RENDERED: MAY 19, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001473-MR

SUSAN J. DIXON — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE STEVE ALAN WILSON, JUDGE
ACTION NO. 14-CI-00781

THE KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION; AND MAX MEDIA OF KENTUCKY, LLC, D/B/A WNKY — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: JONES, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Susan J. Dixon, *pro se*, appeals from a Warren Circuit Court order affirming the Kentucky Unemployment Insurance Commission's denial of her application for unemployment benefits. Dixon argues the Commission abused its discretion and violated her due process rights when it refused to grant her a rehearing after she failed to appear for the originally-

scheduled telephonic hearing. Because Dixon demonstrated good cause for her failure to appear at the telephonic hearing, we hold the Commission abused its discretion and reverse and remand.

After her employment with Max Media of Kentucky, LLC (d/b/a "WNKY") was terminated, Dixon sought unemployment insurance benefits. The Division of Unemployment Insurance issued a Notice of Determination on March 25, 2014, disqualifying her from receiving benefits on the grounds that she was discharged for "unsatisfactory attendance without good cause for a majority of incidents of absences or tardiness."

Dixon appealed. A notice of administrative hearing was mailed to Dixon instructing as follows:

> NOTICE IS HEREBY GIVEN THAT A HEARING ON THE APPEAL FILED IN CONNECTION WITH THE ABOVE ENTITLED CLAIM WILL BE HELD ON APRIL 23, 2014, AT 10:15 A.M. ET 9:15 A.M. CT VIA TELECONFERENCE.

Confusing the Eastern and Central time differences, Dixon and her attorney appeared telephonically for the hearing at 10:15 a.m. Central Time, making them one hour late for the telephonic conference. Just fifteen minutes later, they realized their error, and Dixon's attorney immediately filed an "Entry of Appearance and Rehearing Request," explaining the mistake and requesting another opportunity for a hearing. On May 6, 2014, the referee summarily affirmed the earlier determination that Dixon was disqualified from receiving

benefits based on the conclusion that a rehearing was not required because Dixon had not demonstrated good cause for her failure to appear at the scheduled hearing.

Dixon appealed the referee's decision to the Unemployment Insurance Commission, which upheld the denial of a rehearing. It stated in part:

> It is the claimant's responsibility to read the information provided to her regarding her hearing and to be available at the time scheduled for the hearing. The parties were mailed a "Notice of Administrative Hearing," containing the times for the scheduled hearing for both the Eastern Time Zone and the Central Time Zone. The employer appeared for the scheduled hearing at the proper time.

Dixon appealed the denial of her request for rehearing to the Warren Circuit Court pursuant to Kentucky Revised Statutes (KRS) 341.450. The circuit court affirmed the Commission's order, stating that Dixon had not demonstrated good cause in that her confusion concerning the different time zones was a matter within her control. This appeal by Dixon followed.

Dixon argues that she and counsel's confusion concerning the time for the hearing arose from the notice itself and the fact that all significant events occurred and relevant places were situated in the Central Time Zone. Her place of employment was located in the Central Time Zone, her termination occurred in the Central Time Zone, and the unemployment office where she applied for benefits was located in the Central Time Zone. Dixon points out that the notice provided only obscure abbreviations for the two time zones and the time zone designated for the call was not highlighted, bolded or otherwise distinguishable in the notice. She emphasizes she and her attorney appeared for the hearing prepared to present

evidence and, just over one hour after the scheduled hearing time, submitted a request for rehearing. Under the circumstances, she submits the Commission abused its discretion in not granting a rehearing, particularly where there was no prejudice to Max Media. We agree.

787 Kentucky Administrative Regulations (KAR) 1:110 Section 1(5)2 provides that "[i]f the appellant fails to appear and prosecute an appeal, the referee shall summarily affirm the determination." However, the regulation provides an avenue of relief for appellants.

Under Section 4(5)(a) of that same regulation, an appellant may file a request for a rehearing within seven days from the hearing date. The regulation further provides that the request shall be granted "if the party has shown good cause, in accordance with the examples listed in Section 3(2)(c)1 through 4 of [the same regulation] for failure to appear[.]" 787 KAR 1:110 Section 4(5)(b)1. Examples of good cause listed in Section 3(2)(c) are as follows:

> 1. A claimant's inability to attend the hearing due to current employment;
>
> 2. Medical emergency;
>
> 3. Death of a family member; or
>
> 4. Acts of God.

The question squarely before us is what constitutes "good cause," a term undefined in the regulation or, if the examples provided, preclude any cause that was attributable to the fault of or under the control of the appellant.

Our standard of review is that applicable to administrative decisions.

> [A]n administrative agency's findings of fact are reviewed for clear error, and its conclusions of law are reviewed *de novo.* "The judicial standard of review of an unemployment benefit decision is whether the [Commission's] findings of fact were supported by substantial evidence and whether the agency correctly applied the law to the facts."

Hutchison v. Kentucky Unemployment Ins. Comm'n, 329 S.W.3d 353, 356 (Ky. App. 2010) (quoting *Thompson v. Kentucky Unemployment Ins. Comm'n,* 85 S.W.3d 621, 624 (Ky.App. 2002)). Whether "good cause" as used in 787 KAR 1:110 Section 4(5)(b)1 is limited to causes beyond the appellant's control is a question of law.

"[I]n the construction and interpretation of administrative regulations, the same rules apply that would be applicable to statutory construction and interpretation." *Revenue Cabinet v. Gaba,* 885 S.W.2d 706, 708 (Ky.App. 1994). Several of those rules, summarized in *Workforce Dev. Cabinet v. Gaines,* 276 S.W.3d 789, 792 (Ky. 2008) (internal citations and quotations omitted), are as follows:

> In Kentucky, [regulations] are to be liberally construed with a view to promote their objects and carry out the intent of the legislature[.] In addition, words and phrases are to be construed according to the common and approved usage of language unless a word has a certain technical meaning. Finally, [regulations] which are remedial in nature should be liberally construed in favor of their remedial purpose.
>
> An additional and a less commonly cited rule, *ejusdem generis*, provides:

> [W]here, in a statute, general words follow or precede a designation of particular subjects or classes of persons, the meaning of the general words ordinarily will be presumed to be restricted by the particular designation, and to include only things or persons of the same kind, class, or nature as those specifically enumerated, unless there is a clear manifestation of a contrary purpose.

Steinfeld v. Jefferson Cty. Fiscal Court, 312 Ky. 614, 617, 229 S.W.2d 319, 320 (1950). Max Media argues the rule was properly applied in this case to exclude any reason for not appearing at a scheduled hearing that was under the appellant's control "like" the examples listed in 787 KAR 1:110 Section 3(2)(c).

Max Media argues that the meaning of good cause is restricted by the rule of *ejusdem generis* and relief is available under the regulation only if no fault can be attributed to the appellant for missing the scheduled hearing. Under its interpretation, even the most reasonable human mistake made with the upmost good faith, is punishable by summary affirmance of the denial of benefits. We conclude the regulatory references to circumstances which expressly constitute good cause are diverse and unrelated and do not limit what may constitute good cause.

While the rule of *ejusdem generis* may be used when construing ambiguous statutory or regulatory language, the rule is "never [to] be applied in the construction of a statute so as to thwart or to confine the operation thereof to narrower limits than those clearly intended by the Legislature." *Mills v. City of Barbourville*, 273 Ky. 490, 117 S.W.2d 187, 188 (1938). Therefore, as with any

statute or regulation, the purpose of our unemployment laws is our primary concern.

The purpose of unemployment compensation is to provide benefits to those who are forced to involuntarily leave their employment. To further that purpose, statutes and regulations must be interpreted in a manner to effectuate the humanitarian purpose of unemployment compensation law. *Ford Motor Co. v. Kentucky Unemployment Comp. Comm'n*, 243 S.W.2d 657, 659 (Ky. 1951). Additionally, "[d]ue process requires, at a minimum, that persons forced to settle their claims of right and duty through the judicial process be given a meaningful opportunity to be heard." *Utility Regulatory Comm'n v. Kentucky Water Service Co., Inc.,* 642 S.W.2d 591, 593 (Ky.App. 1982).

To satisfy due process, KRS 341.420(4) provides that the parties be afforded a "reasonable opportunity for a fair hearing" before a referee. The purpose of the provision for a rehearing after the failure to appear at a scheduled hearing is to afford the hearing opportunity.

Despite that those who come before administrative agencies have a right to a hearing, administrative agencies like their judicial counterparts have the inherent power to control the disposition of the causes on its dockets. *Rehm v. Clayton*, 132 S.W.3d 864, 869 (Ky. 2004). Yet, the concept of relieving litigants from the consequences of human error is embodied throughout our statutes, rules and judicial decisions.

For instance, Kentucky Rules of Civil Procedure (CR) 55.02 provides that a court may set aside a default judgment in accordance with CR 60.02 for *good cause* shown. In determining good cause, the court must consider where there was a valid excuse for default, a meritorious defense and prejudice to the other party. *Perry v. Cent. Bank & Trust Co.*, 812 S.W.2d 166, 170 (Ky.App. 1991). Under CR 41.02(1), permitting involuntary dismissal for failure to prosecute or comply with the civil rules or orders of the court, a court must exercise its discretion keeping in mind that the severe sanction of dismissal should not be imposed for a one-time dilatory act of counsel without considering alternative sanctions. *Ward v. Housman*, 809 S.W.2d 717, 720 (Ky.App. 1991).

Imbedded in our judicial decisions and rules is the notion that deciding cases on the merits is the primary objective of appellate procedure. That same rule is equally applicable in the administrative context. In short, good cause is itself a humanitarian concept that is flexible and must be determined under the circumstances presented.

There are no published Kentucky cases applying the definition of good cause as used in 787 KAR 1:110 Section 4(5)(b)1. The sole unpublished case, *Little v. Kentucky Unemployment Ins. Comm'n*, 2007-CA-002476-MR, 2009 WL 1491322, (Ky.App. 2009) (unpublished), dealing with the failure of a claimant to appear at a hearing is not persuasive. Not only does it lack precedential value because it is unpublished, there is no indication that the claimant filed a timely request for a rehearing. On that record, we affirmed the denial of her request for

benefits. The undisputed facts in this case compel a different, and more humanitarian, result.

First, Dixon timely appealed the denial of unemployment benefits and retained counsel to accumulate evidence and prepare her case. Second, we agree with Dixon that the notice of hearing was far from clear as to the time for the hearing. The words Eastern Time Zone and Central Time Zone were not spelled out but abbreviated and not distinguished in any manner. Moreover, this was a telephonic conference without a designation of the place the referee was located or that the claimant or employer were to physically appear and, consequently, whether all or any of the participants were in the Eastern Time Zone. Without more specifics than provided in the notice, it was certainly reasonable for Dixon and her attorney to believe the time for the hearing was 10:15 a.m. Central Time particularly in view of the fact that all significant events occurred and places were situated in the Central Time Zone. Fourth, she and her counsel appeared at the designated hearing place prepared to present evidence promptly at 10:15 Central time. Finally, she immediately requested a rehearing.

As we noted at the outset of this opinion, the right to a fair hearing in unemployment cases arises from the requirement of due process and is codified in our statutory law. We agree with the Court in *Chobert v. Commonwealth, Unemployment Comp. Bd. of Review*, 86 Pa. Cmwlth. 151, 484 A.2d 223 (1984). While "[w]e do not condemn the practice of conducting administrative hearings or the examination of witnesses by telephone conference call…such hearings and

examinations must comport with fundamental fairness guaranteed by the due process clause, with the statutory requirement of a fair hearing in unemployment compensation hearings[.]" *Id*. at 154, 484 A.2d 225. The right to a fair hearing requires actual and understandable notice of the time and place of the hearing. The notice given to Dixon falls short of satisfying that requirement.

Putting due process considerations aside, what occurred here was a simple human mistake made in good faith and reasonable under the circumstances. Few of us who live in Kentucky can say we have not made the same mistake when traversing the different time zones within the Commonwealth. There could not have been any prejudice to Max Media by promptly rescheduling a telephonic conference and the inconvenience to the referee was minimal when compared to the severity of the sanction imposed. We conclude that "good cause" as that term is used in 787 KAR 1:110 Section 4(5)(b)1 evinces the humanitarian spirit of our unemployment law and must be interpreted accordingly.

Dixon's claim may or may not have merit. All that we have decided today is that she is entitled to a hearing.

The order affirming the Commission is reversed and the case remanded for a hearing.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Dixon, *pro se*
Smiths Grove, Kentucky

BRIEF FOR APPELLEE KENTUCKY UNEMPLOYMENT INSURANCE COMMISSION:

Amy F. Howard
Education and Workforce Development Cabinet
Frankfort, Kentucky

BRIEF FOR APPELLEE MAX MEDIA OF KENTUCKY, LLC:

David F. Broderick
Brandon T. Murley
Bowling Green, Kentucky