

No. 35749-6-II

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

DEPARTMENT OF EMPLOYMENT SECURITY, ET AL

Respondent

v.

STEVEN P. GRAVES

Appellant

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY

REPLY BRIEF OF APPELLANT

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I. Reply to Counterstatement of the Issues

The Respondent has re-characterized the essential issue pending before the Court of Appeals in its responsive brief.¹ While it serves the purpose of the Respondent to recite the history of the appeal of the Appellant, this appeal is focused on the issue of whether there was error on the part of the trial court when it failed to find that the discretionary determination made by the Commissioner that confirmed the decision of the administrative law judge abridged the procedural due process rights of the appellant by entering a default judgment on his appeal.

If the Respondent believed that there was a basis for appeal predicated upon the determinations made by the agency to grant an appeal, irrespective of the date by which an appeal was made, then it should have filed an appeal or made a cross-appeal, which it did not do. Had the agency elected to determine that the date the appeal was initiated by the Appellant was not in compliance with its administrative rules, this appeal would have flowed from that determination and not the decision made at the end of the process, after the appeal was accepted for hearing.

The issue in this appeal relates only to the exercise of discretion under the standard of “good cause” as that term was applied to deny the

¹ Page 1, Paragraph I.

Appellant a fair hearing on the merits of his appeal because he did not phone in on the date scheduled for the hearing.

The Respondent has also mischaracterized the issue in this matter as whether “Graves failed to comply with Department requests for information to corroborate his eligibility for benefits...” Again, that could have been an issue had that been raised by the Appellant or on a cross-appeal. But, there was no cross-appeal and the Appellant did not raise the issue.

What did occur is that the agency accepted the appeal of Mr. Graves, albeit at a date later than it now contends was appropriate. The Appellant sought an opportunity to contest the determination by the agency that its payment of unemployment compensation were incorrectly made due to what it determined was the Appellant’s eligibility to receive those payments.

II. Decisions as Precedent

The decision of the Commissioner to confirm the default judgment of the administrative law judge was based upon the failure of the Appellant to appear for the scheduled hearing. Consequently, the question of “good cause” for purposes of this appeal relates to the imposition of that standard to the confirming ruling by the Commissioner. The

argument employed by the Respondent seeks to include issues that are not a part of the ruling.

The Appellant concedes that a statute² enables the Commissioner to designate certain decisions made by the Commissioner as precedent. In support of its position on appeal, the Respondent has cited to a series of decisions of the Commissioner that it contends serve as precedent in this cause.³

The first decision claimed to support the Respondent's position was *In re Jaiteh*, Commissioner's Decision 2nd, 899 (2004). A copy of that Decision was not attached to the Respondent's brief.

The second decision cited was *In Re Bowman*. That decision did not identify, explain or describe what was "good cause" and what was not "good cause". It did identify that the ruling was addressed to "procedural due process" and not to "substantive due process".

The third decision cited was *In Re Groves*. The *Groves* decision related to the procedural rights of the "employer" and not the claimant. Further, in the decision, a representative of the employer actually contacted the administrative law judge on the day prior to the hearing but did not request a continuance, nor does the record indicate that the employer would not appear. This case is inapposite to the issue before the

² RCW 50.32.095

³ At Page 7-8, Respondent's Brief.

Court in this appeal. The legislative mandate is focused on the employee and requires that the law be given a liberal construction for the employee, not the employer. Shoreline Community College No. 7 v. Employment Security Department, 120 Wn.2d 394, 406, 842 P.2d 938 (1992).⁴

The fourth decision cited in the Respondent's Brief was *In Re Perry*. Mr. Perry actually appeared for the hearing as scheduled, but was informed that the hearing was delayed in its start. He remained for an additional 45 minutes beyond the scheduled time of the hearing when he left at the insistence of the person who had provided transportation for him to the hearing site. He did not ask for a continuance of the hearing or even inform anyone that he was going to leave or had left the location of the hearing. The negligence of the claimant was overborne by his effort and attendance at the prescribed location at the prescribed time scheduled for the hearing. The default was set aside. However, there was no discussion of "good cause" or what constituted "good cause" in the decision.

Consequently, this decision does not serve as a basis for the Court to ascertain the actual standard when discretion is exercised in "good cause".

The fifth decision cited by the Respondent that it offers in support of the "good cause" determination is *In Re Moilanen*. Mr. Moilanen failed

⁴ Respondent's argument that Lighle v. Department of Labor and Industries, cited at page 22 of Respondent's brief is inapplicable ignores the legal principle of liberal construction also established by the ruling in Shoreline Community College.

to enter a notice of appearance, and did not ask for a postponement of the hearing despite the fact that his stated reason for not appearing at the scheduled hearing was due to his then current work and his concern that he would be discharged if he attempted to take time off to appear at the hearing. The Commissioner's designee indicated that there was no indication why he could not have asked for a postponement because he knew he would be working at the time the hearing was scheduled. This decision did not address "good cause", the standards for when "good cause" would be applied, except the Commissioner's designee apparently felt that because Mr. Moilanen did not follow the instructions printed on the opposite side of the Notice relating to requesting postponements that "good cause" was not showed.

The sixth decision cited by the Respondent in support of its position was *In Re Braun*. Mr. Braun had moved from the address he held when he filed the appeal and neglected to inform the administrative hearings office of his new address and failed to get the notice of the hearing. This decision is inapposite because the Appellant, here, did get the notice of hearing, but confused the date of the hearing. Again, the decision in *Braun* does not inform the Court of what standard is applied to determine "good cause" or not "good cause", only that in the factual circumstance identified, where a claimant fails to keep the administrative

hearing office informed of their address, Notice sent to the address known to that office is sufficient for procedural due process purposes.

The seventh decision cited by the Respondent is *In Re Herbert*. A series of registered letters were sent to Mr. Herbert to advise him of the hearing date on his appeal. When he was not present at the address, a Notice of Registered Mail was left for him. Apparently, he failed to follow up on the Notice of Registered Mail and never went to the Post Office where the Letters were being held to obtain them. The Commissioner's designee held that the effort by the agency was sufficient and that for procedural due process purposes, the agency had met its burden to inform Mr. Herbert of the date of his hearing. The decision held that his failure to claim the registered letter(s) was the basis for his non-appearance at the scheduled hearing. His petition to overturn was denied. There was no identification of what would have been "good cause" in the ruling. The ruling did find no "good cause" to overturn the decision by the administrative tribunal.

The next decision cited to support the Respondent position was *In Re Kelly*. Ms. Kelly like Mr. Moilanen moved between the date of her appeal and the date that the hearing was scheduled to be heard and did not receive the Notice of hearing until four days after the actual hearing date. In manner consistent with *Moilanen* (decided 13 years later) the

Commissioner found no “good cause” to overturn the adverse determination. There was no discussion of what constituted “good cause” or what did not. Like the ruling in *Moilanen*, this decision is inapposite to the facts before the Court in this Appeal.

The last decision cited by the Respondent is *In Re Mills*. The decision held that even though there was a miscommunication between the claimant and her attorney (both of whom were sent registered letter Notices of the Hearing), her failure to appear or to request a continuance prior to the hearing did not form a basis for a “good cause” determination to overturn the Default Judgment. The facts of this decision are likewise inapposite to the facts before the Court in this appeal.

All of the decisions cited by the Respondent in support of its position on this appeal, save the decision not appended to the brief (*In Re Jaiteh*) were published at least three year prior to the adoption of RCW 50.32.095 by the Washington State Legislature in 1982. The oldest cited decision occurred twenty years prior to the adoption of the law authorizing designation of precedent decisions. A statute is not retroactive merely because it relates to prior facts or transactions where it does not change their legal effect. State v. Scheffel, 82 Wn.2d 872, 514 P.2d 1052 (1973). A statute or ordinance speaks only from the time it goes into effect. State ex rel. Thorp v. Devin, 26 Wn.2d 333, 173 P.2d 994 (1946). Generally,

statutes are presumed to operate prospectively unless the legislature indicates that the statute is to apply retroactively. State v. Koester, 131 Wn.App. 501, 127 P.3rd 784 (2006).

The Respondent is seeking retroactive application of the statute authorizing the Commissioner to designate certain decisions as precedent. This effort is contrary to law because all statutes are prospective in application from their effective date unless the legislature indicates that the statute applies retroactively. An examination of RCW 50.32.095 does not reveal that it was intended to apply retroactively. Thus, even if any of the eight cited decisions discussed above claimed to support the position of the Respondent were applicable, they could not have been validly designated by the Respondent because they were all decided prior to the effective date of the authorizing statute.

III. The Issue in the Appeal

The primary issue in this appeal is whether in the exercise of the discretion authorized to the Commissioner of Employment Security there was abuse in application of the “good cause” determination made in the entry of a Default Judgment by that agency designee. Notwithstanding the serial arguments made by the Respondent that the Appellant failed to comply with the time limitations imposed by the agency, it accepted his

appeal, set a hearing date and reviewed his petition ultimately deciding his appeal on a procedural ground.

The Appellant is seeking to have a hearing on the merits to have a fair decision made concerning whether the unilateral determination made by the agency to recoup unemployment benefits paid to the Appellant was valid under law. The issue before the Court is grounded in procedural due process.

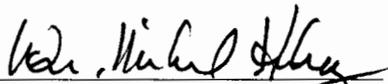
The Appellant contends he was not afforded procedural due process⁵ because the discretion applied by the agency is unfettered by specific standards to inform a claimant, an appellant, a judge or an appellate court what comprises “good cause” or a lack of “good cause”. The Respondent has provided no law or administrative regulation to explain or enable a review to comprehend what is considered “good cause” and what is not. The agency showed itself capable of identifying “good cause” for an untimely appeal⁶ but it has not similarly addressed that standard for entry of a default judgment. This failure constitutes a violation of the procedural due process entitled to the Appellant and should form the basis for the Court to determine that the agency abused its discretion.

⁵ The argument is set forth in the Appellant’s Brief beginning at page 15.

⁶ WAC 192-04-090, page 12-13, Appellant’s Brief.

The Court should set aside the default order and remand the matter back to the administrative hearing level for a full and fair hearing on the merits.

RESPECTFULLY SUBMITTED THIS 20th DAY OF AUGUST
2007.


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COURT OF APPEALS
DIVISION II

CERTIFICATE OF SERVICE: 07 AUG 21 PM 1:35

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

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BY *[Signature]*

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

Dated this 20th day of August, 2007

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