642.

In Danielson, a Seattle police officer against whom felony charges had been filed contended he was entitled to a pretermination hearing prior to his firing. The discharge was upheld by the Public Safety Civil Service Commission and the officer appealed. The Superior Court found a due process violation, the Court of Appeals reversed, and the Supreme Court affirmed the Court of Appeals. Id., at 790.

The Danielson Court noted that the “root” requirement of due process “is that a deprivation of property be preceded by notice and an opportunity for hearing appropriate to the nature of the case.” Id., at 797. In order to determine what process was due, the Danielson Court balanced the competing considerations: “(1) the employee’s interest in retaining employment; (2) the government’s interest in expeditious removal of unsatisfactory employees; and (3) the risk of erroneous termination.” Danielson, at 798.

The Court found that Danielson had a significant interest in retaining employment and that the Department had a similar interest in discharging an officer who abuses his position. Id. After noting that “informal conferences” can satisfy due process requirements, the Court then looked at the Department’s discharge

procedures and found that Danielson was interviewed by internal investigation officers prior to his discharge. During the interview, these officers notified Danielson of the nature of the charges against him, explained the evidence which supported those charges, and allowed Danielson to explain his actions.

Danielson held that the internal affairs interview satisfied Danielson's pretermination due process rights because the interview served as an initial check against mistake and gave Danielson both notice and an opportunity to respond. The Court noted that the Seattle Civil Service ordinance provided for posttermination evidentiary hearings and that Danielson was afforded a full hearing 5 weeks after his discharge, holding that the internal investigation interview and the full posttermination hearing provided an adequate safeguard against the Department's erroneous termination of Danielson's interest in continued employment without intruding to an unwarranted extent on the Department's interest in quickly removing him from his position as a police officer. Danielson, at 798-99, citing Cleveland Board of Education v. Loudermill, 470 U.S. 532, 547-48, 105 S. Ct. 1487, 84 L.Ed.2d 494 (1985) ("all the process that is due is provided by a

process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided"); [other citation omitted].

Unlike Danielson, who was provided actual notice of the nature of the charges him and an opportunity to respond at an interview that preceded his termination, Aarin Morris was altogether denied notice and an opportunity to be heard prior to the ESD's 4/7/2010 determination in this case. Further unlike Danielson, Aarin Morris has never been afforded an evidentiary hearing in this case because the Commissioner concluded that her appeal was untimely.

4. A proper weighing of the Mathews v. Eldridge factors favors Aarin Morris.

Consideration of the three Mathews v. Eldridge factors in this case weighs in favor of Aarin Morris. These factors are:

(1) the private interest at stake in the governmental action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government interest, including the additional burdens that added procedural safeguards would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 396 S. Ct. 893, 47 L.Ed.2d 18 (1976).

With respect to the first factor, Ms. Morris has significant property and liberty interests in retaining the monetary benefits that the ESD had paid to her in 2009, in not being disqualified for future benefits for the 26 week period from April 2010 to October 2010 (CR 43), and not having her good name sullied with unproven fraud allegations.

Under the second factor, there is an unacceptable risk of erroneous deprivation where, as here, the ESD fails to provide a claimant with notice of the charges and some opportunity to tell his or her side of the story. There is a second unacceptable risk of erroneous deprivation where, as here, the ESD issues an ambiguous and cryptic determination notice coupled with verbal advice that that merely required Ms. Morris to file her appeal “as soon as she [could].”

The burden placed upon the ESD in providing claimants with actual notice of charges and a pre-determination opportunity to be heard and in providing claimants with determination notices and advice that accurately describes appeal rights is comparatively minimal. The ESD need only provide the claimants it suspects of receiving overpayments with notice of its allegations and of the right

of claimants to provide information that relates their side of the story prior to issuing a determination notice, as it is required to do under the existing regulation. WAC 192-220-010. Here, after the Postal Service returned the “overpayment advice of rights” notice to the ESD as undeliverable, a phone call to Ms. Morris at the phone number that was known to ESD would have resulted in Ms. Morris’ actual receipt of the constitutionally required notice.

Similarly, when the ESD learns that a claimant who did not receive a determination notice wishes to contest the determination, it should issue a new determination notice that accurately explains the claimant’s appeal rights without including multiple references to a long past deadline.

If the ESD had provided Ms. Morris with a *new* determination notice with a new appeal deadline *in the future*, all of the confusion engendered by the ESD’s reissuance of the old notice would have been averted with minimal burden to the agency.⁹

⁹ It should be noted that most claimants who have actually committed fraud probably do not choose to pursue an administrative appeal in ESD overpayment cases.

III. CONCLUSION

Aarin Morris asks the Court to reverse the Employment Security Department Commissioner's decision dated December 30, 2010 in its entirety and to remand the case to the agency with a directive to provide Ms. Morris with her rights under WAC 192-220-110 prior to issuing a determination notice with respect to overpayment allegations. Ms. Morris also asks the Court to order the ESD to refund to her all of the money that it has collected from her since commencing collection activities in July 2010.

DATED this 3rd day of January 2013.


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

APPENDIX A

Due Process Claims Raised at 11/2/2010 Administrative Hearing.

"I deserve to be granted an appeal and be heard concerning the rest of these fraud accusations. Up until now, I have not been able to, because it is only recently that I have even been made aware that there was another default judgment against me. I was not properly notified, and knew nothing of this until, out of the blue, I received a "90 Days Past Due" notice [Exhibit 1], demanding an outrageous sum of money from me ..., the notice giving me almost no time to respond and containing no instructions on how I could appeal." (CR 51).

"I will show cause as to why I deserve an appeal and a hearing in my case, and I will argue that I believe *the collection efforts against me for 'overpayment' are grossly premature because I was denied my due process to appeal*, by not being notified that there was even a case against me until well after the default judgment was made against me." [Emphasis in original]. (CR 51-52).

"I was not informed by the ESD of any problems at all until very recently, when out of the blue [Exhibit 1], I received a 'Notice of Past Due Account' on July 12, 2010, demanding immediate payment of \$856.32.... For reasons I still do not understand, I was kept in the dark and never given my right of due process to argue or appeal any of this because I literally was never informed by the ESD that this was happening at all, this notice being *the first communication of any kind that I have received* about any of this." [Emphases in original]. (CR 55).

"This 'Notice of Past Due Account' was my first clue that there was even an issue, and I started making calls and trying to contact the ESD (documented below). Only then did I receive any other information, all post-dated months after the fact [Exhibits 5 and 8] with the normal appeal windows closed and expired. Therefore, I was given no proper notice of this issue, this default judgment or of my right to appeal. *I was denied my right to due process and not given any opportunity to respond within any time frame, much less a reasonable one.*" [Emphasis in original]. (CR 56).

"However, now that I know about these allegations and have made numerous attempts to contact the ESD and various other departments, *I am being told so far on all fronts that it is too late to exercise my rights and, too bad, I should just pay up?* How is this fair, especially when I am certain that I am not guilty of fraud and I believe that if given a deserved chance to be heard with a proper appeal opportunity and hearing, that I can prove my innocence." [Emphasis in original]. (CR 56).

"Therefore, I am not asking for my appeal of the April 7, 2010 decision against me with my rights of due process intact...." (CR 56).

"Now, since termination of my employment (I was fired by text message on December 23, 2009), the ESD is making judgments against me I was not aware of, not informed of, nor was I given a reasonable opportunity to learn about, understand, answer to and even refute these allegations and default judgments until well after the fact, leaving me scared and confused. I feel judged as guilty without a trial, because even the right to appeal, much less a hearing on these matters, have been denied to me until now through a lack of contact." (CR 57).

"I am here now, with proof that I was given very late notice (only after this reached 'collections' and lapsed a full 90 days) and through no fault of my own, I believe that I have thus been denied my original and timely right to appeal and the ability to request a hearing on my behalf in a timely manner. [. . .] *I have yet to be granted my due process rights to even appeal or be heard on this case. I haven't had a proper chance to defend myself and I am asking for that chance now.*" [Emphasis in original]. (CR 58).

"If I owe this money, you'll be able to collect it soon enough. But please, allow me to be heard first? Allow me my appeal? Allow me my hearing?" (CR 58).

"Therefore, I now petition that the default judgment be postponed and that I be granted a reasonable amount of time to refute it, and that all collection efforts against me should temporarily cease while I go through the appeal process, because until now I had no

opportunity to appeal my case in the first place.” [Emphases in original]. (CR 59).

“August 4, 2010 – Called Fraud Investigation Unit. I requested information on how to file an appeal for due process. I was told that the information was already sent, and that I could only file a late appeal and state why it was late. However, she refused to tell me how and with whom to file said appeal, only telling me that ‘things were different now that I have let it go this long and was now in collections’ but would not clarify what this meant.”¹ (CR 60).

“August 23, 2010 – Called the Telecenter and was told that I could try to file a late appeal ... but regardless, the overpayment amount was still late and that collection efforts would remain in full force. (CR 60).

¹ The ALJ found that Ms. Morris called the ESD on 8/4/2010. (CR 174). However this information was omitted from the ESD's so-called “Comments Inquiry Screen.” (CR 147).

APPENDIX B

Due Process Claims Raised in 12/2/2010 Petition for Review.

"I was also not made aware of any time limit to file the late appeal, I was acting on good faith and believe that it would be unfair to deny my a hearing now by refusing to grant me a hearing merely on the grounds that my 'late appeal' was late." (CR 180).

"Also, I need to make this clear, at no time was I informed that there was a time limit on filing this appeal. I was not made aware of a deadline of any kind, at any time, by anyone. In the interest of due process and simple fairness, shouldn't I have been, especially when I asked?" (CR 181).

"I also wish to state that I was operating under some confusion, because at no time was I ever told, either by phone or on paper, that there was a deadline for my late appeal. I was never told that a clock had started against me, if in fact one did, at any time. I submit under penalty of perjury that I was never given detailed information on where or when to file my appeal, even when I asked for it. [....] When speaking to Chris, for example, and asking for a specific date, the exact answer I received, in fact, was 'as soon as you can.' Those were Chris' exact words in the phone call dated July 21, 2010 (on file as Exhibit 21, page 1 of Docket -2-2010-3928). I was only told to file a late appeal (which I knew already), 'as soon as I can' but was not told where to file it, nor was I told that there was a deadline to do so. In fact, to this day, I still have no idea what the supposed date was that made my 'late appeal' late." (CR 182).

"At no time was I ever given a deadline to file my late appeal. [. . . .] In fact, I was never even told that a clock was ticking against me. [. . . .] The information I was given even when I asked by phone, and attached as 'Attachment 1' finds only the words 'Late Appeal' on the top of my 04/07/2010 Determination Notice, that I did not even receive until July 20, 2010 (due to post office errors I have already proven to have occurred), with only expired dates including the "Bye" on the Determination Notice itself.... I submit that this isn't a proper way to inform me of my rights, deadlines or

procedures in this manner. Chris' July 21, 2010 answer via phone of 'as soon as you can' was also nowhere near specific enough for me to have known." (CR 182).

"Therefore, I respectfully request that my hearing denial be set aside and that I be granted a hearing so that I can present my evidence and argue my case in the interest of justice." [Emphasis in original]. (CR 182).

APPENDIX C

Due Process Claims Raised in 12/30/2010 Petition for Reconsideration.

“The ESD also failed to properly notify me that there even was a time limit to file the late appeal, even when I called and asked numerous times [citations to evidentiary record omitted], the only instructions given being, and I quote, ‘*As soon as you can.*’ The information I did receive on July 21, 2010 had only expired dates on it, no new instructions given and only the handwritten words ‘Late Appeal’ in the top right hand corner to guide me. Even when I called [citations to evidentiary record omitted], I was not given the proper information when I requested it in multiple instances. Therefore, in light of all of this, I was in fact acting in good faith even while under duress and thus it would be unfair to deny me a hearing now by refusing to grant it merely on the grounds that my ‘late appeal’ was supposedly late.” [Emphases in original]. (CR 199).

“I state here and would state again under oath that at no time was I informed by anyone at the ESD or otherwise that there was time limit on filing this *already* late appeal. I was not made aware of any deadline of any kind, not given a date, at any time, by anyone. *While I should have been made aware that there was a time limit for filing this ‘late appeal’ I certainly was not made aware of it and I did due diligence via phone in trying to gain this information, specifics which the ESD repeatedly failed to give to me.*” [Emphases in original]. (CR 200).

“I also wish to state that I was operating under some confusion, because at no time was I ever told, either by phone or on paper, that there was a deadline for my late appeal. I was never told that a clock had started against me, if in fact one did, at any time. [. . . .] The only dates that I had in hand were already expired.” (CR 201).

As to the date and any deadline for this, I did try to call and find this out, multiple times [citations to evidentiary record omitted]. When speaking to Chris, for example, and asking for a specific date, the exact answer I received, in fact, was ‘as soon as you can.’ Those

were Chris' exact words in the phone call dated July 21, 2010 [citation to evidentiary record omitted]. I was told only to file a late appeal 'as soon as I can' but was not told ... that there was a deadline to do so, even when I asked. In fact, to this day, I still have no idea what the supposed date was that made my 'late appeal' late. I asked Chris for specifics in that conversation, after she told me to file my late appeal 'As soon as you can,' I asked her: Do you mean 20 days? How much time do I have? --- with her reply being, again, 'As soon as you can.' [. . .] Assuredly, Chris' answer via phone of 'as soon as you can' was nowhere near specific enough for me to have known about any specific deadline for my late appeal." (CR 201).

APPENDIX D

The ALJ's Findings of Fact, Conclusions of Law and Order dated November 2, 2010.

On November 2, 2010, Administrative Law Judge Kathleen O'Shea Senecal of the Office of Administrative Hearings entered findings of fact and conclusions of law (which were later adopted by the Commissioner of the Employment Security Department) and an order dismissing Aarin Morris' administrative appeal for lack of jurisdiction as follows:

FINDINGS OF FACT:

1. The claimant initially applied for unemployment compensation benefits in July 2009 and established a valid Benefit Year End of July 3, 2010.
2. On April 7, 2010, the Employment Security Department (Department) issued a Determination Notice disqualifying the claimant from receiving benefits on the basis that [sic] was not an unemployed individual pursuant to RCW 50.04.310 and advising that her weekly benefit amount was subject to reduction pursuant to RCW 50.04.310 and advising that her weekly benefit amount was subject to reduction pursuant to RCW 50.20.130 due to partial earnings and that the claimant was disqualified for benefits for fraud pursuant to RCW 50.20.070. The Determination Notice was sent to the claimant at her correct address of record.
3. The claimant did not receive the Determination Notice advising her that if she disagreed with the decision, she could submit an appeal. The claimant was not made aware that the appeal must be in

writing and that the claimant could FAX or mail it and that the appeal would have to be received or postmarked by May 7, 2010. Exhibit 2.

4. The claimant advised she became aware of the overpayment and fraud when she received a Notice of Past Due Account on July 16, 2010. The claimant called the Department and was advised she needed to contact the Fraud Management Unit. The Department then sent the claimant a copy of the Determination Notice and Overpayment Advise of Rights. The claimant made contact with Department representatives on July 16, 2010; July 19, 2010; July 20, 2010; July 21, 2010; August 4, 2010; and August 23, 2010. When contacted the Department representatives instructed the claimant to file a late appeal. Exhibit 3, page 12 and 13; Exhibit 28; pages 2 and 3; Exhibit 21, pages 1 and 2.

5. The claimant appealed on September 7, 2010 advising that she, "Filed as soon as she could and as soon as she understood what she was appealing." The claimant advised that the Determination Notice wasn't clear and she was given multiple addresses and did not know which address to appeal to use to appeal. The claimant advised that she was going through an appeal for her job separation and didn't understand the appeal process or reason in the Determination Notice but advised she constantly contacted the Department and was instructed to file an appeal.

CONCLUSIONS OF LAW:

1. The provisions of RCW 50.32.020, 50.32.025, 50.32.075 and WAC 192-04-090 apply.

2. Pursuant to RCW 50.32.075 the thirty (30) day time limitation on an appeal may be waived if good cause for the late-filed appeal is shown. A three prong test is applied in determining whether a

claimant has established good cause for a late-filed appeal. The criteria considered are as follows: "...(1) the shortness of the delay; (2) the absence of prejudice to the parties; an (3) the excusability of the error." *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). With regard to the shortness of the delay and the excusability of the error, the analysis is based upon a sliding scale in which a short delay requires a less compelling reason for the failure to file a timely appeal than does a longer delay. *Wells*, supra.

3. Based on the relevant Findings of Fact set forth above, the delay of approximately two months once the claimant became aware of the Determination Notice, and the fact that the claimant was involved in an appeal and aware of the process, the undersigned concludes there was no excuse for her failure to appeal in July. Accordingly, the appellant has not established that the appeal was timely filed or filed late with good cause.

IT IS HEREBY ORDERED:

The claimant's appeal in this matter is untimely and is DISMISSED for lack of jurisdiction.

(CR 173-175).

APPENDIX E

The Commissioner's Additional and Modified Findings of Fact and Conclusions of Law and Order dated December 30, 2010.

On December 30, 2010, the Commissioner of the Employment Security Department, after adopting the ALJ's findings of fact and conclusions of law, made additional and modified findings and conclusions and entered an order as follows:

[1.] Although the claimant did not timely receive the Determination Notice issued on April 7, 2010, she was provided a copy of it after she called the Department in July and made inquiry. She received her copy of the Determination Notice on July 20, 2010. The claimant's appeal rights are set forth therein, including a statement that she could fax or mail her written appeal to the fax number or return address listed at the beginning of the decision. The Fraud Investigation Unit address and fax number are clearly set forth at the beginning of the decision.

[2.] The claimant did not file her appeal until September 7, 2010, a month and one half after she received the Determination Notice. This delay is a substantial delay, and requires a compelling reason to be deemed excusable. *Wells v. Employment Security Dep't*, 61 Wn. App. 306, 8-09 P.2d 1386 (1991). The reasons set forth by the claimant for the substantial delay in the filing of the appeal are not so compelling as to excuse the delay of a month and one half. The Order of Dismissal – Untimely Appeal shall stand.

Accordingly,

IT IS HEREBY ORDERED that the Order of Dismissal – Untimely Appeal of the Office of

Administrative Hearings issued on November 2, 2010, is AFFIRMED. Claimant's appeal in this matter is untimely and is DISMISSED for lack of jurisdiction.

(CR 194-195).

APPENDIX F

**The Commissioner's Order Denying Petition for
Reconsideration dated January 28, 2011.**

On January 28, 2011, the Commissioner of the Employment Security Department denied Ms. Morris' petition for reconsideration and entered the following order:

On January 7, 2011, AARIN N. MORRIS filed a Petition for Reconsideration of a Decision of Commissioner issued on December 30, 2010, pursuant to RCW 34.05.470 and WAC 192-04-190. We perceive no obvious material, clerical error in the decision, nor does it appear that the petitioner was denied a reasonable opportunity to present argument under WAC 192-04-170.

Now therefore,

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

(CR 206).

APPENDIX G

WAC 192-120-001. Information for claimants

- (1) The department will provide you with information necessary for filing your weekly claims for benefits.
- (2) The department will provide assistance to any person who needs help in filing claims.
- (3) You will be responsible for following written information provided by the department for the duration of your claim, and will be presumed to understand the information unless you ask for help in understanding it.

WAC 192-120-010. Claimant information booklet

- (1) The department will publish an information for claimants booklet, form number EMS 8139, to provide basic information on the laws, rules and procedures about claims for unemployment insurance benefits. Single copies of the booklet will be available to the public at no charge.
- (2) Each person who files an application for benefits will be mailed a copy of the most recent version of the information for claimants booklet.
- (3) Each person who is mailed a copy of the information booklet will be responsible for filing claims in accordance with its instructions.
- (4) A replacement booklet will be mailed to any person who requests one.
- (5) Each person who is mailed a booklet is responsible for reporting and filing claims according to the information in the booklet for the duration of the claim unless other specific information is given to the person in writing.

(6) The department will assist any person who may have difficulty understanding the booklet.

(7) If you fail to ask for help in understanding the booklet, you will be presumed to understand its contents and held responsible for any failure to act as directed by the booklet.

DECLARATION OF SERVICE

I certify that I personally hand-delivered a copy of the Appellant's Reply Brief to the Attorney General of Washington, Licensing & Administrative Law Division and Assistant Attorney General April Benson Bishop, attorneys for respondent State of Washington Department of Employment Security, at 800 Fifth Avenue, Suite 2000, Seattle, WA 98104 on January 3, 2013.

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

DATED at Seattle, Washington this 3rd day of January, 2013.


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