NO. 35749-6

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STEVEN P. GRAVES,

Appellant,

v.

STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

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STATE OF WASHINGTON
BY DEPUTY
FILED
COURT OF APPEALS
DIVISION II

RESPONDENT'S BRIEF

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I. COUNTERSTATEMENT OF THE ISSUES

The Washington Administrative Procedures Act (APA) authorizes the presiding officer at an administrative hearing to enter a default if a party fails to appear as directed. RCW 34.05.440. The Department promulgated a rule that allows the Commissioner to set aside a default order for "good cause." WAC 192-04-180. Good cause for failure to appear is defined in the Commissioner's precedential decisions: circumstances which are external and apart from the claimant. This case presents two issues concerning these provisions:

Whether the Commissioner properly exercised his discretion by finding that Steven P. Graves (Graves) lacked "good cause" for failing to appear at his administrative hearing after he persistently ignored the Department's regulations and filed his appeal five months late?

Whether the Department's administrative review process afforded Graves sufficient procedural due process when Graves failed to comply with Department requests for information to corroborate his eligibility for benefits, and was given notice of the Department's determinations and an opportunity to respond?

II. STATEMENT OF THE CASE

Graves received unemployment insurance benefits from February 5, 2005 until August 6, 2005. AR 20.[1] The benefit payments were sent to an Olympia address which Graves provided to the Department when he applied for benefits. AR 6, 11-12, 16, 24-25.

The Department requested Graves appear for a job search interview that was scheduled for July 30, 2005.[2] AR 6. The purpose of the interview was to confirm his eligibility for benefits. He did not appear at the interview. AR 6-8. The Department sent Graves a Determination Notice to the same address where Graves received his benefit payments on August 15, 2005. AR 6-8. The notice informed Graves that he was ineligible for benefits, because he did not appear at the job search interview, and he did not provide an excuse for failing to appear:[3]

> FACTS: You were scheduled to report to your WorkSource Office or local employment center during the week ending 07/30/2005. Our records show you failed to report.
> REASONING: You did not respond by the date indicated to our request for additional information about your failure to report.
> DECISION: Based on the information provided to us, we presume you did not have good cause for failing to report.

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[1] The Commissioner's Record is referenced herein as "AR."

[2] RCW 50.20.010(1)(a) requires unemployment insurance claimants to report to an employment office in accordance with Department rules for each week that benefits are claimed. WAC 192-180-020(1) informs claimants that job search requirements must be certified for each week in which they receive benefits, and that the department may review "job search activities at any time."

[3] Failure to report to a scheduled job search interview is grounds for denial of benefits. WAC 192-180-030(1)(d).

> RESULTS: Benefits are denied beginning 07/24/2005 and ending 07/30/2005.

AR 6-7. The notice instructed Graves how to appeal the determination and the last date for receipt of an appeal:

> YOUR RIGHT TO APPEAL: If you disagree with this decision, you may appeal. An "appeal" is a written disagreement with our decision and a request for a hearing. You can FAX your written appeal to or mail it to the return address listed. **It MUST be received or postmarked by 09/13/2005.**
> Your letter should include the following: That you want to appeal; the reason(s) you want to appeal; your name and Social Security number; your current address; your telephone number; and your signature. If you or one of your witnesses does not speak English, tell us that you need an interpreter and the language you need interpreted. The appeals office will mail a hearing notice to you.

AR 7 (emphasis added). The Determination Notice informed Graves that he was required to file an appeal by September 13, 2005. *Id.*

The Department sent Graves another determination notice on August 24, 2005. AR 16-17. The notice informed Graves that he was ineligible for benefits, because he did not provide the Department with requested information corroborating his job search efforts:[4]

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[4] RCW 50.20.240(1)(a) directs the Department to "implement a job search monitoring program" to ensure that "following the initial application for benefits" claimants are "actively engaged in searching for work." RCW 50.20.240(2) requires claimants that have "received five or more weeks of benefits" to "provide evidence of seeking work . . . for each week beyond five in which a claim is filed." That "evidence must demonstrate contacts with at least three employers per week or documented in-person job search activities at the local reemployment center at least three times per week."

> FACTS: You were scheduled to report to your WorkSource Office or local employment center for a review of your job search logs for all weeks claimed. Our records show that you failed to report or failed to provide adequate proof that you met the job search requirements.
> REASONING: You did not respond to our request for additional information showing that you complied with the job search requirements for the weeks shown below.
> DECISION: Based on the information provided to us, we presume that you have not complied with the job search requirements for the weeks shown below.
> RESULTS: Benefits are denied beginning 01/30/2005 and ending 08/06/2005.

AR 16-17. This notice also informed Graves how to appeal and the deadline for receipt of his appeal: September 22, 2005. AR 17.

However, Graves did not appeal either the August 15, 2005, or August 24, 2005 determination until January 13, 2006. AR 5. He attached a letter to his appeal that was purportedly sent on September 6, 2005. AR 4. In the letter, Graves did not state his intent to appeal the Department's determination. Rather, he acknowledged that he made a choice not to attend the scheduled meeting to show compliance with the job search requirements: "I guess I just felt being at a job interview was more important than reviewing why I hadn't found a job." *Id.* Graves did not include or address the job search logs requested by the Department in the August 24, 2005 determination notice. AR 5-6, 16-17.

The Department sent two notices acknowledging receipt of Graves' appeal on January 17, 2006. AR 3-5, 13. The first notice

addressed the determination sent on August 15, 2005. AR 3. The second addressed the determination sent on August 24, 2005. AR 13. Both notices informed Graves that his appeal would be scheduled and conducted by the Office of Administrative Hearings (OAH). AR 3, 13. Both notices also contained instructions on how to prepare for the hearing:

> [O]AH will send all parties a Notice of Hearing, with the date and time of the hearing, the name of the administrative law judge assigned to hear the case, a copy of proposed exhibits, and a booklet "How to Prepare and Present Your Case." The booklet explains in detail the hearing process.

Id. The notices informed Graves the process for submitting evidence in support of his claim:

> Submission of Additional Documents: After you receive the Notice of Hearing and proposed exhibits from OAH, **if you have documents you wish to have considered in the hearing, send copies of those documents to the OAH office listed on the Notice of Hearing and to all other parties and representatives listed on the Notice of Hearing.** If you mail or FAX documents to OAH, include the name of the administrative law judge, the docket number or SSN, the date and time of the hearing, and a statement that copies of the additional documents were sent to all other parties and representatives.

Id. (emphasis added). Graves did not submit any evidence, such as his job search log, in response to that guidance. AR 1-45.

OAH subsequently sent Graves two notices informing him of the issues that would be addressed at his hearing. AR 1, 28. The notices also informed him that the consequences for "**failure to appear will result in**

a Default." *Id.* (emphasis in the original). Below that warning, the day of the week, date and time for the hearing were prominently noted on each notice:

> DATE: Wednesday, February 08, 2006
> TIME: 10:45 AM Pacific Standard Time

Id. However, Graves asserted that he mismarked his calendar and failed to appear at his hearing. AR 6, 40. The ALJ entered a default order pursuant to RCW 34.05.440. AR 26, 30.

Graves petitioned the Commissioner for review of the Administrative Law Judge's (ALJ) default order. AR 33. The Commissioner determined that Graves had not shown good cause for his failure to appear at the February 8, 2006 hearing, because he was provided two notices of the hearing that "clearly and unambiguously" stated the day of the week and the date on which the hearing was scheduled to be held:

> It was the claimant's responsibility to properly note the hearing date on his calendar and appear at the hearing as scheduled or in the alternative, if unable to appear for any reason, to timely contact the Office of Administrative Hearings to request a postponement. He did neither.

AR 36.

The Commissioner's Decision was dated February 24, 2006, and it informed Graves that he had ten days to file a request for reconsideration

of that decision. *Id.* Graves filed a request for reconsideration, but it was denied: the Department received it on March 15, 2006, nine days past the deadline. AR 40-41.

Graves sought judicial review of the Commissioner's Decision in Thurston County Superior Court which affirmed the Commissioner's Decision. Graves now appeals to this Court. The only issue before this Court is whether the Commissioner properly held that Graves did not have good cause for failure to appear at his administrative hearing.

III. ARGUMENT

The APA authorizes the presiding officer at an administrative hearing to enter a default if a party fails to appear as directed. RCW 34.05.440. The Department promulgated a rule that allows the Commissioner to set aside a default order for "good cause." WAC 192-04-180. Good cause for failure to appear is defined in the Commissioner's precedential decisions: circumstances which are external and apart from the claimant. *See In re Jaiteh*, Comm'r Dec.2d 899 (2004);[5] *In re Bowman*, Comm. Dec. 491 (1979); *In re Groves*, Comm. Dec. 374 (1978); *In re Perry*, Comm. Dec. 502 (1979); *In re Moilanen*,

[5] The Commissioner may designate certain Commissioner's decisions as precedents. Decisions designated as precedents are published and available to the public by the department. They are persuasive authority for the Court of Appeals. *Martini v. Empl. Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981, 984 (2000). A copy of each cited precedential Commissioner's decision is attached to this brief.

Comm. Dec. 1283 (1973); *In re Braun*, Comm'r Dec. 698 (1967); *In re Herbert*, Comm. Dec. 544 (1963); *In re Kelly*, Comm'r Dec. 714 (1962); *In re Mills*, Comm'r Dec. 642 (1965).

In this case, Graves failed to comply with the Department's requests for information to corroborate his eligibility for benefits. He ignored two determination notices that informed him of his ineligibility. AR 6-8, 16-17. The notices informed him how and when to appeal if he disagreed with the determinations. *Id.*

He appealed five months late. AR 5. After being given notice of the Department's determinations and an opportunity to respond, Graves failed to appear. The ALJ entered a default order pursuant to RCW 34.05.440. AR 26, 30. The Commissioner affirmed that decision pursuant to WAC 192-04-180, because Graves' excuse amounted to neglect of his own affairs, rather than a factor that was external and apart from his control. AR 36.

The principle of allowing "good cause" for circumstances that are "external and apart" from an appellant is a manageable standard for the Department that comports with procedural due process. It provides discretion to consider the facts of an individual claimant's case, and it ensures that the Department can effectively manage its administrative appeal process.

A. Standard Of Review

Judicial review of the Commissioner's decision is governed by the APA. RCW 34.05.510. The Court of Appeals "sits in the same position as the superior court" on review of an agency action under the APA. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). 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; *Employees of Intalco Aluminum Corp. v. Empl. Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005).

Unchallenged findings of fact will be treated as verities on appeal. *Brown v. Dep't of Health, Dental Disciplinary Bd.,* 94 Wn. App. 7, 13, 972 P.2d 101 (1999), citing *In re Perry*, 31 Wn. App. 268, 269, 641 P.2d 178 (1982). *See also Tapper v. Empl. Sec. Dep't,* 122 Wn.2d 397, 407, 858 P.2d 494, 500 (1993); and, *Fuller v. Empl. Sec. Dep't*, 52 Wn. App. 603, 606, 762 P.2d 367 (1988). Graves does not challenge any findings of fact; therefore, they are verities on appeal.

Questions of law are reviewed *de novo* under the error of law standard. *Penick v. Empl. Sec. Dep't*, 82 Wn. App. 30, 37, 917 P.2d 136 (1996); *Tapper*, 122 Wn.2d at 403. The Court must give substantial weight to an agency's construction of statutory language and legislative intent where, as here, the statute is within the agency's area of expertise.

Macey v. Empl. Sec. Dep't, 110 Wn.2d 308, 313, 752 P.2d 372 (1988); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 407, 914 P.2d 750 (1996).

Whether to set aside a default order is a matter of discretion. When reviewing matters within agency discretion, "the court shall limit its function to assuring that the agency has exercised its discretion in 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, 870-871, 955 P.2d 394 (1998).[6] 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, 482 P.2d 775 (1971).

B. The Commissioner Properly Exercised His Discretion In Finding That Graves Had Not Demonstrated Good Cause For Failing To Appear.

1. The ALJ's Entry Of A Default Order For Graves' Failure To Appear Complied With RCW 34.05.440.

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[6] "Judicial discretion is a composite of many things, among which are *conclusions drawn from objective criteria*; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously . . . . Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker,* 79 Wn.2d 12, 482 P.2d 775 (1971) (emphasis added).

Under the APA, if a party requesting a hearing does not appear at the hearing, the presiding officer may enter a default order against him:

> (2) If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding . . . the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order.
>
> (3) Within seven days after service of a default order under subsection (2) of this section, or such longer period as provided by agency rule, the party against whom it was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon . . . .

RCW 34.05.440(2), (3).

A claimant may file a motion to vacate the default order, pursuant to RCW 34.05.440(3). The Legislature did not specify the grounds for vacating a default order pursuant to RCW 34.05.440(3) because it intended agencies to exercise their sound discretion in applying this provision:

> Careful consideration was given to comments urging that the grounds for vacating a default be specified. However, *this is an area best left to the presiding officer's or the agency's discretion.*

Journal of the Senate, March 12, 1987, Comments to SSB 5090, 606-632, at 622, Comment 45 (emphasis added).

2. The Commissioner's Determination That Graves Did Not Show Good Cause For Failing To Appear At His Hearing Was Exercised In Accordance With WAC 192-04-180 And Precedential Commissioner's Decisions.

The Department has adopted a rule to address the grounds for vacating default orders in accordance with RCW 34.05.440(3). WAC 192-04-180 provides, in pertinent part:

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

WAC 192-04-180 (emphasis added). The Department's standard for what constitutes good cause is stated in its precedential Commissioner's decisions.

The Department's precedential decisions define "good cause" as circumstances which are external and apart from a claimant. The standard is well understood as meaning something more than mere neglect of one's affairs. For example, *In re Jaiteh*, 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.

Similarly, *In re Bowman*, Comm. Dec. 491 (1979),[7] the Notice of Hearing was timely mailed, but the claimant did not receive it until after the day of the hearing. The Commissioner ruled that the claimant had good cause for failing to appear, because mail delivery is a factor that is external and apart from a claimant's control.

In re Perry, Comm. Dec. 502 (1979), a claimant was driven by another person to his administrative hearing which took place approximately 70 miles from his home. The claimant appeared on time but was told that his hearing was delayed because the previously scheduled hearing was still taking place. The claimant stayed for another hour, but then left without announcing his departure because his driver insisted on leaving immediately for home. The Commissioner found good cause because the driver's decision to leave was external and apart from Perry's control.

However, the Commissioner did not find good cause for failure to appear *In re Herbert*, Comm. Dec. 544 (1963). The claimant did not retrieve registered mail from the post office after notice from the Post Office that it was being held for him, and after being personally advised by the Department that the Notice of Hearing was mailed to him by

[7] *In re Perry* involved WAC 192-09-310, the predecessor to WAC 192-04-180. WAC 192-09-310 was substantially similar to the current rule as it used the term "good and sufficient cause."

registered mail. His failure to check his mail was neglect of his own affairs and within his control.

Nor did the Commissioner find good cause *In re Kelly*, Comm'r Dec. 714 (1962). Kelly moved after she had filed her appeal, but she failed to provide the Department with a change of address. This was neglect of her affairs and within her span of control. *See also In re Braun*, Comm'r Dec. 698 (1967); *In re Mills*, Comm'r Dec. 642 (1965).

Likewise, the Commissioner did not find "good cause" in the case of *In re Moilanen*, Comm. Dec. 1283 (1973): the claimant received the Notice of Hearing but was concerned that he might lose his new job if he took time off to appear at the hearing. The claimant did not appear at his hearing, and he did not request a continuance. The choice not to appear was his.

Finally, *In re Groves*, Comm. Dec. 374 (1978), an employer received the Notice of Hearing, but the Notice was mislaid. The employer's representative failed to appear at the hearing. The Commissioner ruled that "good cause" had not been established, because the employer's mishandling of the hearing notice amounted to neglect of its affairs.

As the above-cited Commissioner's decisions make clear, Graves's failure to appear at his hearing in this case was without "good cause."

Graves received two notices of hearing. AR 1, 28. The notices clearly stated that a default order would be entered against him should he fail to appear at the correct date and time. AR 1, 26, 30, 33, 36, 40-41. However, Graves entered the incorrect date for the hearing, a circumstance that was intrinsic to, rather than external and apart from, his control. *Id.*

3. The Commissioner Did Not Abuse His Discretion In Finding That Graves Did Not Have Good Cause.

When reviewing matters within agency discretion:

> the court shall limit its function to assuring that the agency has exercised its discretion in 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).

The Washington Supreme Court has ruled that courts do not have equitable authority in unemployment compensation cases:

> This is not an equitable proceeding. It is a proceeding to review an administrative determination, conducted under the provisions of the administrative procedure act (RCW 34.04), as required by RCW 50.32.120. . . . Unless a party can show that he is entitled to . . . [a remedy] under the law which gives the right of review (here, RCW 50.32), there is no authority in the court . . . pursuant to equitable or other doctrines.

Pennsylvania Life Ins. Co. v. Empl. Sec. Dep't, 97 Wn.2d 412, 417, 645 P.2d 693 (1982). As such, courts lack authority to dismiss the default

order absent a showing of an "abuse of discretion" on the part of the Commissioner.

Graves persistently ignored the Department's regulations. He appealed five months late. AR 7, 16-17. He failed to appear after being given notice of the Department's determinations and an opportunity to respond. AR 1, 28. Pursuant to RCW 34.05.440, the ALJ had the authority to enter a default order. AR 26, 30. The Commissioner affirmed that decision pursuant to WAC 192-04-180, because Graves' excuse amounted to neglect of his own affairs, rather than a factor that was external and apart from his control. AR 36. The Commissioner's finding that Graves did not have good cause for failure to appear was not an abuse of discretion.

Graves "contends that WAC 192-04-170(5) while authorizing the filing for a Petition for Review does not likewise inform the claimant of what should be included in the provisions of the Petition to be acceptable." That subsection does not seem to support his argument if he is suggesting that the rule is deficient because it does not dictate the exact content.[8]

Regardless, the default order restates the key provisions of WAC 192-04-170 instructing claimants how to file a petition for review:

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[8] "Arrangements for representation and requests for copies of the hearing record and exhibits will not extend the period for the filing of a petition for review, argument in support thereof, or a reply to the petition for review." WAC 192-04-170(5).

> This Order is final unless a written Petition for Review is addressed and mailed to:
>
> Agency Records Center
> Employment Security Department
> PO Box 9046 Olympia, Washington 98507·9046
>
> and postmarked on or before March 10. 2006. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review. Do not file your Petition for Review by Facsimile (FAX). Do not mail your Petition to any location other than the Agency Records Center.

Graves read those instructions and petitioned the Commissioner for review of the ALJ's default order. AR 33.

The Commissioner determined that Graves had not shown good cause for his failure to appear at the February 8, 2006 hearing, because he was provided two notices of the hearing that "clearly and unambiguously" stated the day of the week and the date on which the hearing was scheduled to be held. AR 36.

The Commissioner's decision recognized that the ALJ had a legal basis to enter a default judgment for Graves' failure to appear at his hearing pursuant to RCW 34.05.440. His decision is in alignment with precedential Commissioner's decisions stating that mere neglect of one's affairs does not amount to good cause. The Commissioner's decision is

reasonable in light of the record which shows a persistent neglect by Graves to comport with the Department's regulations and process for determining eligibility for benefits.

4. The Commissioner Properly Denied Graves' Petition For Reconsideration.

Graves subsequently wrote two letters requesting reconsideration of the Commissioner's decision. One was dated February 10, 2006. AR 40. The other was dated March 13, 2006. AR 41. Both were postmarked March 13, 2006, and they were received by the Department on March 16, 2006. AR 40-41, 44. The Commissioner properly denied Graves' request for reconsideration pursuant to WAC 192-04-190, because a petition for reconsideration must be filed within ten days of the mailing of the initial Decision of Commissioner. AR 44.

In the letter dated February 10, 2006, Graves claimed that he did not respond to the Department's determinations because of his location:

> [I] would like it known that living in Alaska has made it "Very Difficult" in my attempting to resolve this matter!! My mail is forwarded by "an ex-roommate" from Olympia, WA., and she is not always home! Therefore the mail if not already forwarded by the Post Office is sometimes late getting to me!

AR 40. He reiterated that theme in the letter dated March 13:

> Please be a "little understanding" to the fact that Alaska is a very difficult area to get mail to arrive on time!!

AR 41. However, the difference between the dates for items sent and received between Graves and the Department suggests that three days was the upper limit for mail routing between Washington State and Juneau, Alaska. AR 33-34, 41. The record also indicates that he had no difficulty in receiving his benefit checks when mailed after he moved to Alaska. AR 21-23.

In sum, the Commissioner properly exercised his discretion in finding that Graves had not demonstrated good cause for failing to appear at his administrative hearing. 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.

C. Graves Was Afforded Sufficient Procedural Due Process.

Graves confuses an opportunity to respond with availing one's self of that opportunity once granted. He contends that the standard to show good cause to set aside a default order should be the same as that defined in RCW 50.32.075 for failure to timely file an appeal. Appellant's Brief at 12. However, there is a difference in kind between the two situations. Filing an appeal is the threshold requirement to gain the *opportunity* to present the merits of one's case.

A state may erect reasonable procedural requirements for triggering the right to adjudication, such as statutes of limitations. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 437, 102 S.Ct. 1148, 1158, 71 L.Ed.2d 265, 279 (1982). Similarly, a state may terminate a claim for failure to comply with reasonable procedural rules without violating the claimant's rights to due process. *Id.*

Due process does not require that every litigant actually have a hearing on the merits. *Boddie v. Connecticut*, 401 U .S. 371, 378, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971). As here, an agency may enter a default judgment:

> against a defendant who, after adequate notice, fails to make a timely appearance, or who, without justifiable excuse, violates a procedural rule requiring the production of evidence necessary for orderly adjudication.

Id.

Due process requires "timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend." *Goldberg v. Kelly,* 397 U.S. 254, 268, 90 S.Ct. 1011(1970). The traditional standard for determining whether notice of a pending legal action provides sufficient procedural due process is whether the notice is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to

present their objections." *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). What is reasonable depends on the circumstances of the case. *Id.*

Alleged violations of due process, as well as the constitutional entitlement to an administrative hearing, are questions of law reviewed de novo. *State v. Warner*, 125 Wn.2d 876, 882-83, 889 P.2d 479 (1995); *Conway v. Dep't of Social and Health Service*, 131 Wn. App. 406, 418, 120 P.3d 130 (2005). Here, the Department's handling of Graves' claim throughout its administrative processing comported with procedural due process: Graves received notice and an opportunity to respond.

1. Graves Received Proper Notice.

The Department sent Graves two Determination Notices to the same address where Graves received his benefit payments. AR 6-8. The notices informed Graves why he was ineligible for benefits, and they instructed Graves how to appeal the determination and the last date for receipt of an appeal. AR 6-7, 16-17. However, Graves did not timely appeal either the August 15, 2005, or August 24, 2005 determination.

2. Graves Had An Opportunity To Respond.

The Department sent Graves two notices acknowledging receipt of his appeal. AR 3-5, 13. Both notices informed him that his appeal would be scheduled and conducted by the Office of Administrative Hearings

(OAH). AR 3, 13. Both notices also contained instructions on how to prepare for the hearing. *Id.* The notices informed Graves of how to submit evidence in support of his claim. *Id.* Graves did not submit any evidence, such as his job search log that was at issue, in response to that guidance. AR 1-45.

OAH subsequently sent Graves a notice informing him of the issues that would be addressed at his hearing. AR 28. The notice also informed him that the consequences for "**failure to appear will result in a Default.**" AR 1, 28 (emphasis in the original). The notice prominently stated the day of the week, date and time for the hearing. *Id.* However, Graves did not avail himself of that opportunity to respond once granted.

3. Graves Has Not Suffered A Violation Of His Substantive Due Process Rights: He Failed To Comply With Statutory Reporting Requirements.

Graves contends that he should be able to retain all benefits received despite non-compliance with the Employment Security Act's job search requirements. Brief of Appellant at 9 (Appellant's Brief). He cites *Lighle v. Dep't of Labor & Indus.*, 68 Wn.2d. 507, 413 P.2d 814 (1966), for the proposition that the Court should liberally construe the applicable provisions of the Act to the facts of his case. *Id.* However, *Lighle* addressed provisions of the Industrial Insurance Act, and the court held that "a liberal construction of the act does not dispose of the requirement

that a claimant must prove his claim by competent evidence." *Lighle*, 68 Wn.2d. at 510-11.

RCW 50.20.240(1)(a) directs the Department to "implement a job search monitoring program" to ensure that "following the initial application for benefits" claimants are "actively engaged in searching for work." RCW 50.20.240(2) requires claimants that have "received five or more weeks of benefits" to "provide evidence of seeking work . . . for each week beyond five in which a claim is filed." That "evidence must demonstrate contacts with at least three employers per week or documented in-person job search activities at the local reemployment center at least three times per week."

WAC 192-180-020(1) informs claimants that job search requirements must be certified for each week in which they receive benefits, and that the department may review "job search activities at any time." Failure to report to a scheduled job search interview is grounds for denial of benefits. WAC 192-180-030(1)(d).

Here, the Department directed Graves to provide proof of his job search efforts. AR 6-7, 16-17. He failed to do so, contending that he did not receive notice because of a change in address. AR 5-6. However, he received his benefit checks at that same address during the same time

frame. AR 6, 11-12, 16, 24-25. His contention that he did not receive notice is untenable. AR 40-41, 44.

The Department later provided Graves an opportunity to provide evidence of his job search activities prior to his hearing. AR 1, 13. Graves made no effort to provide the required information. AR 1-45. Graves has not provided competent evidence to support his claim that he was eligible for benefits during the period at issue. *Lighle*, 68 Wn.2d. at 510-511.

Graves contends that "he should have been granted a postponement of his hearing[,]" because "the purpose of the Unemployment Benefits Program in the State of Washington is to temporarily help those persons financially unemployed through no fault of their own[.]" Appellant's Brief at 6. Graves cites the policy underlying the Act as supporting his position that the Department acted contrary to the Act's purposes. *Id.*

The chief purposes of unemployment compensation are indeed to minimize disruption caused by an involuntary inability to obtain employment **and to provide support for unemployed workers as they seek new jobs.** *Tapper v. State Employment Sec. Dep't,* 122 Wn.2d 397, 858 P.2d 494 (1993). Graves received benefits for over six months, accomplishing the Act's purpose of ameliorating the effect of *his*

involuntary unemployment by providing support to him as he sought a new job. AR 20-23.

D. The Remainder Of Graves' Arguments Are Without Merit.

Graves asserts that "he was subjected to a lack of equal protection in the law." Appellant's Brief at 7. However, he does not explain how the guarantees of equal protection apply in his case. "Naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *Meyer v. University of Washington,* 105 Wn.2d 847, 855, 719 P.2d 98 (1986) *quoting U.S. v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970). Therefore, the equal protection claim is waived pursuant to RAP 10.3(a)(5).

Graves also critiques the drafting of WAC 192-04-170 and the ALJ's default order as being deficient without citing authority or articulating a coherent argument. *See* Appellant's Brief at 22. However, the Commissioner's Review Office received his petition for review on February 17, 2006, and issued a decision on February 24, 2006. AR 33, 36-37. The Commissioner's decision addressed the content of Graves' petition for review:

> Under the circumstances, the claimant has not demonstrated good cause for his failure to appear at the hearing scheduled to be held on his appeal. He was provided two notices of the hearing, and both of them clearly and unambiguously stated the day of the week and

> the date on which the hearing was scheduled to be held. It was the claimant's responsibility to properly note the hearing date on his calendar and appear at the hearing as scheduled or in the alternative, if unable to appear for any reason, to timely contact the Office of Administrative Hearings to request a postponement. He did neither....

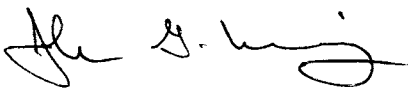
AR 36-37. The Commissioner reasonably determined that Graves had not demonstrated good cause for failing to appear at his hearing.

IV. CONCLUSION

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

RESPECTFULLY SUBMITTED this 19th day of July, 2007.

ROBERT M. MCKENNA
Attorney General



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PROOF OF SERVICE

I, Brandyn J. Brockmann, certify that I served a copy of this **Respondent's Brief** document on all parties or their counsel of record on the date below as follows:

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P.O. Box 2575
Olympia, WA 98507-2575

☐ABC/Legal Messenger

☐State Campus Delivery

☒Hand delivered to COA II by: **JOHN MACEJUNAS**

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

DATED this 19 day of July, 2007, at Olympia, WA.

BRANDYN J. BROCKMANN, Legal Assistant

PRECEDENTIAL COMMISSIONER DECISIONS

Empl. Sec. Comm'r Dec.2d 899

Term

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

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, 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. [FNa1]

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

[FNa1]. Copies of this decision were mailed to all interested parties on this date.
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Empl. Sec. Comm'r Dec.2d 491

Term

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

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". 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

Thomas W. Hillier
Commissioner's Delegate
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Empl. Sec. Comm'r Dec.2d **491**
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Empl. Sec. Comm'r Dec.2d 374

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

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.
DATED at Olympia, Washington, JAN 13 1978

David J. Freeman
Commissioner's Delegate
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Empl. Sec. Comm'r Dec.2d 502

In re PERRY, Petitioner, Empl. Sec. Comm'r Dec.2d ←**502**→ (1979)

Commissioner of the Employment Security Department
State of Washington

IN 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

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 recapitulation 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 petitionerdid 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 unrebutted 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

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Empl. Sec. Comm'r Dec.2d **←502→**

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Empl. Sec. Comm'r Dec.2d

Term

In re MOILANEN, Petitioner, Empl. Sec. Comm'r Dec.2d ←**1283** →(1975)

Commissioner of the Employment Security Department
State of Washington

IN RE MELVIN B. MOILANEN PETITIONER

July 23, 1975

Case No.
←**1283**→
Review No.
22453
Docket No.
5-01389

DECISION OF COMMISSIONER

MELVIN B. MOILANEN, the claimant herein, duly petitioned the undersigned Commissioner to review a Decision of an Appeal Tribunal entered in this matter on the 20th day of March, 1975 Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the Commissioner hereby adopts the Findings of Fact and Conclusions of the Appeal Tribunal, subject to the following comment.

The record indicates the interested employer, NORTHWEST WIRE WORKS, INC., by and through its attorney of record, WILLIAM W. TREVERTON, filed a timely appeal from a Determination Notice issued on January 13, 1975, holding the petitioner not disqualified from benefits pursuant to RCW 50.20.050. The Appeal Tribunal thereafter scheduled a hearing to be held at 11:15 a.m., Tuesday, February 25, 1975, at 200 South 2nd Street, Renton, Washington. Notice of this hearing was sent to the petitioner's last known address, to-wit: 11546 - 85th South, Seattle, Washington 98178, on February 18, 1975. The reverse side of this Notice of Hearing informed the petitioner, in part, as follows:

"POSTPONEMENT OF HEARING: Postponement or delay of the hearing for a compelling reason may be granted only when advance notice is given. If for any reason you cannot be at the hearing, NOTIFY the Appeal Examiner AT ONCE in writing OR contact the local office. If any interested party fails to appear or request a postponement the Appeal Examiner may have the testimony of those present and enter his decision based upon the available evidence." (Emphasis supplied.)

The record further indicates that at the time and place scheduled for hearing, the petitioner failed to enter an appearance, nor had he requested, either orally or in writing, a postponement of the hearing prior to the scheduled date thereof.

In his Petition for Review, the petitioner sets forth the following reason for his failure to appear:

"I could not appear at the hearing scheduled on 2-25-75. I was working full time for Buyken Machinery in Renton. I was fearful of losing my job if I took time off. I was laid off for lack of work on 3-25-75. I wish to request an opportunity to present my side of this separation issue at a hearing." However, no reason is set forth for

his failure to timely request a postponement of the hearing.
The petitioner was given due notice of the time and place of the scheduled hearing. Moreover, written advice contained on the reverse side of the Notice of Hearing clearly apprised him of the necessity for timely requesting a postponement of the hearing if it appeared that he would be unable to attend. Neither the record nor the Petition for Review indicate any basis in good cause for the petitioner's non-compliance with said advice. Finally, the petitioner was clearly informed of the potential consequence of such non-compliance. Accordingly,
IT IS HEREBY ORDERED THAT the Decision of the Appeal Tribunal entered in this matter on the 20th day of March, 1975, shall be AFFIRMED. Pursuant to RCW 50.20.050, the petitioner is disqualified from benefits commencing September 15, 1974, and until the petitioner has obtained work and earned wages of not less than his suspended weekly benefit amount in each of five calendar weeks: PROVIDED, the disqualification shall not extend beyond the calendar week ending November 30, 1974. Finally, any issue of overpayment arising from this decision is hereby remanded to the local office for resolution, pursuant to RCW 50.20.190.
DATED at Olympia, Washington, JUL 23 1975

Norward J. Brooks
Commissioner
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Empl. Sec. Comm'r Dec.2d **←1283→**
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Empl. Sec. Comm'r Dec. 698

In re BRAUN, Petitioner, Empl. Sec. Comm'r Dec. ←**698** →(1967)

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
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Empl. Sec. Comm'r Dec. **←698→**
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Empl. Sec. Comm'r Dec. 544

In re HERBERT, Petitioner, Empl. Sec. Comm'r Dec. ←**544**→ (1963)

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 nonappearance, 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
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Empl. Sec. Comm'r Dec. **544**
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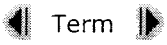
Empl. Sec. Comm'r Dec. 714



In re KELLY, Petitioner, Empl. Sec. Comm'r Dec. ←**714** →(1962)

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
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Empl. Sec. Comm'r Dec. **←714→**
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Empl. Sec. Comm'r Dec. 642

In re MILLS, Petitioner, Empl. Sec. Comm'r Dec. ←**642** →(1965)

Commissioner of the Employment Security Department
State of Washington

IN RE T. JEAN MILLS PETITIONER

November 9, 1965

Case No.
←**642**→
Review No.
7296
Docket No.
A-56331

DECISION OF COMMISSIONER

T. JEAN MILLS, duly petitioned the undersigned Commissioner to review an Order of Default entered in this matter by an Appeal Tribunal on the 13th day of October, 1965. Having now completed a thorough examination of the record and files herein , thereby being fully advised in the premises, the Commissioner hereby enters the following:

FINDINGS OF FACT

I

On the 17th day of September, 1965, the petitioner was mailed a Determination Notice by the Spokane local office holding that she was discharged from her former employment for reasons constituting misconduct connected with her work, resulting in a denial of benefits for the calendar week ending August 7, 1965, through the week ending September 11, 1965, pursuant to the provisions of Section 74 of the Act.

II

On September 24, 1965, the petitioner filed a timely Notice of Appeal, on the face of which she requested that a Notice of Hearing be mailed to her attorney, Lester Edge, Paulsen Building, Spokane, Washington.

III

On September 29, 1965, a Notice of Hearing was mailed to the petitioner, by registered mail, copies of which were mailed, also be registered mail, to Lester Edge, Attorney at Law, and to Knud's Copper Grill, the petitioner's former employer. None of the three Notices of Hearing were returned to this Department by postal authorities as being undeliverable.

IV

At the time and place scheduled for hearing, the petitioner failed to appear. Petitioner's counsel also failed to enter an appearance for and on behalf of the petitioner. No request for continuance was communicated by petitioner, or her counsel, to the Appeal Tribunal prior to the date of hearing.

V

In her Petition for Review, the petitioner states as follows:
"I did not receive the notice of hearing, showing that I was to report on Thurs. Oct. 7, 1965 at 1:00 pm for a hearing. I have since found out that my attorney received a copy but he indicated to me that he thought I wasn't going through with it since I hadn't called him.
I recently received the Order of Default decision and this is what brought to my attention the fact that I didn't get notice of the hearing in the first place. I wish to have this case rescheduled as I intend to see it finished."
From the foregoing Findings of Fact, the Commissioner frames the following:

ISSUE

Is the petitioner entitled to have her hearing rescheduled on the merits thereof on the ground that she has established good cause for failing to enter an appearance at the time and place scheduled therefor on the original setting of this matt er?
From the Issue as framed, the Commissioner draws the following:

CONCLUSION

Pertinent to a resolution of the Issue presented are a portion of the provisions of Commissioner's Regulation 16, subparagraph 2:
". . . The examiner assigned to the case by the chief appeal examiner shall set the date of the hearing and at least seven days prior thereto shall send notices of the time and place to the interested parties and any witnesses whose presence has been requested by the parties. If any interested party is unable to appear on the day set for the 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 re quest is not so 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 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. . ."
We have previously held that when an appellant notifies this Department that he intends to be represented at an appeal hearing by counsel, personnel manager, union business representative or the like, such a representative will be considered an interested party to the appeal hearing and shall be accorded all privileges flowing to such an individual. It is for this reason that we have held that failure to communicate a Notice of Hearing to an attorney representative of an appellant is grounds to grant a new hearing to an appellant on the merits of his case.
In the instant case, Notices of Hearing were mailed (by registered mail) to the petitioner and her attorney of record. Although petitioner allegedly did not receive her copy of the Notice of Hearing, it is apparent that her attorney did receive his copy sufficiently prior to the date of hearing to have permitted either (1) an appearance, or (2) a request for continuance. It is equally apparent that some misunderstanding occurred between the petitioner and her attorney which contributed to the nonappearance of the petitioner. We point out that the petitioner's copy of the Notice of Hearing was not returned to this Department by postal authorities which, considering normal postal practices, militates against the allegation of the petitioner that she did not receive her copy. Inasmuch as it is admitted that petitioner's counsel did receive a copy of the Notice of Hearing in timely fashion, such receipt must be imputed to the petitioner. The petitioner's ensuing failure to appear, or to request a continuance prior to the hearing, justified

the Appeal Tribunal's entering of an Order of Default, as it cannot be held that a lack of communication between an appellant and his counsel, which results in a nonappearance at the time and place scheduled for hearing, constitutes "good cause" for such nonappearance. Accordingly,

IT IS HEREBY ORDERED that the Order of Default entered in this matter on the 13th day of October, 1965, shall be AFFIRMED. Benefits shall be denied the petitioner commencing with the calendar week ending August 7, 1965, through the week ending September 11, 1965, pursuant to the provisions of Section 74 of the Act.

DATED at Olympia, Washington, November 9, 1965.

SIDNEY E. SMITH
Commissioner
Employment Security Department

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Empl. Sec. Comm'r Dec. **←642→**

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