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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 02/10/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

TYRONE HENRY,) 1 CA-UB 09-0160
)
Appellant,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ARIZONA DEPARTMENT OF ECONOMIC) Rule 28, Arizona Rules
SECURITY, an Agency,) of Civil Appellate
) Procedure)
and)
)
HUMBERTO S. LOPEZ GEN. PTR. dba HOTEL)
ARIZONA/HOLIDAY INN,)
)
Appellees.)
)
_____)

Appeal from the Appeals Board of the Department of Economic
Security of the State of Arizona

A.D.E.S. Appeals Board No. U-1116148-BR

AFFIRMED

Tyrone Henry Tucson
Appellant, *in Propria Persona*

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B A R K E R, Judge

¶1 Tyrone Henry ("Henry") appeals from an Arizona Department of Economic Security ("ADES") appeals board's determination that Henry was disqualified from collecting unemployment insurance benefits because he untimely filed his petition for review after the appeal tribunal issued an order denying him benefits. For the following reasons, we affirm.

Facts and Procedural History¹

¶2 Henry was discharged by his employer Hotel Arizona ("Employer") in March 2009. After being discharged, Henry applied for unemployment benefits. An ADES deputy initially determined that Henry was eligible for benefits. Subsequently, however, an ADES appeal tribunal concluded that Henry was not eligible for unemployment benefits because he was discharged for willful or negligent conduct in connection with the employment.

¶3 The tribunal's written decision was mailed to Henry on June 19, 2009 and stated that it would become final unless Henry appealed the decision on or before July 6, 2009. Henry did not appeal the tribunal's decision until July 22, 2009. The bulk of Henry's petition for review focused only on the merits of the tribunal's decision. Regarding the late filing of the petition,

¹ We view the evidence in the light most favorable to upholding the appeals board's decision and will affirm the decision if any reasonable interpretation of the record supports it. *Baca v. Ariz. Dep't of Econ. Sec.*, 191 Ariz. 43, 46, 951 P.2d 1235, 1238 (App. 1997). In this review, we are "bound by the appeals board's finding of facts unless they are arbitrary, capricious, or an abuse of discretion." *Avila v. Ariz. Dep't of Econ. Sec.*, 160 Ariz. 246, 248, 772 P.2d 600, 602 (App. 1989).

Henry stated simply, "Appeal is late because Henry never received it."

¶14 In August 2009, the appeals board dismissed Henry's appeal, finding it could not review the merits of the appeal because the petition for review was untimely filed. The appeals board also found that Henry had not alleged any fact which, if accepted as true, would invoke the provisions of Arizona Administrative Code ("A.A.C.") section R6-3-1404(B), which would permit Henry's petition for review to be deemed timely.

¶15 Henry timely requested further review of the appeals board's August 2009 decision. In his request, he provided the appeals board with additional information regarding the circumstances that caused the delay in his filing of the petition for review. Henry stated that the mailing address on file with ADES was a post office box operated by a commercial provider and the provider had no record of any large envelope being received from ADES between the date the tribunal allegedly mailed the decision and the date Henry filed his petition for review. Henry concluded in his request for review that the provision of A.A.C. R6-3-1404(B) that grants additional time for delays of the United States Postal Service should apply to his petition for review.

¶16 Henry also argued that the statute governing appeals lists a "fair hearing" as a "factual predicate for the 15 day

finality clause," and that because he did not receive a fair hearing, his appeal could not be untimely.

¶17 The appeals board rejected Henry's arguments and affirmed its decision on review. Henry timely requested judicial review by this court, and we granted his application for appeal. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 41-1993 (2010).

Discussion

¶18 We are "bound by the appeals board's findings of fact unless they are arbitrary, capricious, or an abuse of discretion." *Avila*, 160 Ariz. at 248, 772 P.2d at 602. We determine de novo whether the appeals board properly applied the law to the facts before it. *Bowman v. Ariz. Dep't of Econ. Sec.*, 182 Ariz. 543, 545, 898 P.2d 492, 494 (App. 1995).

A. Postal Service Exception

¶19 Under A.R.S. § 23-671(D), the decision of an ADES appeal tribunal "shall become final unless within fifteen days after mailing or electronic transmission of the decision any interested party files a written or electronically transmitted petition for review with the appeals board" *See also Slonim v. Ariz. Dept. of Econ. Sec.*, 126 Ariz. 201, 202, 613 P.2d 865, 866 (App. 1980) (stating that claimant's petition for review, if not filed within fifteen-day time limitation, is properly dismissed). Under

A.A.C. R6-3-1404(B), however, a petition for review filed after the fifteen-day window shall be considered timely if

it is established to the satisfaction of the Department that the delay in submission was due to: [ADES] error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

¶10 Henry contends that the appeals board erred in finding that his petition for review could not be deemed timely under the exception granted in A.A.C. R6-3-1404(B) for "delay or other action of the United States Postal Service" ("Postal Service Exception"). In his untimely petition for review, the only explanation Henry provided to the appeals board for the lateness of his appeal was, "Appeal is late because Henry never received it." Henry now argues that this supports the application of the Postal Service exception. We disagree.

¶11 Under A.A.C. R6-3-1404(B), Henry was required to submit an explanation to ADES "setting forth the circumstances of the delay." ADES was required to then determine whether his explanation fit within one of the rule's three narrow exceptions: (1) ADES error, (2) U.S. Postal Service delay, or (3) change of address. See A.A.C. R6-3-1404(B). Although Henry's one-sentence assertion - that his appeal was late because he never received the tribunal's decision - might explain his delay, it does not in any

way establish that his delay was caused by the U.S. Postal Service. Nor does it establish either of the other two exceptions. Based on the brevity of Henry's explanation, it was just as likely that the delay was due to some other cause, for which A.A.C. R6-3-1404(B) provides no exception. Moreover, this court has explicitly rejected the insertion of a good cause exception into A.A.C. R6-3-1404(B) because it "would amount to an amendment of the statute contrary to the legislative intent." *Roman v. Ariz. Dep't of Econ. Sec.*, 130 Ariz. 581, 582, 637 P.2d 1084, 1085 (App. 1981) (citing *Ferguson v. Ariz. Dep't of Econ. Sec.*, 122 Ariz. 290, 594 P.2d 544 (App. 1979)). Thus, we agree with the appeals board's conclusion that Henry's brief explanation for the lateness of his appeal does not trigger the application of A.A.C. R6-3-1404(B).

¶12 Henry also argues that records of his commercial mailbox provider establish the Postal Service exception. He states in his opening brief, "As the record shows, Henry's postal mailbox provided [sic] has records showing no parcel addressed to Henry from the Department of Economic Security of a size consistent with the written decision's bulk received [sic] between June 19 and July 22, 2009." From the opening brief's reference to "the record," it is not clear whether Henry is referring to an affidavit from the provider of Henry's commercial mailbox, which was attached for the first time to Henry's application for appeal, or whether he is referring to the second explanation of his untimely filing, which

he provided to ADES in his request for review. In either case, however, Henry's argument fails.

¶13 When Henry filed his application for appeal to this court, he attached an affidavit from the owner of the commercial establishment that provides Henry's mailbox. However, A.R.S. § 41-1993(B) provides, in relevant part, that "[n]o issue may be raised on appeal [to the Court of Appeals] which has not been raised in the request for review before the appeals board." We are, therefore, prohibited from considering the affidavit that Henry submitted for the first time on appeal to this court. *Prebula v. Ariz. Dep't of Econ. Sec.*, 138 Ariz. 26, 28, 672 P.2d 978, 980 (App. 1983).

¶14 As to the explanation given in his request for review, it was more detailed than his initial one-sentence explanation. We do not read A.A.C. R6-3-1404(B) to permit a party to submit multiple explanations to justify a late submission. However, even granting Henry the benefit of multiple explanations, those explanations still fail to establish that the Postal Service exception applies.

¶15 In his request for review, Henry alleged, "Mr. Henry's [commercial mailbox] provider . . . has no record of any large envelope received for Henry from Department of Economic Security between June 19, 2009 and July 22nd, [sic] 2009." This allegation lacks necessary supporting facts and is therefore inadequate. First, there is no allegation that the tribunal's decision was ever

mailed to Henry in a "large envelope." Second, even if there were, there is no allegation that Henry's commercial mailbox provider had the custom or practice of maintaining records listing the senders of the parcels which were received by the provider on its clients' behalf.² Thus, given the lack of factual support, the appeals board did not err in holding that Henry's allegation was insufficient to establish a delay on the part of the U.S. Postal Service.

¶16 We note that although it was not necessary for Henry to prove the truth of his allegations outside of a hearing, it was his burden to, at the very least, allege sufficient facts that if taken as true would permit the appeals board to apply the exceptions of A.A.C. R6-3-1404(B) or compel the holding of a hearing to explore the matter. Even taking into consideration both explanations for his late filing, Henry has failed to establish that A.A.C. R6-3-1404(B) should be applied to his petition for review.³

² The U.S. Postal Service's Domestic Mail Manual §§ 508.1.4 and 508.1.8 establish that commercial mailbox providers are receiving agents for recipients and not delivering agents for the U.S. Postal Service.

³ Henry argues that the appeals board erred in finding that certain evidence brought into question the credibility of Henry's claim that he never received the tribunal's decision. We need not reach this argument, however. In determining whether A.A.C. R6-3-1404(B) applied to Henry, the appeals board assumed as true all of Henry's allegations. Thus, even if the appeals board did err in making factual findings that questioned the credibility of Henry's allegations, those errors were rendered harmless when the appeals board assumed the allegations were true.

B. Issues Not Raised in Request for Review

¶17 In addition to those issues discussed above, Henry makes the following contentions in his opening brief: (1) the appeals board's decision should be reversed because the tribunal denied Henry his due process rights; (2) ADES never mailed the tribunal's decision; (3) bank records - which Henry did not provide prior to his application for appeal - prove that Henry continued to receive unemployment benefits weeks after the tribunal decision was issued; [OB 10] and (4) the board erred in finding no irregularity in the proceedings when it had not made supporting findings of fact or conclusions of law. Henry did not raise these claims in his request for review.⁴ Under A.R.S. § 41-1993(B), "[n]o issue may be raised on appeal [to the Court of Appeals] which has not been raised in the request for review before the appeals board." Accordingly, Henry may not raise these issues on appeal to this court, and we therefore do not address their merits.

⁴ In the request for review, Henry does discuss the loss of his due process rights. However, there, he only argues that his loss of due process rights means that the clock for the fifteen-day filing window should not have begun to run. See ¶ 6 above. He has abandoned that particular claim on appeal and is now arguing that the due process violation alone should be enough to reverse the board's decision. This argument was not made in the request for review.

Conclusion

¶18 For the foregoing reasons, we affirm.

/s/

DANIEL A. BARKER, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

MICHAEL J. BROWN, Judge