DISTRICT OF COLUMBIA COURT OF APPEALS

DERRICK K. MITCHELL,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 10-AA-109
	)	
ALL STAFF TECH/DHS,	)	
	)	
Respondent.	)	
_____	)	

MOTION FOR SUMMARY REVERSAL

In a final order dated January 10, 2010, the Office of Administrative Hearings ("OAH") dismissed petitioner Derrick Mitchell's administrative appeal from a claim determination denying him unemployment compensation benefits, on the ground that the appeal was untimely. Mr. Mitchell hereby moves for summary reversal of that order as contrary to this Court's decision in *Wright-Taylor v. Howard University Hospital*, 974 A.2d 210 (D.C. 2009) (reversing OAH's dismissal of an unemployment administrative appeal as untimely when the appeal was timely mailed but not received). Mr. Mitchell respectfully requests that this Court reverse and remand to OAH for a determination on the merits of his claim for unemployment compensation benefits.

Mr. Mitchell's private employer, All Staff Technical Solutions, has indicated in a letter to OAH that it will not contest any further Mr. Mitchell's entitlement to unemployment benefits. The Solicitor General in the Office of the Attorney General has advised the undersigned counsel that the Department of Employment Services ("DOES") will not oppose this motion but that it will file a response.

The facts are straightforward: Mr. Mitchell timely mailed his administrative appeal to OAH. Upon contacting OAH and learning that the agency had not received his mailed appeal,

Mr. Mitchell also filed an appeal with OAH in person; although that in-person appeal was filed one day after the expiration of the 10-day filing deadline, it was well within the time OAH would have received a timely-mailed appeal. After the expiration of the appeal period, the U.S. Postal Service returned the envelope to Mr. Mitchell. Not only does the envelope itself evidence that it was delivered to the U.S. Postal Service but was "returned to sender" for additional postage, but the Administrative Law Judge ("ALJ") expressly credited Mr. Mitchell's testimony that he timely placed it in the mail. Nevertheless, because the envelope was returned to Mr. Mitchell and did not bear a postmark, OAH dismissed his appeal as untimely. The only difference between this case and *Wright-Taylor* is that in *Wright-Taylor* the reason the timely-mailed appeal did not arrive is unknown, while here the record shows it was Mr. Mitchell's excusable mistake in using a regular 44-cent stamp. In both situations, however, the Notice of Appeal Rights DOES provided describing the appeal process failed to warn the claimants that dropping the appeal into a mailbox or at a post office might not be enough to perfect an appeal. Notwithstanding *Wright-Taylor*, the ALJ deemed Mr. Mitchell's administrative appeal untimely. Mr. Mitchell timely petitioned this Court for review.

In an order dated February 24, 2010, this Court ordered OAH to file the administrative record within 60 days from the date of that order. That deadline has elapsed, but OAH has not yet complied. Given the undisputed facts and simple legal issue involved here, however, there is no need for the Court to wait for the record to resolve Mr. Mitchell's petition for review.

STATEMENT OF FACTS

On December 7, 2009, a claims examiner at DOES found Mr. Mitchell disqualified from receiving unemployment compensation benefits on the ground that the petitioner left his employment voluntarily and without good cause. *See* Claim Determination (OAH Exh. 300, attached hereto as Exh. 1). The examiner certified that a copy of the determination was mailed

to Mr. Mitchell and his employer, All Staff Tech/DHS, on that date. By statute, petitioner was required to file his administrative appeal "within 10 days after the mailing of notice" of the claim determination to his last-known address. D.C. Code § 51-111(b). Accordingly, Mr. Mitchell's administrative appeal was due on December 17, 2009.

The statute itself is silent regarding how the filing of an administrative unemployment appeal may be accomplished. Under OAH rules, a request for a hearing appealing a determination regarding unemployment compensation "shall be filed with this administrative court in order for the case to be commenced before this administrative court." 1 DCMR § 2805.8. Under OAH Rule 2899, "[f]iled means, unless otherwise specified":

> when the document is actually received by the Clerk of Court. Notwithstanding the foregoing definition, a document filed pursuant to 1 DCMR 2805 shall relate back for purposes of timeliness, if its envelope bears a United States Postal Service post mark, rather than a mark from a private postal meter.

1 DCMR § 2899. Thus, under OAH's rules, in order for a claimant to invoke the rule that an administrative appeal is deemed filed on the date that it is *mailed*, rather on the date of receipt by OAH, the envelope must bear a U.S. Postal Service post mark.

The Notice of Appeal Rights that accompanied the claim determination issued to Mr. Mitchell provided, in relevant part:

> Your hearing request must either be **POSTMARKED** by the U.S. Postal service (rather than a private postage meter) or **ACTUALLY RECEIVED** by the Office of Administrative Hearings with **in** [sic] **ten (10) calendar days (including weekends and holidays) of the mailing date** of the claims examiner's determination that you are appealing, or, if this determination was not mailed to you, within tem [sic] (10) calendar days (including weekends and holidays) of actual delivery of this determination. If the DEADLINE falls on a Saturday, Sunday or legal holiday, the deadline is extended to the next business day. Failure to file a hearing request within the deadline subjects your appeal to dismissal.

Claim Determination, Notice of Appeal Rights (emphasis in original) (Exh. 1). That notice is nearly identical to the one that accompanied the claim determination at issue in

Wright-Taylor.[1]

Mr. Mitchell mailed his request for appeal to OAH on December 14, 2009. OAH Final Order at 2, 3, 4 (attached hereto as Exh. 2). On December 18, 2009, one day after the appeal deadline, Mr. Mitchell checked with OAH on the status of his appeal and was informed that no appeal had been filed. Mr. Mitchell then filed another request for an appeal in person at OAH that same day. *Id.*

Mr. Mitchell learned later, when his envelope was returned to him on December 30, 2009, that he had placed insufficient postage on the envelope. *Id.*; *see* Envelope (OAH Exh. 101, attached hereto as Exh. 3). Mr. Mitchell had affixed a 44-cent stamp on the envelope—the cost of first-class postage for a letter weighing not more than one ounce. *See* http://www.usps.com/prices/first-class-mail-prices.htm; *see also* Exh. 3. Evidently, the envelope weighed more than one ounce because the U.S. Postal Service placed a sticker on the envelope indicating that the envelope was "returned to sender" for "additional postage" and that the postage due was 17 cents, for a total cost of 61 cents—first-class postage for a letter weighing not more than two

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[1] As quoted by the Court in *Wright-Taylor*, the Notice of Appeals Rights in that case provided in relevant part:

> **FILING DEADLINE:** Your request for a hearing **must** be either postmarked by the United States Postal Service (not a private postage meter) or actually received by this administrative court within **ten (10)** calendar days of the mailing date of the Claims Determination you are appealing. The time runs from the date DOES mailed the Determination to you, **NOT** from the date you received it. If the Claims Determination was NOT mailed to you, you must file within **ten (10)** calendar days of actual delivery to you of the Claims Determination.
>
> If the 10-day filing deadline falls on a Saturday, Sunday or a legal holiday, the deadline is extended to the next business day.
>
> **Failure to file a request for a hearing within this deadline subjects your appeal to dismissal.**

974 A.2d at 215 (emphasis in original).

ounces. *See* http://www.usps.com/prices/first-class-mail-prices.htm; *see also* Exh. 3. Because the envelope was "returned to sender," it bears no U.S. Postal Service post mark. The ALJ credited Mr. Mitchell's testimony, however, that he mailed his appeal on December 14, 2009—three days before the filing deadline. Final Order at 2, 3, 4.

On February 9, 2010, Mr. Mitchell filed a timely petition for review with this Court.[2] On February 24, 2010, this Court issued an order requiring OAH to file the administrative record within 60 days and directing the respondent to advise the Court of the identity of its counsel. *See* Order dated Feb. 24, 2010 (attached hereto as Exh. 4). The Court subsequently issued another order directing respondent to identify its counsel. *See* Order dated Mar. 31, 2010 (attached hereto as Exh. 5). In response to the Court's orders, respondent AllStaff Technical Solutions sent a letter dated April 13, 2010 to OAH advising the Court that "AllStaff is no longer interested in pursuing this matter brought by the Petitioner, Mr. Derrick Mitchell, and will not contest his receiving the previously disputed unemployment benefits. We are therefore not appointing counsel to represent us in this matter." *See* AllStaff Letter (attached hereto as Exh. 6).

Counsel for Mr. Mitchell conferred with Todd Kim, the Solicitor General in the Office of the Attorney General, seeking his consent, on behalf of DOES, to this motion for summary reversal. The Solicitor General responded that DOES will not oppose this motion but that it will file a response.

ARGUMENT

The standard for summary reversal in this Court has long been settled. A party seeking summary reversal must "demonstrat[e] both that his remedy is proper and that the merits of his

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[2] Mr. Mitchell's petition for review was filed pro se. The undersigned counsel subsequently entered an appearance on Mr. Mitchell's behalf.

claim so clearly warrant relief as to justify expedited action." *United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969); *accord Oliver T. Carr Mgmt., Inc. v. Nat'l Delicatessen, Inc.*, 397 A.2d 914, 915 (D.C. 1979); *In re M.L. DEJ*, 310 A.2d 834, 836 (D.C. 1973). The Court has elaborated on this standard by stating that the movant must show "that the legal basis of the decision on review is narrow and clear-cut, and must demonstrate that the facts of the case are uncomplicated and undisputed." *Jackson v. D.C. Bd. of Elections & Ethics*, 770 A.2d 79, 80 (D.C. 2001) (citing *Oliver T. Carr Mgmt.*, 397 A.2d at 915). The standard for summary reversal is satisfied in this case.

Here, the legal basis for the decision on review is "narrow and clear-cut," and the facts are both "uncomplicated and undisputed." Although Mr. Mitchell affixed standard first-class postage on his envelope; the envelope bears every indicia of having been delivered to and handled by the U.S. Postal Service, *see* Exh. 3; and the ALJ explicitly credited Mr. Mitchell's testimony that he timely mailed his appeal on December 14, 2009, *see* Final Order at 3, 4 (Exh. 2), OAH dismissed his appeal as untimely. It did so because Mr. Mitchell underestimated the necessary postage; as a result, the U.S. Postal Service did not place a post mark on the envelope.

Although OAH considered the Court's decision in *Wright-Taylor*, the ALJ's final order in this case is nonetheless inconsistent with that decision and should be vacated and remanded on that ground.[3] Even if the Court ordinarily might not be inclined to resolve this matter on a motion for summary reversal, it should do so here given the lack of opposition by the respondent employer, who does not intend to appear in this Court.

[3] As discussed below, an amendment to D.C. Code § 51-111(b) approved by the Council on May 4, 2010 and signed by the Mayor on May 14, 2010, will likely provide an additional basis for remand if and when it goes into effect after the congressional review period.

A. Under *Wright-Taylor*, this Court Should Reverse OAH's Final Order in This Case and Remand for a Determination on the Merits.

In *Wright-Taylor*, the claimant, Rona Wright-Taylor, was denied unemployment benefits by DOES, and OAH dismissed her administratively appeal as untimely. The claimant insisted that she had timely mailed her appeal to OAH by first-class mail. *Wright-Taylor*, 974 A.2d at 211. After the expiration of the appeal period, the claimant subsequently checked with OAH and learned that there was no record of her request for a hearing having arrived. She checked again a week later and again was informed that no appeal had arrived. The OAH staff member invited the claimant to send a letter enclosing a copy of her original request, which she did. *Id.* Although the ALJ acknowledged that the claimant had testified credibly regarding having mailed the appeal, he ruled that an appeal is deemed filed when it is received by OAH or "arrives in an envelope bearing a U.S. Postal Service postmark," in which case OAH "may consider the postmark for determining timeliness." *Id.* at 212. Because the claimant's initial request for a hearing never arrived at OAH, there was "no postmark to establish timeliness" and thus "no evidence the appeal was filed within the statutory period." Accordingly, OAH dismissed the appeal for lack of jurisdiction. *Id.*

This Court reversed and remanded for a hearing on the merits. *Id.* at 218. The Court began its opinion with an extended analysis of which aspects of the unemployment administrative appeal process, if any, are mandatory "jurisdictional" requirements rather than "claims-processing" rules subject to equitable exceptions. *Id.* at 212-17. The Court reasoned that the rules governing what constitutes "filing" an administrative appeal, including the mailing rule, were created by OAH, not by statute, *id.* at 213-14, and that, accordingly, only the statutory 10-day time limit set out in the statute, D.C. Code § 51-111(b), could "be considered strictly

jurisdictional and outside the realm of waiver for equitable purposes." *Id.* at 214.[4] In other words, under the Court's reasoning, OAH's rule that timely mailing can be established only by a U.S. post mark and not by other evidence—even when that evidence is expressly credited by the ALJ—is a claims-processing rule, not a jurisdictional limitation, and as such, is subject to equitable exceptions, which surely would apply in this case. The Court observed in *Wright-Taylor* that "it would not take much to conclude that the end sought by the mailing exception was properly served by the showing here" and that "it would appear that by inserting the ten-day limit, the legislature was expressing its desire that unemployment compensation disputes be promptly resolved . . . rather than creating some kind of procedural straitjacket." *Id.* at 216-17. The same observation applies in this case—where Mr. Mitchell's envelope and his explicitly credited testimony demonstrate that he placed his appeal in the U.S. mail, with postage, three days before the filing deadline had passed.

The Court ultimately did not rest its reversal of OAH's dismissal of Wright-Taylor's appeal, however, on the ground that the mailing rule is not jurisdictional. Instead, the Court

[4] Mr. Mitchell respectfully submits that the Court's assumption in *Wright-Taylor* that statutory time limits are necessarily jurisdictional is wrong, as has been emphasized by the Supreme Court in cases post-dating *Bowles v. Russell*, 551 U.S. 205 (2007), the principal decision on which this Court relied in *Wright-Taylor* for the proposition that statutory time limits are jurisdictional. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1246 (2010) ("A statutory condition that requires a party to take some action before filing a lawsuit is not automatically 'a *jurisdictional* prerequisite to suit.' Rather, the jurisdictional analysis must focus on the 'legal character' of the requirement, . . . discerned by looking to the condition's text, context, and relevant historical treatment . . . .") (citations omitted) (emphasis in original); *Union Pac. R.R. Co. v. Bhd. of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment*, 130 S. Ct. 584, 596-97 (2009) (discussing examples of time limits imposed by statute that are not "jurisdictional"). In any event, the question whether the various rules governing the filing of unemployment administrative appeals in the District are "jurisdictional" and thus not subject to equitable exceptions may be resolved definitively if and when the legislation enacted by the Council goes into effect. *See infra* pp. 11-12. As the Supreme Court has recognized, the availability of equitable exceptions, as are provided in the new unemployment legislation, is inconsistent with treating a time limit as "jurisdictional." *See John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133-34 (2008).

reversed OAH's order because of the lack of the notice provided the claimant regarding the rigidity of OAH's mail exception—a ground that is equally applicable to Mr. Mitchell and governs the proper disposition of his petition for review.

As the Court recognized, "[a] prerequisite to invoking the jurisdictional bar imposed by the statutory ten-day filing period is 'the agency's obligation of giving notice which was reasonably calculated to apprise petitioner of the decision of the claims deputy and an opportunity to contest that decision through an administrative appeal.'" *Id.* at 217 (citing *Thomas v. D.C. Dep't of Employment Servs.*, 490 A.2d 1162, 1164 (D.C. 1985)); *see also Thomas*, 490 A.2d at 1164-65 ("If the agency failed to mail notice to petitioner of the employer's appeal of the claims deputy's decision, the agency cannot be said to have afforded petitioner a 'reasonable opportunity for fair hearing' under the Unemployment Compensation Act . . . ."); *Kidd Int'l Home Care, Inc. v. Dallas*, 901 A.2d 156, 158 (D.C. 2006). The Court has "interpreted this holding in *Thomas* to require that the notice must unambiguously set forth the conditions for filing an appeal." *Wright-Taylor*, 974 A.2d at 217 (citing multiple cases in which the Court has struck down applications of the ten-day limit on the basis of inadequate or ambiguous notice).

The Court determined that the notice in *Wright-Taylor*, which was materially the same as the notice Mr. Mitchell received, *see supra* pp. 3-4 & n.1, was insufficiently clear in explaining what a claimant must do to ensure that an administrative appeal would be deemed timely filed:

> The problem is that . . . unless the mailed item actually arrives at and is properly handled by OAH so that there is a U.S. Postal Service postmark to prove the date of mailing, the retroactive provision permitting the date of mailing to be the date of filing does not apply. Such a position requires far more clarity than appears in the form here. The filer should be warned that the letter should be sent registered mail, with return receipt requested . . . and, indeed, that even then, the only 100 percent certain course of action is to deliver the document in person to OAH and obtain a receipt.

Wright-Taylor, 974 A.2d at 218. The Notice of Appeal Rights accompanying the claim determination sent to Mr. Mitchell was deficient in the same respect, lacking the same warning regarding the precautions necessary to ensure timely filing.

In this case, the ALJ discussed the Court's ruling in *Wright-Taylor* but believed that it was inapposite, *see* Final Order at 4—even though in both instances, the mailed administrative appeals did not arrive at OAH, but the testimony of both claimants that they had timely placed the appeals in the mail was credited by OAH. The only difference in the two cases is that in *Wright-Taylor*, the claimant's appeal was not delivered for reasons that are unknown, whereas in this case, Mr. Mitchell's appeal was returned to him because the standard postage fell short.

OAH's reading of the Court's ruling creates just the kind of "procedural straitjacket" the Court warned against. *Wright-Taylor*, 974 A.2d at 217. It is equally true here, as it was in *Wright-Taylor*, that a person reading the Notice of Appeal Rights that Mr. Mitchell received, could "reasonably conclude" that if he "took the letter personally" to a U.S. Post Office or U.S. mailbox "for mailing within the given time limit," with standard first-class postage affixed to the envelope (albeit here, standard first-class mail came up 17 cents short), that he "would have complied with the filing requirements." *Id.* at 218. Although the Notice of Appeal Rights in *Wright-Taylor*—just like the notice provided to Mr. Mitchell—advised the claimant that the claim, if mailed, must be "postmarked by the United States Postal Service" within 10 calendar days of the mailing date of the claim determination, the Court held that warning insufficient. What the notice did *not* advise either the claimant in *Wright-Taylor* or Mr. Mitchell was that OAH's mail rule regarding filing was absolutely rigid so that even an appeal timely placed in the U.S. mail could potentially not be treated as a timely filing.

The admonition the Court suggested—that the notice advise the claimant, if mailing the appeal to OAH, to send it by "registered mail, with return receipt requested," and that "even

then, the only 100 percent certain course of action is to deliver the document in person to OAH and obtain a receipt," *id.*, would have benefited Mr. Mitchell just as much as it would have benefited the claimant in *Wright-Taylor*. Warned about the need to obtain irrefutable proof of the date of mailing, Mr. Mitchell, if he decided to go ahead with filing the appeal by mail, could have sent it by registered mail, which would have benefited him both by ensuring that the correct postage would be affixed and by affording him authoritative proof of the date of mailing. More likely (and probably better), a claimant warned that "the only 100 percent certain course of action" would be to file the claim in person and obtain a receipt, would do just that. Indeed, as soon as Mr. Mitchell learned that his appeal had not arrived at OAH, he immediately went to OAH and filed the appeal in person. Final Order at 2.

As it stands now, OAH's current mailing rule, accompanied by DOES's deficient notice, sets a trap for the unsuspecting claimant. The notice is inadequate as a matter of law to invoke the jurisdictional bar of the ten-day filing deadline (even assuming that OAH's mailing rule is jurisdictional). But, as the Court recognized in *Wright-Taylor*, OAH's mailing rule is not jurisdictional in any event and thus is subject to equitable exceptions. *See supra* pp. 7-8. Accordingly, just as it did in *Wright-Taylor,* this Court should reverse the dismissal of Mr. Mitchell's appeal and remand to OAH for further proceedings on the merits.

B. The D.C. Council Has Enacted Legislation That Will Independently Require Remand If and When It Goes into Effect.

On May 14, 2010, the Mayor signed a bill approved by the Council on May 4, 2010 that modifies D.C. Code § 51-111(b) in ways that will independently require remand in this case, once the legislation goes into effect.

Bill 18-455 amends D.C. Code § 51-111(b) to allow 15 calendar days, instead of 10 days, to file an unemployment administrative appeal. In addition, the enrolled bill adds two new

sentences after the phrase "actual delivery of such notice" in § 51-111(b), to read as follows:

> The 15-day appeal period may be extended if the claimant or any party to the proceeding shows excusable neglect or good cause. The exception for good cause or excusable neglect shall apply to all claims pending on the effective date of the Unemployment Compensation Reform Amendment Act of 2010, passed on 2nd reading on May 4, 2010 (Enrolled version of Bill 18-455), including those in which an appeal has been filed in the Office of Administrative Hearings or in which a petition for review has been filed in the District of Columbia Court of Appeals.

Bill 18-455, § 2(c) (attached hereto as Exh. 7). The Mayor signed the bill on May 14, 2010, but the legislation has not yet been approved by Congress. Assuming that it goes into effect, Mr. Mitchell will readily be able to show excusable neglect or good cause for his late filing (if, indeed, his filing is late at all) and will be entitled to proceed to the merits of his claim for unemployment compensation benefits.

Nevertheless, there is no reason for further delay in the disposition of Mr. Mitchell's petition for review. Because Mr. Mitchell is plainly entitled under existing law to a remand for a determination of his claim on the merits, because respondent has stated that it does not intend to contest his eligibility for benefits further and will not be entering an appearance in this Court, and because of the severe financial hardship that would be inflicted upon Mr. Mitchell by an additional delay in the disposition of his claim, he urges the Court to grant his motion for summary reversal as soon as possible.

CONCLUSION

For the foregoing reasons, petitioner Derrick Mitchell respectfully requests that this Court reverse OAH's final order and remand to OAH with instructions that it treat petitioner's administrative appeal as timely and consider the merits of his claim for unemployment compensation benefits.

Dated: May 25, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of May, 2010, I caused a true and correct copy of the foregoing Motion for Summary Reversal to be served by first-class mail, postage prepaid, on:

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Attn: Human Resources
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