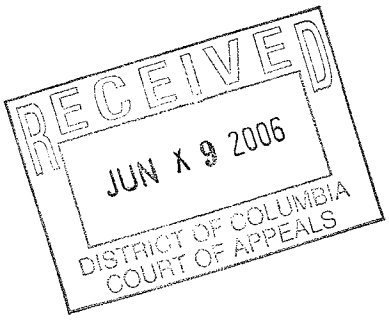
DISTRICT OF COLUMBIA COURT OF APPEALS



No. 05-AA-409

DEREK HILLIARD,

Petitioner,

v.

ADDECO USA, INC.,

Respondent.

PETITION FOR REHEARING OR, IN THE ALTERNATIVE, REHEARING EN BANC

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Derek Hilliard seeks rehearing or, in the alternative, rehearing en banc of the Court's April 27, 2006, published opinion affirming the dismissal as untimely of his administrative appeal of a denial of unemployment compensation, even though he did not have notice of the denial within the short time period allowed for taking an appeal.

Rehearing should be granted because precedent did not compel the unfair result reached in this case. *See* Slip op. 1 ("Although the equities favor Hilliard, we are required, for jurisdictional reasons, to affirm."); *id.* at 10 (Schwelb, J., concurring) ("[A]pplying the law, as we are bound by our oath to do, has not vindicated the hope that justice be done."). Mr. Hilliard represented himself before the Division, and the employer did not appear at all. Without the benefit of briefing to crystallize the statutory and constitutional issues presented, the Division mistakenly concluded that it had no choice but to uphold the ruling of the Office of Administrative Hearings (OAH) that Mr. Hilliard's administrative appeal was jurisdictionally out of time, even though he filed it as soon as he learned of the denial of his claim. As we show, precedent did not require this Court to uphold the dismissal of Mr. Hilliard's administrative appeal; the applicable statutes and regulations permitted OAH to exercise jurisdiction over the appeal or to allow reentry of the order denying his claim so that a timely appeal could be perfected. Moreover, a Supreme Court decision that was not available to the Division (having been issued only the day before the decision here) is inconsistent with the Division's holding that the notice procedures in this instance comported with due process. *See Jones v. Flowers,* 126 S. Ct. 1708 (2006).

In addition to case-specific grounds for rehearing, this petition raises a larger question of exceptional importance concerning the relation between administrative review by OAH and judicial review by this Court: Whether OAH can effectively control this Court's jurisdiction as well as its own when it dismisses administrative appeals. There is an unresolved tension in this

Court's cases concerning the reason why the failure to bring a timely administrative appeal ordinarily cuts off judicial review. Some decisions, including the Division's here, suggest that the untimely administrative appeal affects the Court's own jurisdiction (*see* Slip op. 1, referring to "jurisdictional reasons") while others rely on the exhaustion of administrative remedies doctrine, which is not jurisdictional and allows for exceptions to prevent injustice. *See Barnett v. DOES*, 491 A.2d 1156, 1160 (D.C. 1985). While this case can be resolved more narrowly, it is also an appropriate vehicle by which to clarify this Court's jurisdiction to review administrative actions, particularly in the many cases involving unrepresented individuals claiming safety-net benefits. Otherwise, there is a danger that unduly rigid application of procedural rules by OAH could cut off any avenue to challenge erroneous administrative decisions.

The key facts are undisputed. As the Division recognized, "Mr. Hilliard has been denied unemployment compensation for alleged misconduct, but the employer has, for all practical purposes, acknowledged that it cannot prove the misconduct." Slip op. 6. OAH credited Mr. Hilliard's testimony that he did not receive mailed notice of the denial of his claim by a Department of Employment Services (DOES) hearing examiner. *Id.* He filed his appeal to OAH immediately after personally visiting DOES to check on the status of his claim. Accordingly, this appeal squarely presents the erroneous denial of important, constitutionally protected benefits solely because the applicant did not know about a decision in time to appeal it.

On rehearing, Mr. Hilliard asks the Court to consider the following questions:

1. **Does District of Columbia law require proof that DOES actually mailed a notice of a denial of unemployment benefits to a claimant in order to trigger the running of the ten-day administrative appeal period?**

The rule of constitutional avoidance teaches that – before reaching the due process issue discussed below – the Court should first determine whether Mr. Hilliard could have prevailed on

statutory grounds. *See, e.g., Keels v. United States*, 785 A.2d 672, 684-85 (D.C. 2001).[1] D.C. Code § 51-111(b) provides two alternative triggers for the statutory deadline for administrative appeals: "The Director shall promptly notify the claimant and any party to the proceeding of its determination, and such determination shall be final within 10 days after the mailing of notice thereof to the party's last-known address or in the absence of such mailing, within 10 days of the actual delivery of such notice." If the notice was not properly mailed, the time for filing an appeal runs from the date Mr. Hilliard received the notice, in which event his appeal was timely.

"[T]he agency's 'obligation of giving notice which was reasonably calculated to apprise petitioner of the decision * * * and an opportunity to contest that decision through an administrative appeal,'" is a "prerequisite to invoking [the] jurisdictional bar" to an untimely administrative appeal. *Bobb v. Howard Univ. Hosp.*, No. 05-AA-768, Slip op. 3 (D.C., June 8, 2006) (quoting *Thomas v. DOES*, 490 A.2d 1162, 1164 (D.C. 1985)); *accord Kidd Int'l Home Care Inc. v. Dallas*, No. 05-AA-130, Slip op. 5 (D.C., June 8, 2006); *Ploufe v. DOES*, 497 A.2d 464, 465 (D.C. 1985) (ambiguity as to length of appeals period rendered notice inadequate). Precedent requires the agency to give actual (not constructive) notice of the deadline for an appeal. *See Bailey v. DOES*, 499 A.2d 1223, 1224-25 (D.C. 1985) (notice inadequate because of suggestion that late-filed appeals could be accepted); *Cobo v. DOES*, 501 A.2d 1278, 1279-80 (D.C. 1985) (notice inadequate because it was reasonable to believe that claim was still being processed); *Lundahl v.*

[1] Even in the absence of due process implications, this Court has often construed statutory notice requirements to avoid unfairness, *e.g. Allen v. DOES*, 578 A.2d 687, 692-93 (D.C. 1990) (record was insufficient to establish mailing to "last known address of employer"); *Joyce v. D.C. Rental Housing Comm'n*, 741 A.2d 24 (D.C. 1999) (reversing dismissal of landlord's appeal when notice was sent to old address, rejecting agency's determination that landlord had not used proper form to communicate address change); *York Apt. Tenants Assn. v. D.C. Zoning Comm'n*, 856 A.2d 1079, 1082-83 (D.C. 2004) (construing time for filing petition for review in this Court to run from date order was served on parties, rather than date it was published in D.C. Register and deemed final by agency).

DOES, 596 A.2d 1001, 1002 (D.C. 1991) (remanding for determination whether claimant was misled by agency notices); *D.C Water & Sewer Auth. v. DOES*, 843 A.2d 750, 751-52 (D.C. 2004) (disability compensation order) (appeal should have been considered timely because of errata order extending time).

When the agency fails to mail the decision, the obligation to give adequate notice is not satisfied. *Thomas*, 490 A.2d at 1164-65. Thus, in *McDowell v. Southwest Distribution*, No. 05-AA-626 (D.C., May 25, 2006), the Court reversed and remanded a decision by OAH dismissing as untimely an appeal filed 18 days after the date of mailing stated in an agency certificate. Mr. McDowell had called DOES to inquire about his case, learned his claim had been denied, and alleged that he was told to wait for a written decision. When no decision arrived, he called DOES again. Evidence in the record indicated that he received the decision by fax a day before the deadline to appeal, corroborating his claim that he did not receive the notice by mail, despite the agency's certification that it had been mailed. He also represented that he had been told that the deadline to file an appeal had been extended to ten days after the faxed delivery. The Court, accordingly, remanded to OAH for a determination whether he had been promised additional time to appeal, in which case OAH "shall treat the appeal as timely, and proceed to consider the merits of Mr. McDowell's claim." Slip op. 8.

The ALJ credited Mr. Hilliard's testimony that he did not receive any notice of the hearing examiner's decision. As in *McDowell*, DOES failed to give Mr. Hilliard timely notice of the decision and his right to appeal. As in *McDowell*, Mr. Hilliard made efforts to check on the status of his case after hearing nothing. Unlike in *McDowell*, however, Mr. Hilliard did not receive the adverse decision and notice of appeal rights until after the ten-day period to appeal had expired. Mr. Hilliard could not have appealed a decision he did not even know existed within

that ten-day period. Consequently this case does not require a remand, as in *McDowell*, to determine whether DOES also gave misleading instructions about the time to appeal.

McDowell rules out treating a bare agency certification as conclusive proof of mailing for purposes of D.C. Code § 51-111(b). Previously, in *Thomas*, the Court reversed the dismissal of an appeal on grounds of untimeliness and remanded for a new hearing. The administrative record included a form with the words "Dated and mailed 10/7/83." 490 A.2d at 1163. The form had the claimant's correct name and address, and the employer appeared in response to the notice. The claimant denied receiving the notice. The Court concluded that "the record evidence is insufficient for us to conclude that either of the notices in issue were ever in fact mailed to [Mr. Thomas]," and declined, for that reason, to hold that he was jurisdictionally barred from appealing. *Id.* at 1164; *accord Dozier v. DOES*, 498 A.2d 577 (D.C. 1985). *Dozier* expressly distinguished *Carroll v. DOES*, 487 A.2d 622, 624 (D.C. 1985), which involved only a due process challenge, and not a challenge to the sufficiency of the proof of mailing. 498 A.2d at 580.

More recently, in *Bobb* and *Kidd*, the Court held that the agency's proof of mailing was insufficient. *Bobb* involved an unsigned certificate, while the certificate in this case was signed; however, the Court further noted that "the record is devoid of any explanation of the internal agency mailing process" (Slip op. 4), and the same is true here.[2] Also, there is no indication that the certificate in *McDowell* was unsigned, so the presence or absence of a signature cannot be dispositive. In *Kidd*, the certificate was quoted only in the administrative law judge's decision, and it cannot be determined whether it was signed or unsigned. Although *Kidd* states that "[t]his

[2] *Thomas* refers to "certification," but in the context of "certification or description of agency mailing procedures," not in the context of a conclusory certificate. 490 A.2d at 1164. *Dusenbery v. United States*, 534 U.S. 161 (2002), a case cited by OAH, followed a hearing at which the government offered direct proof that the mailed notice of forfeiture was received at the prison where the defendant was confined as well as testimony about the prison's general procedures for distributing mail to inmates.

case differs materially from *Hilliard*" (Slip op. at 6 n.4), there is no more proof of mailing in this case than there was in *Kidd*.[3] Furthermore, the disputes concerning mailing in *McDowell*, *Bobb*, *Kidd*, and this case raise serious questions about "the internal agency mailing process" that preclude reliance on bare certificates.

At least when the matter is contested by credible evidence (as it was here), mailing cannot be conclusively proved by a boilerplate certificate that is really no different from the notation the Court found insufficient in *Thomas*. Moreover, as a general matter, disputed facts in unemployment compensation cases must be resolved on the basis of sworn testimony, rather than an unsworn ex parte certificate. *Curtis v. DOES*, 490 A.2d 178, 180 (D.C. 1985); *Hawkins v. D.C. Unemployment Compensation Bd.*, 381 A.2d 619, 623 (D.C. 1977).

Because the record does not establish that the agency actually mailed notice to Mr. Hilliard, D.C. Code § 51-111(b) required OAH to treat the date Mr. Hilliard received the notice as the date triggering the ten-day appeal deadline. Under that construction of the statute, Mr. Hilliard's appeal was timely, and should have been decided on the merits.

2. May OAH dismiss an administrative appeal as untimely, with the effect of denying unemployment compensation, without considering whether the claimant's credible testimony that he did not receive notice justifies granting relief from the original agency decision so as to permit a timely appeal on the merits?

OAH was not required to dismiss Mr. Hilliard's appeal after crediting his testimony that he did not receive notice. Given Mr. Hilliard's diligence in pursuing his claim, including making inquiries in person about its status when he heard nothing from the agency, OAH could have granted relief from the DOES decision under its equivalent of Rule of Civil Procedure 60(b).

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[3] The fact that mail was not returned to the agency does not tend to prove that notice was mailed. Given that OAH credited Mr. Hillard's testimony, non-return supports the inference that the adverse decision was not mailed in the first place.

See 1 DCMR § 2833.2. Allowing entry of a new order bearing a later date would have permitted Mr. Hilliard to pursue his appeal to OAH. *Cf. Schmittinger v. Schmittinger*, 538 A.2d 1158, 1162-63 (D.C. 1988) (upholding order granting relief from judgment when neither party received notice of entry of judgment in time to appeal); *In re Estate of Bryant*, 738 A.2d 283 (D.C. 1999) (upholding sua sponte order rescinding prior denial of relief under Rule 60(b)).

3. If the answers to the foregoing questions are "no," was the denial of unemployment compensation in this case consistent with the requirements of due process, as most recently articulated by the Supreme Court in *Jones v. Flowers*?

This Court has recognized that unemployment compensation is "a matter of statutory entitlement" protected by the due process clauses. *Hawkins*, 381 A.2d at 623. A bedrock requirement of due process is "notice and an opportunity for hearing appropriate to the nature of the case." *Jones v. Flowers*, 126 S. Ct. at 1713-14 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)). Here, Mr. Hilliard was denied unemployment compensation solely because he did not receive notice of an adverse decision and thus could not invoke his right to an OAH hearing. *Jones*, which was not available to the Division (having been decided the day before its decision here), requires reconsideration of the Division's due process analysis.

The Division concluded that due process requires nothing more than that DOES give notice to unemployment claimants using "a method reasonably calculated to afford the party an opportunity to be heard." Slip op. 8. The application of that principle in this case does not withstand careful scrutiny for two reasons. *First*, there is nothing in the record to show that DOES does, in fact, use "a method reasonably calculated to afford the party an opportunity to be heard." The fact that DOES certifies mailing does not mean that it actually mails each and every notice at the time and to the address stated on the certificate.

Second, the deprivation at issue in this case came even though OAH found that Mr. Hilliard did not receive notice. *Jones* teaches that whether a system for providing notice is constitutionally adequate depends not only on the means chosen to communicate notice in the ordinary case, but also on what happens in the unusual case in which notice is not received. In *Jones*, the Court held that, when the government knows that its initial attempt to provide notice has failed, it must take additional reasonable steps to provide notice. For example, the government could reasonably be expected, as in *McDowell*, to send notice again, with the appeal time running from the second effort. Here, all the government had to do was allow Mr. Hilliard to pursue the appeal he filed on the same day that he received actual notice of the decision after going to DOES to inquire about it.

Jones is also noteworthy for the Court's rejection of the State's argument that Mr. Jones himself was at fault for failing to update his address, as he had a statutory obligation to do. 126 S. Ct. at 1717. For the same reason, Mr. Hilliard did not forfeit his right to notice by failing to notify DOES that he planned to move at the beginning of March, especially when he made arrangements to be notified if mail from DOES arrived at his old address. *See* Slip op. 8.

4. Assuming OAH lacked jurisdiction to review the denial of unemployment compensation, did this Court nevertheless have jurisdiction to review the final DOES action denying compensation under the D.C. Administrative Procedure Act and to excuse any failure to exhaust administrative remedies for equitable reasons?

The Division erred in treating the dismissal of Mr. Hilliard's administrative appeal as a jurisdictional bar to its own judicial review of the final agency action in this case. *See* Slip op. 1 (affirming "for jurisdictional reasons"). In so doing, the Division seems to have conflated the prudential requirement that a party exhaust administrative remedies before seeking judicial review with limits on the jurisdiction of the Court. The claims examiner's initial decision only became the final agency action when OAH erroneously concluded the time to appeal had expired.

D.C. Code § 51-111(b). Thus, Mr. Hilliard first received notice for purposes of D.C. App. R. 15(a)(2) when he received the OAH ruling. Mr. Hilliard invoked this Court's jurisdiction under the APA and the specific statute governing unemployment claims to challenge that final decision. D.C. Code § 51-112 ("Any person aggrieved by the decision of the Director may seek review of such decision in the District of Columbia Court of Appeals in accordance with [the APA]."); D.C. Code § 2-510. The Court had jurisdiction to consider both OAH's jurisdictional ruling and the merits of the DOES decision. *See McCaskill v. DOES*, 572 A.2d 443, 445-46 (D.C. 1990); *cf. Kamerow v. D.C. Rental Housing Comm'n,* 891 A.2d 253, 256 n.2 (D.C. 2006) (Court has jurisdiction over petition to review timeliness of administrative appeal, but not over final agency merits decision of which petitioner had notice, but did not timely appeal).

The question was not whether this Court had jurisdiction over Mr. Hilliard's petition for review, but whether his petition failed because he failed to exhaust the administrative review process. *See Price v. D.C. Unemployment Compensation Bd.*, 350 A.2d 730 (D.C. 1976); *Siler v. DOES*, 525 A.2d 620, 622 (D.C. 1987). Although this Court has held that "in most cases the failure to note a timely appeal should foreclose both administrative and judicial review of the claim" for failure to exhaust, the exhaustion requirement is not jurisdictional. *Barnett v. DOES*, 491 A.2d at 1160; *Burton v. District of Columbia*, 835 A.2d 1076, 1079 (D.C. 2003); *Finch v. District of Columbia*, 894 A.2d 419, 422 n.7 (D.C. 2006).[4]

There are compelling equitable grounds for excusing Mr. Hilliard's failure to exhaust by perfecting his administrative appeal: He did not get notice of the decision, and he acted

[4] Indeed, under the federal APA, courts cannot even require exhaustion of administrative remedies unless a statute or agency rule so provides. *Darby v. Cisneros*, 509 U.S. 137 (1993). The Supreme Court recently remanded *Whitman v. Dept. of Transportation*, 126 S. Ct. 2014 (2006) (per curiam) for, *inter alia*, consideration of whether exhaustion is required under the applicable statute.

promptly and reasonably to obtain information about his case and to seek review. Moreover, his failure to exhaust imposes no real costs on the Court or the administrative agency, because the employer's decision not to pursue its misconduct claim conclusively means that Mr. Hilliard is entitled to benefits. No additional fact-finding is required in this case and the Court is free to remand to OAH (as it did in *McDowell*) for further proceedings as appropriate. In addition, because OAH is an administrative court of general jurisdiction, not a specialized agency, a failure to exhaust does not deprive the Court of the benefits of agency expertise. *See Bender v. DOES*, 562 A.2d 1205, 1208 (D.C. 1989).

Clarification of the nature of the exhaustion requirement is exceptionally important and applies to many of the administrative cases that come before the Court, meriting en banc review.

Conclusion

Rehearing or rehearing en banc should be granted.

Respectfully submitted,

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* Appointed by this Court.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Petition for Rehearing or, in the Alternative, Rehearing En Banc was served by first-class mail, postage prepaid this 9th day of June to: Adecco USA, Inc., c/o TALX – Kathleen Dorsey, P.O. Box 66736, St. Louis, MO 63166.

Barbara McDowell