SUPREME COURT OF NEW JERSEY
Docket No. 34,225

ANGEL RIVERA,	)	
Petitioner,	)	Civil Action
v.	)	
BOARD OF REVIEW,	)	Sat Below:
Respondent.	)	Judges King, Long and Stern J.A.D.

BRIEF AND APPENDIX OF AMICUS CURIAE ON PETITION FOR CERTIFICATION AND APPEAL

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PRELIMINARY STATEMENT

This case involves a fundamental flaw in the Department of Labor's (DOL) construction of New Jersey's Unemployment Compensation Law, N.J.S.A. 43:21-1 et seq. This law is intended to protect those who are unemployed through no fault of their own from the serious harm unemployment causes workers, their families, and society at large. The statute implements in New Jersey the unemployment compensation program initiated by the federal Social Security Act of 1935. It is remedial social legislation, and thus to be construed liberally in favor of the intended beneficiary, in this case the unemployed worker.

Current DOL policy, approved by the Appellate Division in its decision below, may have the effect, as it does in this case, of requiring people who are fully entitled to unemployment insurance (UI) benefits nonetheless to return them to the State. DOL may require workers to return benefits they properly received when it concludes, at any point up to four years after benefits have been paid, that the worker was not entitled after all. It reaches this conclusion on its own, without prior notice to or consultation with the recipient, and without any sort of hearing. This closed process is thus rife with the opportunity for error.

Although DOL has up to four years to demand a refund, the worker has ten days to respond. N.J.S.A. 43:21-16(d). If the previous benefit recipients for any reason do not receive DOL's notice, or do not respond in this ten-day period, they are required by DOL to pay all benefits back: "Failure to timely comply makes the determination 'final' without exception." Appellate Division decision at 2, Exhibit 3 of Petition to Review Appeal as of Right and for Certification (hereafter Petition).

Legal Services of New Jersey (LSNJ), admitted as amicus curiae below,

provides coordination and support to the Legal Services system in New Jersey. In doing so, it attempts to address problems affecting low-income people on a state-wide basis. In its coordinating role, LSNJ sees the consequences of DOL's harsh interpretation of the time limits for UI appeals falling heavily on the poor and uneducated across the state. Over four years, very commonly the worker will no longer be at the same address where he or she received benefits; transience is even more common among low-income people than the population as a whole. In this four-year period, having been unemployed, the worker may have been evicted, moved to cheaper premises, moved to look for work, or simply be away for a few days, such as in this case to visit a sick relative. The realities of the lives of those most in need of UI benefits are such that they are least likely to be able to respond to DOL within ten days after it mails its notice to the worker's last known address.

Amicus suggests that this extreme DOL position is in conflict with the governing statutory language, with the remedial purpose of the statute, with well-established precedent of this Court, and with constitutional assurances of fairness and due process. It is essential that the decision below, and more importantly the policy it ratifies, be clearly and firmly reversed.

One very recent case, mistakenly relied upon by the Appellate Division below, recognizes and highlights the untenability of the current practice. In Hopkins v. Bd. of Review, 249 N.J.Super. 84 (App. Div. 1991), the Appellate Division refused to apply DOL policy as a bar. Rather, because the recipient's benefits had been awarded properly, it instead barred DOL from using the ten-day limit to block the appeal. Judge Pressler found that forcing a low-income worker to repay properly paid benefits was "too unpalatable a disposition for a court of law to accept," id. at 89, and under an estoppel theory granted the worker

relief.

"The bureaucracy charged with the implementation of remedial social legislation is supposed to assist its intended beneficiaries, not victimize them." Hopkins at 89-90. Amicus herein argues that DOL must adapt its procedures to avoid victimizing additional workers and to conform to Legislative intent and the dictates of current law.[1]

BACKGROUND: THE REFUND PROCESS AND ITS PROBLEMS

Rivera's situation is typical of that of numerous other UI claimants in New Jersey who have received UI benefits but are unable to appeal DOL's request for refund within ten days after DOL mails it.[2] Under the UI system, workers are required to contribute a portion of their wages to the state's fund. See N.J.S.A. 43:21-7(d). When they become involuntarily unemployed, they can receive UI benefits while searching for another job.

After they have collected their benefits,[3] workers have no reason to be in further contact with DOL. Workers ordinarily do not inform DOL of changes of address after benefits have run out, nor does DOL want them to, as Deputy

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[1]In its brief to the Appellate Division, amicus further argues that DOL never sent effective notice in compliance with the statute requiring Spanish notices to agricultural workers, and therefore Rivera's time for appeal was never triggered. Amicus relies on its brief below at 21-23 on this point.

[2]This case involves claims for repayment of allegedly overpaid benefits, governed by N.J.S.A. 43:21-16(d). This is a distinct section from that governing initial applications for benefits, N.J.S.A. 43:21-6(b), although the limits on initial application appeals raise many of the same issues, and create similar problems. See Point VI following.

[3] UI benefits are generally available for 26 weeks. N.J.S.A. 43:21-3(d). In times of high unemployment extended benefits of up to 13 additional weeks are available. N.J.S.A. 43:21-24.15. Currently, New Jersey grants 6.5 weeks of extended benefits to those who remain unemployed and seeking work after the initial 26 weeks.

Attorney General (DAG) Turi stated at oral argument in the Appellate Division. In response to Judge Long's question, DAG Turi acknowledged that indeed there was no way for a worker who properly received UI benefits within the last four years to be assured that he or she would not have to repay those benefits if DOL were to request a refund during ten days the worker happened to be away from home. The worker simply could not be heard: the matter is "jurisdictional."

Various things trigger DOL's decision to request a refund. DOL may run a computer cross-check of workers and UI recipients' names to attempt to find persons unlawfully collecting UI while working.[4] DOL may get an anonymous phone call from a disgruntled employer or landlord or acquaintance. In Hopkins' case, months after she informed it of her studies, DOL "unilaterally undertook to redetermine claimant's eligibility based on her school attendance and tutoring, and decided that she was disqualified thereby for benefits." Hopkins, 249 N.J. Super. at 87 (emphasis added). DOL may have any number of other reasons, particular to each individual case, to suspect anytime within four years that benefits were paid in error and to demand repayment.

In this case[5] Rivera appealed late because he had gone to visit his ill mother in Pennsylvania.[6] Rivera had finished collecting his UI benefits, and

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[4] In IMO Jose Garcia, AT-S-88-4840 (1988), Aa12, for example, a computer check turned up another person with the same name who was working in another part of the state while the claimant in this case was receiving UI benefits. DOL sent claimant a notice requesting a refund of what it supposed were overpaid benefits. The matter was ultimately resolved.

[5] Amicus relies upon the Procedural History and Statement of Facts supplied by Petitioner in his brief at 2-4.

[6] Not even a death in the family will excuse filing more than ten days after DOL mails its notice, according to BR-5900, listed in DOL's Digest of Precedent Decisions, Interpretation Service Manual, 430.2 "Taking and Perfecting Proceedings for Review, Time," (hereafter Precedent Decisions), attached hereto as Appendix A (hereafter Aa_) at Aa3. The volume is a compendium of Board of Review decisions used by DOL as precedent in UI cases.

had no reason to expect that DOL would contact him. Although Rivera arranged to have his daughter forward his mail to him, which she promptly did, the ten days allowed for appeal had passed before Rivera even received the notice. Pa5-6.[7] He appealed within two days of actually receiving DOL's notice, approximately three weeks after it was mailed.[8]

The consequences of this "unforgiving" limit, as the Decision below referred to it, fall heavily on the poor and uneducated, or as Judge Pressler recently stated, the "uneducated, untutored and unrepresented." Hopkins, 249 N.J.Super. at 89. Many workers misunderstand the often confusing information on DOL forms. However, even when a worker with limited education appeals immediately upon understanding the notice, DOL rejects the appeal as untimely.[9] Some workers who seek information from DOL are advised improperly and wait too

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[7] According to DOL's Precedent Decisions, failure of even the postal authorities to forward mail to claimant's new address "did not constitute good cause for filing a late appeal, where the decision was mailed to claimant's last known address." BR-5907, Aa3.

[8] Rivera refutes the factual basis for DOL's decision that Rivera was ineligible for the benefits he received. In his affidavit, Rivera states "I am willing to accept a reduction in my social security benefits if I found full-time work. I have always complied with the work-search requirements and all other requirements of the unemployment office." Pa7, ¶¶ 16, 17.

The rationale behind DOL's notice is unclear: it is not arguing that social security benefits should be offset or that receipt of them made him ineligible. Nor is it saying he failed to comply with reporting requirements that he actively be searching for work. Given that Rivera was a 66-year-old illiterate farmworker seeking work in the off-season, his failure to find new employment is not surprising. Regardless, only a hearing on the merits can fully resolve the questions that DOL's inscrutable notice raises.

[9] DOL's Precedent Decisions hold:

> A claimant with a limited education who misinterpreted the significance of Form B-26 - Notice of Decision of Deputy - and accordingly failed to appeal in time, but who appealed immediately upon learning the significance thereof, held not to have appealed in time since the notice was clear and the appellate body had no discretion to extend the appeal period. BR-6038.

Accord, BR-6039, Aa3.

long to appeal, without recourse.[10] Many simply do not see the notice of appeal rights, printed in type smaller than the worker's address in the corner of the form. See, e.g., Notice to Rivera, Pa 42, attached hereto at Aa5. Even completely reasonable, though incorrect, interpretations of appeal time limits are rejected.[11]

Low-income people as a whole are likely to be less well educated, and thus not particularly adept at responding to a legal document such as a refund demand notice. Equally important, they are also likely to not actually receive the notice at all. As noted above, over a period of four years, they are likely to have moved. Additionally, Legal Services clients have trouble receiving their mail due to insecure mail receptacles in poorly maintained buildings or public access to mail delivered in hallways or common quarters. Passers-by may take communications from the Unemployment Compensation office in the hope that they contain checks. Absent landlords may not forward mail left for tenants who are no longer present. For a variety of reasons, those most in need of UI benefits are those most likely to be unable to respond to DOL within the ten days after

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[10] Precedent Decisions hold:

> The voluntary acceptance of local office advice against the filing of an appeal did not constitute good cause for waiving the time limit on a late appeal. BR-2161. Aa2.

[11] A worker who regularly reported to a DOL office that was only open certain days was held untimely when he appealed on the first day it was open following his receipt of the notice:

> Where a claimant's appeal was filed on the first day that the itinerant office, to which he regularly reported, was open subsequent to receipt of the Deputy's determination, but was not filed with the seven-day statutory limit, held the Deputy's determination of ineligibility became final and the appellate body had no jurisdiction to review the period covered by the determination. The claimant did not have to wait until the itinerant office opened. He could have appealed by mail. BR-15194. Aa4.

it mails its notice.[12]

Frequently, the worker never receives DOL's notice, and first learns of DOL's suspicion that benefits were overpaid when he or she next becomes unemployed and applies for UI. When the much-needed benefits do not arrive,[13] the claimant learns of DOL's suspicion, but by that time it is too late to appeal. DOL may also attempt to collect suspected overpayments through income tax and homestead rebate intercepts and through other enforcement of civil judgments pursuant to N.J.S.A. 54A:9-8.1. Workers may find they are collaterally estopped from challenging the recovery of funds in any of these proceedings because of DOL's jurisdictional bar earlier. In all these instances, ten days from mailing the original notice are long past; the "decision is 'final' without exception." Appellate Division Decision at 2, Exhibit 3 to Petition.

DOL's interpretation of the UI statute forces some people, such as Hopkins, onto welfare, even though UI benefits are intended to "limit[] the serious social consequences of poor relief assistance," N.J.S.A. 43:21-2; California Dept. of Human Resources v. Java, 402 U.S. 121 (1971) (hereafter Java); Hopkins, 249 N.J.Super. at 88. Other workers and their families go hungry and homeless.

ARGUMENT

The Appellate Division adopted DOL's interpretation of the legislative time limitations for workers to file appeals of DOL notices: "Failure to timely comply

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[12] Several Precedent Decisions reflect that DOL may at times mail its notice later than the date stated. See Precedent Decisions BR-3747, 4049, 4360, Aa2.

[13] DOL may collect allegedly overpaid UI benefits by recouping them from benefits due the next time the person is unemployed and applies for UI. N.J.S.A. 43:21-16(d).

[i.e., appeal within ten days] makes the determination 'final' without exception." Decision at 2, Exhibit 3 to Petition. The matter becomes uncontestable: if a worker does not respond in ten days, then the worker must pay. Nor did the Appellate Division "perceive any due process notice violation, though the time period is short, unforgiving, and immutable." Id. As discussed below, DOL's interpretation is contrary to the Legislature's intent to benefit unemployed workers, well-established precedent of the Court permitting relaxing time limitations to achieve statutory purpose, and constitutional precepts of fundamental fairness and due process requirements of a fair opportunity to be heard. Amicus submits that DOL's interpretation of time limitations for UI appeals is in error and should be corrected to prevent further widespread harm.

I. The intent of the Unemployment Compensation Law is to provide economic security to qualified unemployed workers

The purposes of the UI statutes are to lighten the "crushing force" of the burden of unemployment, N.J.S.A. 43:21-2, by avoiding resort to welfare, providing income where otherwise there is none, providing security to the unemployed, and stabilizing industry through continued consumer purchasing. See also Java, 402 U.S. 121, 130-33 (1970) (outlining purposes of UI). Generally the UI system is intended to combat "economic insecurity due to unemployment [which] is a serious menace to the health, morals and welfare of the people of this state." Id. See amicus' brief to the Appellate Division at 12-17.

This remedial social welfare legislation is to be liberally construed in favor of the allowance of benefits. Meaney v. Bd. of Review & Atlas Floral Decorators, 151 N.J.Super. 295 (App. Div. 1977) (see cases cited therein and at p. 13-14 of amicus' brief to the Appellate Division). However, contrary to

legislative goals, DOL's interpretation fails to construe the statute liberally, leaving those most in need economically vulnerable.

II. Well-established precedent from this Court and other tribunals calls for the relaxation of time limitations to achieve statutory goals

This Court's decision in White v. Violent Crimes Compensation Bd., 76 N.J. 368 (1978) (hereafter White), as well as the Appellate Division's recent decision in Hopkins v. Bd. of Review, 249 N.J.Super. 84 (App. Div. 1991), and other precedent permit relaxing of time limitations to achieve statutory purposes.

A. Contrary to the decision below, substantive limitations are not a jurisdictional bar, as this Court held in White v. Violent Crime Compensation Bd.; analysis of legislative intent is required

The Appellate Division did not address the argument, presented in detail in amicus' original and reply briefs below, that White impliedly overruled the authority for DOL's position that the time limit poses a "jurisdictional"[14] bar to untimely appeals. In White a crime victim applied for benefits after the one-year period set by statute. Though she was otherwise eligible, benefits were denied because White filed beyond the time limit.

This Court rejected "talismanic adherence" to the idea that statutes of limitation are not susceptible to tolling, finding such "disserves the goals of

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[14] The use of the language of "jurisdiction," apparently first introduced in Lowden v. Bd. of Review, 78 N.J.Super. 467, 471 (App. Div. 1963), is unfortunate. Traditionally, "jurisdiction" has referred to the power and authority of a court to hear a case. Where a statute of limitation has run, the court is not deprived of power; it merely may decide that there is a defense to the claim brought. See e.g., Bowen v. City of New York, 476 U.S. 467, 476-78 (1986) (holding that 60-day requirement for seeking review of denials of Social Security claims was not "jurisdictional" but a statute of limitations subject to tolling).

justice." Id. at 376:

> With respect to a substantive limitation period, traditional and respectable authority has construed a party's noncompliance with its requirements as an absolute bar to his claim. It was often held that no equitable circumstances could justify any judicial expansion of the time limitation for taking action, despite the harshness of the result in a particular case. We are persuaded that the underlying talismanic adherence to this concept found in much of the decisional law on this subject disserves the goals of justice. [White, 76 N.J. at 376 (emphasis added).]

Instead, this Court held that courts should toll statutes of limitation to "effectuate the legislative purpose underlying the statutory scheme." Id. at 379. Applied here, that means the ten-day deadline cannot absolutely bar workers from demonstrating their eligibility for UI benefits.

The decision below in this case stated that "[w]here the legislature has fixed an absolute deadline in the statute for the performance of an act [i.e., a substantive limitation], we are not privileged to extend this time limitation." Decision at 2, Exhibit 3 to Petition. This Court explicitly rejected this view in White:

> [I]n the case of a statutorily created right, a "substantive" limitation period may appropriately be tolled in a particular set of circumstances if the legislative purpose underlying the statutory scheme will thereby be effectuated.

White, 76 N.J. at 379.[15] See also Galligan v. Westfield Centre Service, Inc., 82 N.J. 188, 192 (1980) (permitting tolling of the two-year statutory time limit for personal injury: "Unswerving, 'mechanistic' application of statutes of

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[15] This Court in White explicitly recognized the opposing position that if a state has created a right, "'it may, if it so chooses, subject it to a limitation in such manner that the right is to terminate upon expiration of the limitation.'" White, 76 N.J. at 374, quoting Marshall v. Geo. M. Brewster & Son, Inc., 37 N.J. 176 (1962). However, White held that despite such a built-in limitation period, courts must still inquire as to the intent of the Legislature. In this manner courts can determine whether the situation presented was one which the Legislature intended to cover. A worker should be given the opportunity to demonstrate that he or she falls within the group the Legislature intended to be eligible for benefits, despite an untimely appeal.

limitations would at times inflict obvious and unnecessary harm upon individual plaintiffs without advancing [the] legislative purposes [of statutes of limitations] [quoting White]"); Zaccardi v. Becker, 88 N.J. 245, 259 (1982) (footnote omitted) ("It is now well settled in New Jersey that statutes of limitation will not be applied when they would unnecessarily sacrifice individual justice under the circumstances.")

Numerous cases involving statutes other than UI have concluded, consistently with White and Galligan, that statutes of limitations may be tolled.[16] The principles enunciated in White and Galligan apply equally in UI cases. The ten-day limit is not "jurisdictional" and is subject to equitable principles such as tolling.

The purpose of this remedial social legislation is thwarted when persons entitled to UI benefits are required to return them because they did not respond within ten days of the mailing of a notice they had no reason to expect and which could come anytime within a four-year period. The statute is effectuated by tolling the ten-day limit for appeals in appropriate cases. DOL and the decision below rely on Lowden v. Bd. of Review, 78 N.J.Super. 467 (App. Div. 1963), for the proposition that untimely appeals fail for lack of jurisdiction. Lowden, to the extent that it might be construed to bar appeals in refund situations, see Point VI following, is no longer good law in New Jersey.

B. The decision below misconstrues Hopkins v. Bd. of Review, which permits relaxing UI time limits

The decision below cited Hopkins for the proposition that the ten-day

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[16] See cases cited in Brief of Amicus Curiae to the Appellate Division in n.4 at pp. 10-11 and n.5 at p. 12.

period is jurisdictional and not generally subject to enlargement. Decision at 2, Exhibit 3 to Petition. After paraphrasing claimant's argument, the Hopkins decision continues "[w]e need not address any of these issues, however, because we are satisfied that irrespective of the untimely appeal, [DOL] cannot recover from this claimant payments to which [it] has found her entitled." 249 N.J.Super. at 89 (emphasis added).[17]

In Hopkins the worker advised DOL that she intended to and did in fact enroll in a high school diploma program while she was receiving UI benefits. DOL awarded benefits. Approximately four months later, it notified her that it suspected she was not eligible for the funds she received because she was in an "unapproved" training program and she was unavailable for work. At a subsequent hearing, the Appeals Examiner determined Hopkins indeed was eligible for UI benefits, but awarded them prospectively only since, even though her situation had not changed, he believed Hopkins' failure to timely appeal DOL's notice precluded jurisdiction over past benefits. Therefore he ordered Hopkins to repay benefits she had rightfully received.

The Appellate Division in Hopkins recognized that it is intolerable for DOL to demand a refund of benefits properly paid merely because a claimant did not appeal an erroneous determination within ten days. It therefore flatly barred the agency's attempt to recover the refund, thus not reaching the technical issue of the statutory limitation.

> The Division argues that in the absence of a timely appeal, its repayment demand must be complied with even though the underlying debt is not owed because, it asserts, that is the law. We decline, however, to take so dickensian an approach. [Hopkins, 249 N.J.Super. at 90.]

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[17] Of course, even to have considered whether estoppel applied, the court necessarily assumed jurisdiction of the case. See n. 13 supra.

Other New Jersey cases involving UI benefits have relaxed time limits to permit reaching the merits of untimely appeals. See, e.g., Dare v. Bd. of Review, 160 N.J.Super. 136 (App. Div. 1978) (finding claimant was entitled to be heard on the question of his mental incompetency during appeal period, and if found incompetent, then the appeal period should be tolled); Air-Way Branches, Inc. v. Bd. of Review, 10 N.J. 609, 615 (1952) (while commenting that the statutory time limit "though short may be said to be fair," continued "it would, however, be rendered wholly unjust if notice to an unauthorized [employee] were sufficient to start the period of limitation," and permitting an employer's appeal more than seven days after an employee accepted the DOL notice) (emphasis added). Cf. Meaney v. Bd. of Review & Atlas Floral Decorators, 151 N.J.Super. 295 (App. Div. 1977) (finding DOL abused its discretion in failing to predate claimant's application for UI benefits where she filed late as a consequence of misinformation from a DOL employee).

The rationales of White, Hopkins, and the above cases support relaxing strict time limitations where appropriate in UI cases. Implicit in these cases is that the only way to assure that DOL is not requiring repayment of benefits properly received is to permit workers to present explanations of DOL's errors, at least where they have not intentionally slept on their rights, that is, where they have a good reason for failing to appeal DOL's notice within ten days of mailing.

III. The statute lends itself to a construction quite different from DOL's narrow reading, that would far better serve the statutory purpose

The Legislature's intent to avoid economic instability can be achieved by reading the disjunctive statutory time limitations provisions in favor of the

worker. Under this view, the ten-day limitations period would begin to run later than currently interpreted. The statute states:

> Unless such person, within seven calendar days after the delivery of such determination, or within 10 calendar days after such notification was mailed to his last-known address, files an appeal from such determination, such determination shall be final. [N.J.S.A. 43:21-16(d).]

DOL interprets the statute as meaning "either seven days or ten days, whichever is first" to start the time for appeal running. The statute is more appropriately construed, however, in favor of benefits by reading it as "either seven days after delivery or ten days after mailing, whichever is later."

In Pietrowitz v. Bd. of Review, A-3014-72 (App. Div. 1974), the worker appealed three days after he received DOL's decision, which had taken six days to arrive. However, this was nine days after the decision was mailed and beyond the time limit for appeals (the limits then were five and seven days, rather than seven and ten days as they are now). The Appellate Division held in an unpublished opinion that the appeal was timely under the five day portion of N.J.S.A. 43:21-16(d), stating:

> That provision was clearly inserted to protect against the contingency of just what occurred in the present case. Mails are frequently delayed and when they are, notice may not be received in time to comply with the seven day period provided for the taking of an appeal when the decision being appealed from is mailed. In such cases, a five day period for the taking of appeals runs from the date of delivery.

Pietrowitz, Pa 72, Aa9. If read in the alternative, Rivera's appeal was timely in that he appealed promptly upon receiving DOL's notice, as do many other workers in similar situations.

IV. Concepts of "[f]undamental fairness, substantial justice and the legitimacy of the governmental process" impel relief from strict construction of the ten-day limit

"[F]undamental fairness, substantial justice and the legitimacy of the governmental process itself are implicated" Hopkins, 249 N.J.Super. at 90, when the government has determined that an individual is entitled to benefits, pays the benefits and then demands a refund without allowing the person to be heard. Though in Hopkins the Appeals Examiner expressly determined she was eligible for benefits,[18] the absence of an express determination on the merits in this or other cases in not important. Rivera and others should be entitled to a hearing to demonstrate their reason for filing beyond the ten-day limit. Where such reasons are sufficient, then the merits of the worker's underlying eligibility should be reached. Reason and fairness require no less.

V. The decision below failed to perceive that due process protections apply to DOL's demand for refunds of UI benefits, and did not balance interests to determine what process is due. Balancing of the interests involved weighs heavily in favor of relaxing time limitations.

Petitioner argues forcefully, with substantial authority from other jurisdictions, that DOL's failure to permit exceptions to its ten-day limit violates the guarantees of Due Process under the New Jersey and United States Constitutions. See Petition at 5-17; Letter to Appellate Division dated May 20,

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[18] Hopkins had not yet exhausted her 26 weeks of UI benefits. The Appeals Examiner therefore permitted testimony as to prospective eligibility, without limiting the hearing to whether the appeal was filed within ten days of mailing. Generally Appeals Examiners will consider timeliness only, as was the case here. See Pa 12, 33, 36.

1991 at 5-11.[19] Amicus will not duplicate the analyses presented there.

It may be helpful, however, to make explicit what interests are balanced in determining whether DOL's strict construction of a short time limitation "without exception" violates due process guarantees. The Mathews v. Eldridge, 424 U.S. 319 (1976), framework for such analysis is common.[20]

Workers' interests affected by DOL's actions--namely, permitting workers to demonstrate their entitlement to UI benefits when DOL suspects otherwise, and not requiring them to refund properly paid benefits--are substantial. Workers pay a portion of their wages into the state's fund, N.J.S.A. 43:21-7(d), and rightfully expect that if they become eligible for UI benefits, they will receive and keep them. Because DOL sets off unpaid refunds against future benefits, UI benefits may not be available the next time they are needed and due. Often UI benefits provide the means to avoid eviction and hunger, and to gain new employment by maintaining a fixed residence and means of transportation.

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[19] Among other UI benefits cases, Petitioner cites International Union v. Giles, 5 Ohio Bar Reports 300 (N.D.Ohio 1982) ("Given [the state's] failure to [use any alternative to simply mailing notice], plaintiffs reasonably seek a remedy which permits them to show cause [why] they did not appeal within 14 days. Such a remedy leaves the legislative judgment intact and accommodates the current system to the minimum requirements of due process of law."); and Bennett v. Lopeman, 598 F.Supp. 774, 783 (N.D. Ohio 1984) ("This Court is reluctant to demand that all notices of denial of benefits be sent by certified mail or personal service,...but believes at the very least, the State should provide a "good cause exception" to claimants who can demonstrate that they did not receive timely notice.")

[20]

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [Citation.] [Mathews v. Eldridge, 424 U.S. 319, 335 (1976).]

Requiring repayment of money not due is too "dickensian" to be supportable. Hopkins, 249 N.J.Super. at 90.

DOL procedures involve a high risk of erroneous deprivation, the second Mathews factor. In Garcia's case, see footnote 4, DOL did not notice that the job Garcia was supposedly currently working at was in northern Jersey, while the address at which he was collecting benefits and had worked in the past was in southern Jersey. In Hopkins' case DOL acknowledged it had made an error. Here Rivera's affidavit demonstrates that DOL is wrong again. See Pa 5-8. As outlined above, late receipt or no receipt of DOL notices is common. Current procedures entail a high risk of erroneous deprivation.

In respect to the third Mathews factor, the administrative burden to the state of allowing claimants to demonstrate their entitlement is negligible. Relaxing time limits will not add to the number of hearings already contemplated by existing law. The person from whom the government is demanding a refund is not asking for a second hearing, just for the first one which the worker was provided by statute but, for good cause, asked for "late." It is not an additional hearing, just one held later than originally contemplated.

DOL cannot argue that it has a financial justification in requiring strict adherence to the ten-day limit. Only those entitled to benefits on the merits will not be required to repay them.[21] Nor can the need for finality of decisions support DOL policy. Respondent argued below that "[t]here must come a time when a matter ends and the parties may rely on the finality of the conclusion." Rb16-17. The appropriate time at which finality is required should

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[21] To the knowledge of amicus, no federal prohibitions bar states from relaxing time limits for UI appeals. There is no federal appeals time limit; indeed most other states allow longer appeals periods than does New Jersey and many others permit "good cause" exceptions late filing. See Exhibit 1 to Petitioner's Letter Brief to the Appellate Division dated May 20 1990.

bear a rational relationship to the other time-scales involved in the claim for and award of benefits procedures. The need for such finality cannot come about a mere ten days after DOL mails its notice when DOL has four years to recoup benefits after they are paid. N.J.S.A. 43:21-16(d). The need for finality must be balanced against the reason for an untimely appeal and the resultant harm if the appeal is not allowed. Tolling does not eradicate finality; it merely helps assure that many who properly received benefits, like Rivera, will not have to repay them because of absence from their homes for more than a week at a time DOL happens to send a notice.

On balance, workers' interests in receiving future UI benefits and in not having to repay benefits properly paid profoundly outweigh DOL's interests in administrative convenience.

VI. Tolling of the statute in issue, N.J.S.A. 43:21-16(d), is not barred by the cases relied upon by the decision below

In addition to Lowden, the Appellate Division decision cites Air-Way Branches, Inc. v. Bd. of Review, 10 N.J. 609 (1952). Reference to Air-Way Branches is remarkable in that its holding actually was to relax the statutory time limit: the Court held receipt of a DOL notice by a manager at a branch office could not trigger the time limit against the Ohio parent corporation, and allowed the corporation's appeal more than ten days after the notice was mailed. The Court's observation in Air-Way Branches that the time limit "may be said be fair" was expressly tempered and qualified by the recognition that some events or circumstances such as the one in that case would make strict application of the statute "wholly unjust." Id. at 615.

Air-Way Branches is further distinguished in that the party against which

the time limit was being applied was the employer. What may be fair for a business set up to handle such matters may not be fair for the "uneducated, untutored and unrepresented" worker. Hopkins, 249 N.J.Super. at 89.

In addition, the time limitation referred to in Air-Way Branches, as well as in Lowden, is N.J.S.A. 43:21-6(b), not 43:21-16(d). The 6(b) statutory section sets out a ten-day appeal period for denials of initial applications, not later claims for refunds, and is not involved in this case. While strict, absolute application of the 6(b) limitation leads to results just as harsh, unjust, and in conflict with the statute and Constitution as in the 16(d) context, the fact is that 6(b) is not involved in this case. There are important differences between the initial claim and refund stages: initial applicants have recently supplied their addresses to DOL, are expecting a decision from DOL, and will likely contact it if they move or do not hear from DOL soon. While the 6(b) appeal period is still too short and should be subject to good cause relaxation, claimants with 6(b) appeals are more likely to surface a challenge sooner if there has been a problem with late receipt of a DOL notice.

In contrast, the 16(d) statutory section before the Court here affects workers who are not expecting any communication from DOL, may not be at the address where they received benefits up to four years earlier, and would have no reason to think that ordinary forwarding of mail with its attendant delays would be inadequate for any purpose.

Even if Lowden and Air-Way Branches survive White, a conclusion argued against in Point II above, they are distinguished from this case, and do not govern. Relaxing time limits is not barred, and should be done where the worker has good reason for appealing beyond the ten-day period.

CONCLUSION

Workers should not have to repay UI benefits that they properly received. DOL's policy of refusing to consider appeals filed after ten days ensures this unacceptable result in numbers of cases. The "jurisdictional" barrier permits DOL to avoid the often involved details of workers' lives and misfortunes, and more expediently process appeals. Legislative intent, judicial precedent, fundamental fairness and due process all mandate that this "jurisdictional" barrier be dismantled, that workers have access to a program designed for them and to which they have financially contributed, and that DOL truly assist workers, not victimize them as it has done to too many too often in the past.

Respectfully submitted,

LEGAL SERVICES OF NEW JERSEY

By: Margaret Stevenson

Margaret Stevenson
Melville D. Miller, Jr.

Dated: November 20, 1991

Madeline Houston /mg

Madeline Houston

Dated: November 20, 1991

Theodore Gardner /mg

Theodore Gardner

Dated: November 20, 1991

CERTIFICATION OF SERVICE

I hereby certify that I caused to be mailed by regular mail on this date two copies of Brief and Appendix of Amicus Curiae on Petition for Certification and Appeal to counsel for the parties:

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Counsel for Respondent

Respectfully submitted,

Dated: November 20, 1991

Margaret Stevenson

Appendix

Interpretation Service Manual
Unemployment Benefits

DIGEST OF PRECEDENT DECISIONS

PROCEDURE

430.15 Taking and Perfecting Proceedings for Review, Notice (continued)

It was held that appeal need not be formal. Any communication which indicates an intent to appeal will be regarded as an appeal. BR-6711, 4010.

An employer who filed an appeal stating, "It is our desire to appeal any payments in this case in order to interrogate claimant's possible restrictions on availability based upon previous claim experience," held not to have filed a valid appeal because the burden of establishing grounds for appeal rests upon the appellant, an appellant must set forth sufficient grounds to establish a prima facie cause of action in order to support an appeal, and the appellee is not required to appear for interrogation. BR-16849.

The Rules of the Board of Review provide that any communication which sets forth substantial grounds for objection to the payment of benefits shall be treated as an appeal, regardless of its technical form. The decision as to what constitutes an appeal lies with the appellate bodies; for if the Agency could exercise that right it could, in effect, deny the right of review of its decisions. BR-33367.

.2 Time

The voluntary acceptance of local office advice against the filing of an appeal did not constitute good cause for waiving the time limit on a late appeal. BR-2161.

In the face of positive testimony by the claimant to the effect that the decision could not have been mailed on the date alleged by the Deputy, the burden of proof was upon the Deputy to show actual date of mailing. BR-3747, 4049, 4360.

It was held that a valid appeal may be filed at any time before the decision becomes final. BR-4034.

It was held that the Board of Review has no discretion concerning the time limit on appeals. BR-4794.

Where a claimant elected to accept a decision and failed to file a timely appeal he was barred from further action. BR-5364.

A later postmark on the envelope mailed by the Deputy containing a notice of determination overcomes the presumption created by his date stamp. BR-5458, 5785.

It was held that the statutory time limit on appeals does not start running until notice of decision has actually been given or mailed. BR-5483, 4439.

430.2 Taking and Perfecting Proceedings for Review, Time (continued)

An appeal which was not filed within the statutory time limit was held untimely regardless of the extent of its untimeliness. An appeal filed one day late was held untimely. BR-5532.

It was held that an appeal which was abandoned could not be revived after the expiration of the statutory time limit. BR-5565.

Receipt of a Deputy's determination and demand for repayment of benefits too late to file a timely appeal due to a change of address did not constitute good cause for filing a late appeal, where the decision was mailed to claimant's last known address. BR-5692, 19160.

In the absence of proof to the contrary the date of mailing stamped by the Deputy on a notice of determination governs. BR-5861, 6228.

Illness or death in family was not considered good cause for filing a late appeal. BR-5900.

Failure of the postal authorities to forward mail to claimant's new address did not constitute good cause for filing a late appeal, where the decision was mailed to claimant's last known address. BR-5907.

Working was not considered good cause for filing a late appeal. BR-6003.

A claimant with a limited education who misinterpreted the significance of Form B-26 - Notice of Decision of Deputy - and accordingly failed to appeal in time, but who appealed immediately upon learning the significance thereof, held not to have appealed in time since the notice was clear and the appellate body had no discretion to extend the appeal period. BR-6038.

Misunderstanding the contents of a determination of the Deputy, which was properly filled out, did not warrant the waiving of the statutory appeal period. BR-6039.

Failure to receive a determination did not constitute good cause for filing a late appeal, where the Deputy mailed the determination to claimant's last known address. BR-7100.

Where a determination of the Deputy was not mailed to claimant's last known address, the statutory time limit for appeal does not apply because the law required that such notice be mailed to claimant's last known address. BR-10411.

Where the Deputy issued a decision of ineligibility up to a fixed date, subsequent failure to pay benefits, without the issuance of any notice to the parties, was appealable and was not subject to the statutory time limit because only the giving of notice fixes such limit. BR-10634.

430.2 Taking and Perfecting Proceedings for Review, Time (continued)

Where a claimant's appeal was filed on the first day that the itinerant office, to which he regularly reported, was open subsequent to receipt of the Deputy's determination, but was not filed within the seven-day statutory limit, held the Deputy's determination of ineligibility became final and the appellate body had no jurisdiction to review the period covered by the determination. The claimant did not have to wait until the itinerant office opened. He could have appealed by mail. BR-15194.

The Deputy appealed eleven days after the Appeal Tribunal decision was mailed. The Board of Review dismissed the Deputy's late appeal. However, the Deputy mailed a redetermination contrary to the decision of the Appeal Tribunal. The Deputy's redetermination also stated that it superseded the decision of the Appeal Tribunal. Held, since the Board of Review had no jurisdiction over an untimely appeal from an Appeal Tribunal decision, it follows that the Deputy could have no authority for reversing or changing in any manner the decision of the Appeal Tribunal after that decision became final, since he had no new information or evidence not previously known. BR-52782, BR-60-217, BR-43644.

No statement of appeal rights or time for filing an appeal was included in the Deputy's letter mailed January 23, 1962 requesting repayment of $980, unemployment and disability benefits, and it was not appealed. A timely appeal was filed from the Deputy's Redetermination of Ineligibility and Demand for Repayment of $70, unemployment benefits, mailed March 5, 1963, which was a repetition of the portion of the January 23, 1962 letter dealing with unemployment benefits. Held the appellate bodies had jurisdiction of the entire matter on the merits because time for appeal did not run from the letter mailed January 23, 1962 inasmuch as it did not comply with regulation 21.05 entitled Benefit Determination Notice, which has the binding effect of law requiring a notice of appeal rights, including a statement of the place and manner for taking an appeal and the period in which an appeal may be taken. BR-56347.

Late appeal was excused where the determination was not mailed to claimant's last known address. BR-5702.

* The claimant filed an initial claim for benefits as of May 7, 1984 and received benefits at a weekly benefit rate of $87 through November 4, 1984. She filed a claim for Federal Supplemental Compensation as of November 5, 1984 and received benefits through November 25, 1984. On December 14, 1984 the Deputy mailed a redetermination which held the claimant ineligible for benefits from May 7, 1984 through December 14, 1984. The claimant did not file an appeal. On December 24, 1984 the Deputy mailed a refund demand of the Director holding the claimant liable to refund the sum of $2,523 received as benefits for the weeks ending May 13, 1984 through November 25, 1984 in accordance with R.S.43:21-16(d); the claimant appealed on December 31, 1984. Held, a timely appeal from a refund demand vests jurisdiction in the appellate bodies over the merits of a case where the demand for repayment results from a redetermination which contains no warning that a refund might result. BR85-5009-C-R.

INTERSTATE CLMS CN391
TRENTON NJ 086250391

NAME OF CLAIMANT
ANGEL* RIVERA
SOCIAL SECURITY NUMBER
581-20-0604
PROGRAM CODE/DATE OF CLAIM
10 11/13/88
DATE OF MAILING
5/25/89
L.O. NO.
999

IMPORTANT INFORMATION N

RIGHT OF APPEAL
ANY APPEAL FROM DETERMINATION MUST SUBMITTED IN WRI WITHIN 10 DAYS FROM DATE OF MAILING. FINAL DATE TO FILE APPEAL IS
6/05/89
SEE REVERSE FO APPEAL RIGHTS.

ANGEL* RIVERA
P.O.BOX 74
AQUIRRE
PR 00608-0000

YOU ARE HEREBY NOTIFIED THAT BASED UPON THE FACTS OBTAINED AND IN ACCORDANCE WITH THE NEW JERSEY UNEMPLOYMENT COMPENSATION LAW, THE DEPUTY (NAMED BELOW) HAS DETERMINED THA

YOU ARE INELIGIBLE FOR BENEFITS FROM 11/13/88 AND WILL CONTINUE TO BE INELIGIBLE UNTIL THERE IS A CHANGE IN THE FACTS UPON WHICH THIS DETERMINATION IS BASED.

YOU WERE NOT AVAILABLE FOR WORK FROM 11/13/88.

YOU ARE UNWILLING TO TAKE A REDUCTION IN YOUR SOCIAL SECURITY RETIREMENT BENEFITS IN ORDER TO ACCEPT FULL TIME WORK. YOUR RESTRICTION TO PART TIME WORK FOR THE PURPOSE OF PRESERVING THESE BENEFITS IS UNREASONABLE. YOU ARE UNAVAILABLE FOR WORK AND INELIGIBLE FOR BENEFITS.

DEPUTY

C FORDHAM

FOR:

DIRECTOR
DIVISION OF UNEMPLOYMENT
AND DISABILITY INSURANCE

Pa 42

IMPORTANT INFORMATION AND
APPEAL RIGHTS ON REVERSE

BC268(F) (R 6-88)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A 3014-72

THOMAS J. PIETROWITZ,

Appellant,

v.

BOARD OF REVIEW, DEPARTMENT OF LABOR AND INDUSTRY, STATE OF NEW JERSEY,

Respondent.

Submitted October 29, 1974 -- Decided NOV 11 1974

Before Judges Michels, Morgan and Kentz

On appeal from final decision of the Board of Review, Department of Labor and Industry.

Mr. Thomas J. Pietrowitz, appellant, pro se.

Mr. William F. Hyland, Attorney General of New Jersey, attorney for respondent (Mr. Stephen Skillman, Assistant Attorney General, of counsel; Mr. Michael S. Bokar, Deputy Attorney General, on the brief).

PER CURIAM.

Appellant appeals pro se from a decision of the Board of Review, Department of Labor and Industry, affirming a decision of the Appeal Tribunal dismissing as untimely claimant's appeal from a determination of the Division of Unemployment and Disability Insurance holding him ineligible for unemployment compensation benefits and liable to refund benefits previously paid.

The appellant applied for unemployment compensation benefits at a local claims office on January 24, 1972. On the basis of his representations at the initial claim interview, he was found eligible and was paid benefits for the weeks ending January 30th through April 16th, 1972. After receiving information indicating that appellant had in fact been self-employed and earning compensation during the period he was receiving benefits, the Division of Unemployment and Disability Insurance reconsidered the claim and on December 20, 1972 mailed appellant its determination that he had improperly received benefits as a result of misrepresentation of his employment status, and demanding repayment in the amount of $912 representing the amount he had already received as benefits. The decision mailed to appellant stated that any appeal therefrom must be received by the agency or postmarked within seven days after the date of mailing. On December 29, 1972, nine days after the mailing date of the decision, claimant went to the local claims office and filed a notice of appeal stating that he had received the decision on December 26th "but could not report to this office until December 29th because this office was closed on the afternoon of December 28, 1972."

At a hearing held before the Appeal Tribunal on February 22, 1973 to consider the timeliness of appellant's appeal, no explanation was given by appellant as to why he

had not gone in person to the local office on the day he received the notice, December 26th or the day following, December 27th, both of which were within the statutory period of seven days from date of mailing. The appeal was dismissed as untimely. Appeal was then taken to the Board of Review, which on May 16, 1973 affirmed the dismissal on the record below. This appeal ensued.

The Unemployment Compensation Law, N.J.S.A. 43:21-16(d) provides that where a claimant, whether by reason of his nondisclosure or misrepresentation of a material fact or for any other reason, has received benefits to which he was not entitled under the statute, the Director of the Division of Unemployment and Disability Insurance may issue a determination to that effect setting forth the reasons therefor, and may recover the funds improperly paid. The same provision further provides:

> *** Unless such person, within 5 calendar days after the delivery of such determination, or within 7 calendar days after such notification was mailed to his last-known address, files an appeal from such determination, such determination shall be final.

It appears to be undisputed that appellant received the notice of the Division of Unemployment and Disability Insurance on December 26, 1972 despite the fact it was postmarked December 20, 1972. The pressure of Christmas mail undoubtedly accounted for the delay in delivery. Notice of appeal was filed by appellant three days after delivery, on December 29, 1972, but nine days after the decision had been mailed to him.

The appeal was timely. It was filed within five days following delivery of the determination being appealed from and thus falls within the 5-day time period provided in N.J.S.A. 43:21-16(d) for filing appeals following delivery of the determination. That provision was clearly inserted to protect against the contingency of just what occurred in the present case. Mails are frequently delayed and when they are, notice may not be received in time to comply with the seven day period provided for the taking of an appeal when the decision being appealed from is mailed. In such cases, a five day period for the taking of appeals runs from the date of delivery.

Lowden v. Board of Review, 78 N.J. Super. 467 (App. Div. 1963) cited by respondent is clearly distinguishable. Lowden dealt with a parallel time provision requiring an appeal to be filed within seven days after delivery of the determination. The appeal was filed more than seven days following personal delivery and was therefore dismissed as untimely. In this case, delivery was not achieved until December 26 and the appeal duly filed only three days later, prior to the expiration of the period of five days from delivery allowed by statute.

Appellant acted with dispatch in the circumstances of this case. Respondent, in its decision dismissing the appeal as untimely failed to give effect to the alternate

five day period of appeal running from date of delivery.

The decision below, dismissing appellant's appeal as untimely is reversed and the matter remanded for a hearing on the merits of appellant's liability to repay the benefits received.

A TRUE COPY.

Elizabeth McLaughlin

Clerk

Department of Law and Public Safety

Inter-Communication

From: Deputy Attorney General

To: Howard Heald, Chief Appeal Examiner - Appeal Tribunal

(Institution or Department) Dept. of Labor and Industr

Date: November 26, 1974

Re: Late Appeals to Appeal Tribunal and Board of Review

Enclosed is a copy of the opinion of the Superior Court, Appellate Division in Pietrowitz v. Board of Review, dated November 1974, holding that the term "delivery" as used in the last sentence R.S. 43:21-16(d) means the date the agency's decision is actually received by the claimant following its mailing. Since the provisions of the Unemployment Compensation Law are intended to be read in pari materia, the court's holding would seem to be equally applicable to the same term as used in § 43:21-6(b)(1), which sets forth the time periods for appeals to the Appeal Tribunal from local claims offices. Although § 43:21-6(c), which governs appeals to the Board of Review, does not use the term "delivery," the term "notification" in that section must in our judgment be read to mean "delivery" in accordance with the in pari materia doctrine referred to earlier, because it would make no sense to assume that the Legislature intended in § 43:21-6(c) to depart from the statutory scheme respecting appeals established in the other two sections cited.

As a result of the Pietrowitz decision, appeals to the App Tribunal or Board of Review must be accepted as timely if filed with the prescribed number of days after the agency's decision is actuall delivered to the claimant, even though the notice of appeal may be f more than 7 days or 10 days, as the case may be, after the date of mailing of the decision.

M. S. B.

MSB:gem
Enc.