No. 07-AA-538

DISTRICT OF COLUMBIA COURT OF APPEALS

FELECIA BURTON,

Petitioner,

v.

NTT CONSULTING, LLC,

Respondent.

On Petition for Review from the Office of Administrative Hearings

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BRIEF OF PETITIONER

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STATEMENT PURSUANT TO RULE 28(a)(2)(A)

The parties to the case are Felecia Burton, the petitioner, and NTT Consulting, LLC, the respondent. Ms. Burton represented herself in the Office of Administrative Hearings. She is represented in this Court by Barbara McDowell, Eric Angel, and Peter G. Wilson of the Legal Aid Society of the District of Columbia. NTT Consulting did not appear in the Office of Administrative Hearings. It is represented in this Court by Timothy J. Sessing.

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QUESTION PRESENTED

Whether the Office of Administrative Hearings erred in summarily denying a pro se claimant's motion for relief from the dismissal of her unemployment compensation appeal, when the motion explained that the claimant had not attended the hearing because she had not received timely notice of it in the mail.

STATEMENT OF THE CASE

The Office of Administrative Hearings (OAH) dismissed petitioner Felecia Burton's appeal of an unemployment claims determination as untimely, despite her insistence that she did not receive the determination in the mail within the appeal period and the Department of Employment Services' agreement to re-mail it to her. Neither Ms. Burton nor her former employer appeared at the OAH hearing in the case to address the timeliness issue. Although Ms. Burton filed a motion for relief explaining that she had not received the hearing notice until the date of the hearing because of difficulties with her mail service, OAH denied the motion as stating "no substantive basis for relief" without further inquiry.

Similar issues have come frequently before this Court. See, e.g., Rhea v. Designmark, Inc., 2008 D.C. App. LEXIS 79 (D.C. Feb. 21, 2008); Frausto v. United States Dep't of Commerce, 926 A.2d 151 (D.C. 2007); Kidd Int'l Home Care, Inc. v. Dallas, 901 A.2d 156 (D.C. 2006); Bobb v. Howard Univ. Hosp., 900 A.2d 166 (D.C. 2006); Thomas v. D.C. Dep't of Employment Servs., 490 A.2d 1162 (D.C. 1985).

STATEMENT OF FACTS

1. After Ms. Burton was fired from her job with respondent NTT Consulting, she applied for unemployment compensation with the District of Columbia Department of Employment Services (DOES). A DOES claims examiner denied the application after concluding that Ms. Bur-

ton had been discharged for "misconduct," consisting of "excessive absenteeism" after having been warned by her employer that her "attendance was not satisfactory." Determination By Claims Examiner 1 [App. A13].

The final paragraph of the determination consists of a certificate of service signed by the claims examiner, which states: "I certify that a copy of this document was mailed to the claimant and to the employer named herein at the above address on 3/30/07." Determination By Claims Examiner 1 [App. A13]. The "above address" listed for Ms. Burton was "3227 O STREET S.E. WASHINGTON, DC – 20020-0000," which was her home address at the time.

The upper right-hand corner of the determination bears the handwritten notation: "I certify I remailed a copy of this determination on 04/13/2007," with the signature of another DOES employee. Determination By Claims Examiner 1 [App. A13].

2. On April 17, 2007, Ms. Burton appealed the claims examiner's determination to OAH. Final Order 1 [App. A6]. In completing OAH's hearing request form for DOES appeals, Ms. Burton gave her name, Social Security number, telephone number, and name and address of her former employer. In the space for "Claimant Address," she gave the home address above. She left the space for "Representative (if any)" blank, indicating that she was continuing to proceed pro se. See REQUEST FOR HEARING TO APPEAL A DETERMINATION BY A CLAIMS EXAMINER INVOLVING UNEMPLOYMENT BENEFITS 1 [App. A16].

OAH scheduled a hearing in Ms. Burton's case for May 9, 2007, at 10:30 a.m. OAH acted to notify the parties of the hearing by mailing a Scheduling Order and Notice of In-Person Hearing. The second page of the document contains a certificate of service, which states: "I hereby certify that on April 25th, 2007, this document was caused to be served upon the above-named parties at the addresses listed by US Mail. A copy was also served via Inter-Agency Mail

to the Department of Employment Services." Scheduling Order 2 [App. A18]. The address listed for Ms. Burton was her home address at "3227 O Street SE." Id.

Neither Ms. Burton nor her former employer appeared personally at the hearing or sent a representative. Final Order 1-2 [App. A6-A7]. The ALJ began the hearing "at approximately 10:41 a.m." Id. at 2 n.1 [App. A7]. There is no indication that the ALJ attempted to ascertain whether Ms. Burton had telephoned OAH that morning to explain her absence. Nor is there any indication that the ALJ, or any other OAH employee, attempted to telephone Ms. Burton at the number on her appeal document.

3. Also on May 9, Ms. Burton checked her Post Office Box, where she discovered OAH's Scheduling Order. After reading the Scheduling Order and recognizing that "[t]here was no way I could have made [the hearing]," she telephoned OAH to explain her situation. She spoke with an OAH employee, who advised her to "write a letter and fax it and the letter will be given to the Judge for review." She did so in a letter dated May 9, which OAH characterized as a "Motion for Reconsideration" and deemed filed on May 10. The Motion asked OAH to "allow me a fair hearing again to defend my claim for benefits." Motion for Reconsideration 1 [App. A20].

In the Motion, Ms. Burton explained that she was not aware of the Scheduling Order until May 9, and that the Order had not been in her Post Office Box when she last checked it on May 3. She explained that she had rented the Post Office Box because of problems with mail delivery to her home, but that delivery to her Post Office Box "is no better." Motion for Reconsideration 1 [App. A20]; Order Denying Motion for Reconsideration 1, 2 [App. A1, A2].

4. On May 15, 2007, apparently unaware of Ms. Burton's motion for reconsideration, OAH entered a Final Order dismissing her appeal for lack of jurisdiction. The ALJ held that Ms.

Burton's appeal was untimely because it was not filed within ten days of the mailing of the DOES determination denying benefits. The ALJ held that Ms. Burton had failed to rebut presumptions that the determination was not only mailed to her by DOES in accordance with the certificate of service but also was received by her. Final Order 3, 4 [App. A8, A9]. Although the ALJ acknowledged that "[t]he Determination bears a notation that it was 'remailed' on April 13 2007," the ALJ gave no weight to the notation because Ms. Burton "did not appear at the hearing" to present evidence on the timeliness issue. Id. at 4 [App. A9].

5. On June 5, 2007, Ms. Burton, still proceeding pro se, submitted an additional document to OAH, titled "Motion of Relief." She expressed her understanding that, once she rented the Post Office Box in February 2007, the Post Office would place any mail addressed to her in the Post Office Box, rather than have the carrier deliver it to her home. She explained, however, that some mail continued to be delivered to her home (although not OAH's Scheduling Order), and that delivery to both the Post Office Box and her home was often slow. Motion of Relief 1 [App. A21].

6. On June 13, 2007, OAH issued an Order Denying Motion for Reconsideration. In the Order, the ALJ acknowledged that, although Ms. Burton had filed a request for rehearing on May 10, "[t]his request was not brought to my attention until the issuance of the Final Order." Order Denying Motion for Reconsideration 1 [App. A1]. The ALJ then held that the motion, while timely filed, "state[s] no error of law" and "raises no substantive basis for relief." Id. at 2 [App. A2]. While observing that the motion could be considered as "a motion for relief from a final order under OAH Rule 2833," its counterpart to Rule 60(b) of the Rules of Civil Procedure, the ALJ did not explicitly address the grounds for relief under that Rule or why Ms. Burton could not satisfy them. Id.

As in the Final Order, the ALJ relied on the presumption of the accuracy of a certificate of service – here, the certificate of service in the Scheduling Order. Order Denying Motion for Reconsideration 2-3 [App. A2-A3]. The ALJ offered two reasons for not inquiring further into the accuracy of the presumption. First, because OAH had addressed the Scheduling Order to Ms. Burton's home, not to a Post Office Box, the ALJ rejected as "not credible" her assertions that she did not receive the Order in her Post Office Box until May 9. Id. at 2 [App. A2]. Second, the ALJ reasoned that, "even if Claimant's street address is actually a post office box," she "had responsibility to check her post office box more regularly," noting that she had not done so between May 3 and May 9. Id.

SUMMARY OF THE ARGUMENT

In depriving Ms. Burton of an opportunity to be heard in her unemployment compensation appeal, OAH erred in summarily denying her motion for relief, without addressing whether her absence from the initial hearing was the result of nothing more than "mistake, inadvertence, surprise, or excusable neglect." OAH Rule 2833.2(1); Super. Ct. R. Civ. P. 60(b)(1). Ms. Burton made a threshold showing of entitlement to such relief. She explained that she learned of the hearing only on May 9, 2007, the day that it occurred, when she retrieved the Scheduling Order from her Post Office Box; that the Order was not in the Box when she had checked it on May 3; that she immediately telephoned OAH to explain why she had not attended the hearing; and that she followed up with a faxed letter that OAH characterized as a timely motion for relief. The ALJ failed to analyze Ms. Burton's motion under this Court's criteria for Rule 60(b) motions. Nor did the ALJ conduct any hearing or other inquiry into the facts and circumstances stated in Ms. Burton's pro se motion.

When Ms. Burton's motion is evaluated under the standard Rule 60(b) criteria, see, e.g., Reid v. District of Columbia, 634 A.2d 423, 424 (D.C. 1993), there is no evident reason on the present record why relief should not have been granted here. A party's or counsel's inadvertent absence from a crucial hearing even because of some arguable carelessness in the monitoring of court notices has often been excused under that Rule. Also militating in Ms. Burton's favor were that she immediately sought relief from OAH; that the employer had not appeared at the initial hearing, and thus would not be prejudiced by the granting of a new hearing; and that the ALJ recognized in his Final Order that Ms. Burton might have been able to prevail on the underlying jurisdictional issue had she participated in the hearing.

There is no valid reason why OAH should impose a stricter standard in such circumstances than would a trial court. Indeed, as an administrative tribunal that frequently deals with unrepresented parties and vital safety-net benefits, OAH should approach cases such as this one with the goal of achieving the appearance and substance of fairness, rather than mere efficiency in the disposition of dockets.

ARGUMENT

I. OAH ERRED IN REFUSING TO REOPEN THIS UNEMPLOYMENT CASE AFTER THE PRO SE CLAIMANT EXPLAINED THAT SHE DID NOT ATTEND THE HEARING BECAUSE SHE DID NOT RECEIVE TIMELY NOTICE OF IT.

In denying Ms. Burton's pro se motion for relief from the Final Order in this unemployment compensation case, the ALJ did not suggest that he lacked authority to grant Ms. Burton a new hearing. Rather, the ALJ appears to have concluded that the motion was legally or factually deficient. The denial of relief cannot be justified on that basis. A party's failure to attend an administrative hearing for which she lacked actual notice is the sort of circumstance that war-

rants relief under OAH Rule 2833.2. That is particularly so when, as here, the party acts immediately to explain and rectify the situation and the opposing party is not prejudiced.

A. When A Party's Absence From A Dispositive Hearing Was Due To Mistake, Inadvertence, Surprise, Or Excusable Neglect, A Court Has Only Limited Discretion To Refuse To Reopen The Case.

OAH Rule 2833.2 is the administrative counterpart to Rule 60(b) of the Superior Court Rules of Civil Procedure. Under both provisions, a party may obtain relief from a final order based on, among other things, "mistake, inadvertence, surprise, or excusable neglect." OAH Rule 2833.2(1); Super. Ct. R. Civ. P. 60(b)(1).

In ruling on motions filed under Rule 60(b), a court is also required to consider "whether the movant (1) had actual notice of the proceeding; (2) acted in good faith; (3) took prompt action; and (4) presented an adequate defense." Frausto v. United States Dep't of Commerce, 926 A.2d 151, 154 (D.C. 2007) (quoting Nuyen v. Luna, 884 A.2d 650, 656 (D.C. 2005), and Starling v. Jephunneh Lawrence & Assocs., 495 A.2d 1157, 1159-1160 (D.C. 1985)). The court also considers the possibility of "[p]rejudice to the other party." Frausto, 926 A.2d at 154.

Although the question whether to grant relief in such circumstances is ordinarily reviewable only for an abuse of discretion, "even a slight abuse of discretion * * * may justify reversal" when the moving party has been denied the opportunity to litigate the case on the merits. Reid v. District of Columbia, 634 A.2d 423, 424 (D.C. 1993); Starling, 495 A.2d at 1159. Here, given that the ALJ's ruling prevented Ms. Burton from pursuing her case on the merits, the "slight abuse" standard should apply. Moreover, given the ALJ's failure to state any reason for denying Ms. Burton relief under OAH Rule 2833.2, his ruling should be reversed on that ground alone.

B. Ms. Burton Made A Sufficient Showing To Require The ALJ, At A Minimum, To Conduct A More Extensive Inquiry Into Whether Reopening Was Warranted.

Ms. Burton's pro se submissions offered OAH an ample basis to conclude that she would be entitled to relief, both because her failure to attend the hearing constituted, at most, "excusable neglect" and because the factors identified in cases such as Starling, Nuyen, and Frausto are satisfied.[1]

1. A Pro Se Party's Failure To Attend A Hearing Of Which She Was Unaware Is The Sort of Conduct Excusable Under Rule 60(b)(1).

Although the ALJ recognized that Ms. Burton's request for relief could be considered under OAH Rule 2833, which encompasses excusable neglect, the ALJ ruled that "Claimant's request raises no substantive basis for relief." Order Denying Motion for Reconsideration 2 [App. A2]. Nothing in the ALJ's decision suggests an awareness of the circumstances that justify – and sometimes require – relief under Rule 60(b)(1) and its counterparts. Much less does the decision reflect any attempt by the ALJ to apply those circumstances to Ms. Burton's case. This Court has recognized that such omissions constitute an abuse of discretion. See, e.g., Frausto, 926 A.2d at 157 (holding that OAH abused its discretion in denying an absent claimant a new hearing without, inter alia, "explaining why the circumstances that [the claimant] contends led to her failure to appear do not constitute excusable neglect within the meaning of the rule").

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[1] To the extent that certain of the relevant factors were not fully addressed in Ms. Burton's filings, the ALJ had an affirmative obligation to inquire into them at a hearing or otherwise. See, e.g., Nuyen, 884 A.2d at 657 (observing that a trial court's "failure to inquire into the factors bearing on a motion to vacate [under Rule 60(b)] 'too heavily tips the scales in favor of the need for finality in litigation'") (quoting Walker v. Smith, 499 A.2d 446, 449 (D.C. 1985)); Miranda v. Contreras, 754 A.2d 277, 280 (D.C. 2000) ("It is the trial court's 'responsibility to inquire where matters are raised which might entitle the movant to relief under Rule 60(b).'") (quoting Starling, 495 A.2d at 1162). Especially in a tribunal such as OAH, where the parties often are not represented by counsel, a party should not be denied relief simply because she has not initially identified and addressed all of the relevant factors.

Courts have repeatedly recognized that relief is warranted under the "excusable neglect" standard when an act of carelessness causes a party or counsel inadvertently to miss a hearing. See, e.g., Johnson v. Lustine Realty Co., 640 A.2d 708, 709 (D.C. 1994) (reversing the trial court's denial of a Rule 60(b) motion when the lawyer and his client did not appear because the lawyer's office had misfiled the hearing notice); Reid, 634 A.2d at 424-425 (reversing the trial court's denial of a Rule 60(b) motion when the lawyer and his client did not appear because the lawyer failed to notice that a new procedure had been used to set the hearing date).

The explanation offered by Ms. Burton for her failure to appear at the May 9 hearing is more compelling than the explanations offered in those previous cases. In contrast to those cases, Ms. Burton was proceeding pro se, as do many claimants in appeals of unemployment determinations to OAH. See Rhea v. Designmark Services, Inc., 2008 D.C. App. LEXIS 79 (D.C. Feb. 21, 2008), at *11 ("[M]any complainants in cases brought under the [Unemployment Compensation] Act are not affluent, nor are they in a position to afford to retain private counsel to conduct protracted proceedings before the [agency, the OAH], and the courts.") (quoting Goodman v. D.C. Rental Hous. Comm'n, 573 A.2d 1293, 1299 (D.C. 1990)). She could thus be expected to have greater challenges in complying with OAH requirements and otherwise monitoring the status of her case.

Ms. Burton offered a valid reason for her failure to attend the OAH hearing in her unemployment compensation case on May 9: She did not receive "actual notice" of the hearing until the day that it was to occur. She explained that the Scheduling Order, which OAH supposedly mailed to her home address on April 27, had never arrived there. Nor had the Scheduling Order made its way to her Post Office Box by May 3. She did not receive the Order until she next checked her Post Office Box on May 9, at which point, as you stated in her request for relief,

"[t]here was no way I could have made [the hearing]." Motion for Reconsideration 1 [App. A20]. The record does not establish when the Order first reached the Post Office Box.

The ALJ suggested two reasons to fault Ms. Burton for any delay in her receipt of the Scheduling Order. But each is readily excusable.

First, the ALJ reasoned that the address that Ms. Burton had given to OAH was "a street address, not a post office box," so that her "assertion that she did not receive the Scheduling Order at her 'P.O. Box' until May 9, 2007, is not credible." Order Denying Motion for Reconsideration 2 [App. A2]. Aside from the questionable nature of such credibility findings, the ALJ should not have given such dispositive weight to Ms. Burton's not having given OAH the address of her Post Office Box. For one thing, OAH's appeal form asks for "Claimant Address," a term that a pro se claimant might understand as referring only to a home address, even if the claimant used a different address to receive mail. REQUEST FOR HEARING TO APPEAL A DETERMINATION BY A CLAIMS EXAMINER INVOLVING UNEMPLOYMENT BENEFITS 1 [App. A16]. Moreover, Ms. Burton understood that the Post Office would automatically place all mail addressed to her in the Post Office Box, even if the mail was addressed to her home, so that she would receive it more quickly and reliably. See Motion of Relief 1 (dated 6/5/07) [App. 21]; Motion for Reconsideration 1 (dated 5/9/07) [App. A20]. It is understandable in such circumstances that Ms. Burton, as a pro se litigant, may not have thought it necessary to give OAH the address for her Post Office Box. Indeed, Ms. Burton's choice to rent a Post Office Box, so that she would receive better mail service, reflects diligence on her part, not neglect.

Second, the ALJ reasoned that, even if Ms. Burton's mail was being delivered to the Post Office Box, she "had responsibility to check her post office box more regularly." Order Denying Motion for Reconsideration 2 [App. A2]. But the six-day interval between Ms. Burton's visits to

the Post Office is not so excessive as to be inexcusable. A person in Ms. Burton's circumstances might well have good reasons for not being able to do so. Those could include illness, lack of transportation, family obligations, coping with the economic circumstances of unemployment, and the need to search for work in order to preserve her unemployment compensation claim. See D.C. Code 51-109 ("An unemployed individual shall be eligible to receive benefits with respect to any week only if it has been found by the Director * * * [t]hat he has made a minimum of 2 contacts for new work in such week."). In any event, the record does not demonstrate that, if Ms. Burton had checked her Post Office Box between May 3 and May 9, the Scheduling Order would have been there.

2. The Other Considerations Governing Rule 60(b)(1) Motions Are Satisfied Here.

Ms. Burton's pro se submissions to OAH suggest that she would satisfy all of the factors identified by the Court as justifying relief under Rule 60(b)(1) to a party who misses a hearing in her case.

Ms. Burton did not have actual notice of the proceeding. As noted above, Ms. Burton explained that she did not attend the hearing on May 9 because she did not retrieve the Scheduling Order from her Post Office Box until the hearing date. She added that the Scheduling Order had not been in the Post Office Box at the time of her previous visit on May 3 and had not been delivered to her home address. See Motion for Reconsideration 1 [App. A20].

Ms. Burton acted promptly and in good faith. On May 9, the very day that she received notice of the Scheduling Order, Ms. Burton telephoned OAH to explain her absence from the hearing. She then submitted a letter to OAH by facsimile explaining the situation and seeking a new hearing. (The letter is dated May 9, but was described by the ALJ has having been filed on May 10.) This Court has recognized that such timely effort by an absent claimant "is a factor

relevant to the decision-maker's consideration of the promptness and good faith of her actions." Frausto, 926 A.2d at 155; see King v. D.C. Water Auth., 803 A.2d 966, 970 (D.C. 2002) (observing that a party who telephoned the agency to seek a continuance on the morning of the hearing was not "a classic no-show," since "within less than an hour of the appointed time, [she] sought relief, with a plausible explanation").

Ms. Burton presented an adequate defense to the underlying jurisdictional issue. To the extent that Ms. Burton had to demonstrate that granting her a new hearing to contest the Final Order "would not be a futile gesture" (Frausto, 926 A.2d at 157), she did so. In the Final Order, the ALJ found that "[t]he [DOES] Determination bears a notation that it was 'remailed' on April 13, 2007," and that Ms. Burton "filed her appeal request with this administrative court on April 17, 2007." Final Order 2 [App. A7]. Although the ALJ observed that "a question is raised" by the "remailing" reference about when the determination was mailed, the ALJ did not pursue the question "given that Claimant did not appear for the hearing." Id. at 4 [App. A9]. Such statements indicate that Ms. Burton might well have been able to persuade the ALJ that her administrative appeal was timely filed, given, for example, an error in DOES's original service.

There is no prejudice to the other party. The employer did not appear for the OAH hearing or seek a continuance. Granting Ms. Burton a new hearing, in which the employer could participate, would not cause the employer any cognizable prejudice.

* * * * *

In sum, given Ms. Burton's plausible explanation that she did not attend the May 9, 2007, hearing because she did not have actual notice of the hearing until that date, the ALJ abused his discretion in summarily denying relief. At a minimum, the ALJ was obligated to engage in a more thorough analysis of the facts relevant to the decision whether to allow the case to be reo-

pened based on excusable neglect. Such an analysis would almost surely lead to the conclusion that Ms. Burton is entitled to a new opportunity to be heard on her claim for unemployment benefits.

CONCLUSION

The Office of Administrative Hearings' Final Order and Order Denying Motion for Reconsideration should be reversed.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of Petitioner to be delivered by first-class mail, postage prepaid, this 3rd day of March, 2008, to:

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