

No. 1-14-0075

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

TADEUSZ SMORCZEWSKI,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County.
	)	
v.	)	No. 12 CH 31439
	)	
ILLINOIS DEPARTMENT OF EMPLOYMENT	)	
SECURITY, and BOARD OF REVIEW,	)	
	)	
Defendants-Appellees	)	
	)	
(Parsec, Inc., and Parsec, Inc., c/o UC Express,	)	Honorable
	)	Eileen O'Neill Burke,
Defendants).	)	Judge

JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Hall concurred in the judgment.

**ORDER**

¶ 1 *Held:* Where plaintiff's appeal to the referee of the Illinois Department of Employment Security was filed after the statutory 30-day time limit and there was no violation of due process, the Board of Review's final administrative decision affirming the referee's dismissal of plaintiff's appeal for lack of jurisdiction was affirmed.

¶ 2 Plaintiff-appellant, Tadeusz Smorzewski, appeals from the circuit court's order affirming the administrative decision of defendants-appellees, the Board of Review (Board) of the Illinois

Department of Employment Security (IDES), which affirmed the referee's dismissal of plaintiff's appeal from the denial of his unemployment benefits on the grounds that it was untimely. Because plaintiff filed an untimely appeal to the referee from the claims adjudicator's denial of benefits, and his due-process argument challenging the notice of his appeal rights fails, we affirm the circuit court's order, which confirmed the Board's final administrative decision which affirmed the referee's dismissal of plaintiff's appeal for lack of jurisdiction.

¶ 3

### I. BACKGROUND

¶ 4 Plaintiff, who worked as a truck driver and mechanic for defendant, Parsec, Inc. (Parsec), was terminated from his employment on July 8, 2011, for violating a company rule prohibiting sleeping on duty. In August 2011, he applied for unemployment benefits with IDES. In his brief, plaintiff claims that he made the application at a local IDES office along with his friend, Katrina Staw, who is conversant in both English and Polish. Parsec protested plaintiff's claim. In support, Parsec submitted to IDES various documents including: (1) a letter dated July 18, 2011, summarizing a July 13, 2011, meeting between its agents and plaintiff's union representatives to resolve a grievance as to his termination; (2) the denial of the grievance, (3) a copy of Parsec's "General Regulations and Safety Rules for all Employees," which included in a section titled "V. Basic Rules," a rule providing that "employees must not sleep on duty," and that "[l]ying down, sitting up or reclining with eyes closed or covered will be considered as sleeping," and (4) an acknowledgement of receipt of the handbook with plaintiff's signature, dated August 3, 2007.

¶ 5 IDES gave plaintiff written notice that Parsec had protested his claim and that a claims adjudicator would interview him by telephone. The interview took place on September 9, 2011,

and was conducted in English. Plaintiff stated that on July 8, 2011, he had been performing the duties of his job. At 1:20 p.m., plaintiff was called to the office by Parsec managers Tim Sullivan and Aden Lugo, and was told that he was discharged for sleeping on the job. Plaintiff stated that he did not know if Parsec had a policy regarding sleeping on the job and never received a warning for that or similar conduct.

¶ 6 In the phone interview, Parsec's representative stated that on July 8, 2011, Mr. Sullivan and Mr. Lugo saw plaintiff in his truck, which was parked on a company lot. Plaintiff was on duty at the time and in a position "conducive to sleeping." Mr. Sullivan and Mr. Lugo observed plaintiff for a few minutes and, during that time, plaintiff did nothing and did not react to their presence. Plaintiff's truck shut off and startled plaintiff. Mr. Sullivan and Mr. Lugo then saw plaintiff reach over and make a "fictitious" entry into his computer which showed that he had been moving his truck. When called to the office, plaintiff admitted that he had his eyes closed, but denied he had been sleeping. According to Parsec, plaintiff was made aware of the rule prohibiting employees sleeping in August 2007, through his receipt of Parsec's employee handbook. Sleeping was defined to include lying down, sitting up, or reclining with eyes closed or covered while on duty. Parsec's representative maintained that a violation of this rule results in financial losses to Parsec.

¶ 7 The claims adjudicator found that plaintiff was discharged for violating a known and reasonable company rule, which constituted misconduct in connection with his work and, therefore, plaintiff was ineligible for benefits. The claims adjudicator's four-page determination (hereinafter, determination) was mailed to plaintiff on September 12, 2011. The determination informed plaintiff of the denial of his claim and that he had 30 calendar days to appeal this

decision. It also provided him with a telephone number to call a local IDES representative if he needed additional information, and set forth the appeal procedures in both English and Spanish.

¶ 8 Plaintiff filed a request for reconsideration of the claim's adjudicator's decision on November 22, 2011. The request was signed by plaintiff and included a handwritten statement in English which asserted that the denial of his claim for unemployment benefits was against the manifest weight of the evidence, unlawful, and that plaintiff had not committed misconduct.

¶ 9 On December 1, 2011, the referee issued a decision without a hearing denying plaintiff's appeal as untimely. The referee's decision informed plaintiff that he could appeal to the Board within 30 days. Plaintiff, now represented by counsel, appealed to the Board and the Board remanded the matter with instructions that the referee hold a hearing on the timeliness of the appeal. Accordingly, the referee held an administrative telephone hearing on April 12, 2012. Plaintiff, his counsel, and representatives of Parsec participated in the hearing. Plaintiff's counsel told the referee that a person (referred to as "Katrina Stalh"), was on the call to translate the proceedings into Polish for plaintiff. However, as was required, the referee obtained an IDES official interpreter who, after being sworn in, translated the proceedings for plaintiff.

¶ 10 In response to the referee's question as to why he filed the appeal from the claims adjudicator's decision after the due date of October 12, 2011, plaintiff stated: "because I called my union and they told me to wait." When asked by the referee to comment, plaintiff's counsel contended plaintiff filed the appeal after the due date because he is unable to speak or write in English and the union representative, knowing plaintiff could not understand English, told plaintiff that the union would handle the matter, but did not do so. Plaintiff's counsel further argued that the appeal should be allowed under the IDES rule which allows a referee to continue

a hearing on "compassionate grounds." 56 Ill. Adm. Code 2720.240(a)(1) (1997). The referee stated that the rule was not applicable to the filing of appeals. After noting plaintiff's tardy request for review included a handwritten statement in English and was signed by plaintiff, the referee indicated that he assumed it had been written by plaintiff. That assumption was neither contradicted nor challenged by plaintiff. On appeal, plaintiff now contends "Ms. Staw wrote the appeal [to the Board] and [he] signed it."

¶ 11 The referee found that the last day to timely file a timely appeal from the denial of plaintiff's claim by the claims adjudicator was October 12, 2011. Because plaintiff did not file his appeal until November 22, 2011, the referee dismissed the appeal as tardy.

¶ 12 Plaintiff sought review of the referee's dismissal by the Board. In his request to the Board, plaintiff asserted that he is a "foreign-born Pole" who is "somewhat limited" in the English language, particularly in "legal matters" which have not been interpreted into Polish. Plaintiff argued that because a referee may continue a hearing on "compassionate grounds" under the Illinois Administrative Code (56 Ill. Adm. Code 2720.240(a)(1) (1997)), plaintiff's tardy appeal should have been allowed because of his "inability to be conversant in the English language" and his misunderstanding that his union was pursuing the appeal. Plaintiff also contended that there was no proof that he was sleeping on the job and, therefore, he did not commit misconduct and was eligible for benefits.

¶ 13 The Board affirmed the referee's determination that he lacked jurisdiction to review plaintiff's appeal, compelling dismissal. The Board explained that plaintiff's assertion that he "does not speak fluent English or that he relied on his union's assertion that the situation would be 'handled by them' do not alter the finality of the jurisdictional requirement." Additionally, the

Board held that the rule allowing the referee to grant a continuance as to a hearing on "compassionate grounds" does not impact the jurisdictional requirements of a timely appeal.

¶ 14 Pursuant to the Administrative Review Law (735 ILCS 5/3-101, *et seq.* (West 2012)), plaintiff filed a complaint for review of the Board's decision in the circuit court. In his complaint, plaintiff alleged that he did receive the determination "sometime" after the mailing date of September 12, 2012. The complaint alleged that "since [p]laintiff was barely conversant in English, and could only negligibly read or write the aforesaid English, he had contacted his [u]nion concerning the 'Determination'." The union allegedly informed plaintiff it would "take care" of the appeal, but failed to do so. In late November 2012, plaintiff contacted a friend who speaks English and Polish, as well as counsel, and he "was immediately directed to file an immediate appeal." Plaintiff sought reversal of the Board's decision based on claimed exceptions to the 30-day requirement due to a "language barrier" and due-process considerations.

¶ 15 Plaintiff filed a memorandum in support of his complaint for administrative review, but IDES did not respond. After conducting a hearing, the circuit court affirmed the Board's decision. Plaintiff now appeals.

¶ 16

## II. ANALYSIS

¶ 17 On appeal, plaintiff maintains that he did not have actual notice of the referee's determination because IDES failed to either notify him of the referee's determination in Polish or notify his interpreter, Ms. Staw, who had helped him make the claim. Plaintiff argues these circumstances should act to "mitigate" the untimely filing of his appeal. He further argues: (1) the lack of actual notice violates his due-process rights, (2) he was not guilty of misconduct, (3)

and IDES's failure to file a responsive memorandum in the circuit court should result in a default and reversal of the Board's decision.

¶ 18 Our review of the Board's decision to affirm the referee's dismissal of plaintiff's appeal is governed by the Administrative Review Law. 735 ILCS 5/3-112 (West 2012). While our review extends to all questions of law and fact present by the record (735 ILCS 5/3-110 (West 2012)), this court reviews an agency's decision and not the decision of the circuit court. *Thompson v. Department of Employment Security*, 399 Ill. App. 3d 393, 394 (2010). A reviewing court may not consider evidence which is beyond the administrative record. *Lyon v. Department of Children and Family Services*, 209 Ill. 2d 264, 271 (2004); 735 ILCS 5/3-110 (West 2012).

¶ 19 The applicable standard of review depends on the issue raised. *Cinkus v. Village of Stickney Municipal Officers Electoral Bd.*, 228 Ill. 2d 200, 210 (2008). An agency's findings of fact are entitled to deference, and will be affirmed unless they are against the manifest weight of the evidence. *Id.* Pursuant to this deferential standard, the reviewing court deems the Board's factual findings to be *prima facie* true and correct. 735 ILCS 5/3-110 (West 2012). Findings of fact will be reversed only if the opposite conclusion is clearly evident. *Cinkus*, 228 Ill. 2d at 210. A reviewing court may not usurp an agency's functions by weighing the evidence or judging the credibility of the witnesses. *Id.*; *Greenlaw v. Department of Employment Security*, 299 Ill. App. 3d 446, 448 (1998).

¶ 20 "Mixed questions of law and fact (where historical facts are established or undisputed, and the issue is whether those facts satisfy the statutory standard) are examined with a standard of review of clearly erroneous." *City of Sandwich v. Illinois Labor Relations Board*, 406 Ill.

App. 3d 1006, 1008 (2011) (citing *Cinkus*, 228 Ill. 2d at 211). This court reviews pure questions of law *de novo*. *Id.* at 210-11. Whether the Board correctly determined the referee lacked jurisdiction over plaintiff's appeal is a question of law, one that is reviewed *de novo*. *Thompson*, 399 Ill. App. 3d at 395.

¶ 21 An administrative agency has no general or common law powers. *Gaffney v. Board of Trustees of Orland Fire Protection District.*, 2010 IL 110012, ¶ 38. Rather, an administrative agency's powers are limited to those granted by the legislature, and any action it takes must be specifically authorized by statute. *Id.*; *Cesario v. Board of Fire, Police and Public Safety Commissioners of the Town of Cicero*, 368 Ill. App. 3d 70, 77 (2006). When an agency acts outside of its statutory authority, it acts without jurisdiction. *Deicke Center v. Illinois Health Facilities Planning Board*, 389 Ill. App. 3d 300, 302 (2009).

¶ 22 Under the framework established by the Unemployment Insurance Act (820 ILCS 405/700 (West 2012)) (Act), a claimant's application for benefits is initially decided without a full hearing by a claims adjudicator. An appeal from a claims adjudicator's determination is considered first by the referee, while a final decision lies with the Board. 820 ILCS 405/800, 803 (West 2012).

¶ 23 Section 800 of the Act states that a claimant who wishes to appeal from the determination of a claims adjudicator must file an appeal to the referee "within 30 calendar days after the delivery of the claims adjudicator's notification of such 'finding' or 'determination,' or within 30 calendar days after such notification was mailed to his last known address \*\*\*." 820 ILCS 405/800 (West 2012). "The time period for filing an appeal from a claims adjudicator's determination is mandatory and operates as a statute of limitations. *Lachenmyer*, 263 Ill. App.

3d at 385. Section 800 does not provide for late filings for either excusable neglect or good cause. *Hernandez v. Department of Labor*, 83 Ill. 2d 512, 519 (1981) (*Hernandez II*). In the absence of a timely filed appeal, the Act does not provide an aggrieved party with any other means of obtaining review. *Id.* at 517; 820 ILCS 405/800 (West 2012). Neither the referee nor the Board has jurisdiction to reach the merits of an untimely filed appeal from a determination of a claims adjudicator. *Camarillo v. State, Department of Labor*, 129 Ill. App. 3d 387, 390 (1984). Failure to file an appeal within the 30-day time limit renders the claims adjudicator's determination final. 820 ILCS 405/800 (West 2012).

¶ 24 Here, the record shows that the determination notifying plaintiff of the denial of unemployment insurance benefits and his appeal rights was mailed to him on September 12, 2011. Therefore, the mandatory deadline for plaintiff to file his appeal to the referee was October 12, 2011. The referee's factual findings as to these points are well supported by the evidence. Plaintiff filed his appeal over one month later on November 22, 2011. Accordingly, we find the referee lacked jurisdiction to consider the merits of plaintiff's appeal and the Board's decision affirming the referee's dismissal of the appeal was correct.

¶ 25 Plaintiff does not dispute that his appeal to the referee was untimely; rather, he asserts several reasons why his appeal should nevertheless not have been dismissed. Plaintiff first argues that mitigating circumstances should serve to relax the time limitation of section 800. Specifically, he argues that because the determination was in English, he was not "conversant in the English language," and the union led him to believe it would pursue the appeal, his tardiness should be excused. We disagree.

¶ 26 First, it is not clear from the administrative record that plaintiff's appeal to the referee was tardy because he did not in fact understand his rights to appeal based on his receipt of the referee's determination. At the hearing before the Board, plaintiff himself testified only that his appeal was untimely because he contacted the union and was told to wait. It was his attorney who maintained that plaintiff could not timely file the appeal because of an insufficient knowledge of English. His attorney also maintained that plaintiff was informed that the union would pursue the appeal. There was no evidence in the administrative record that plaintiff did not actually understand that his appeal to the referee was required to be filed within 30 days. Plaintiff presented no evidence to corroborate his contention that he contacted the union about the appeal, not any evidence to show what, if anything, the union said to him.

¶ 27 Even if plaintiff's contentions were supported by evidence in the administrative record, our supreme court in *Hernandez II* considered and rejected similar arguments that the time limitations of section 800 are subject to any relaxation. At that time, section 800 required that an appeal to the referee be filed within nine days. *Hernandez II*, 83 Ill. 2d at 517. The plaintiff in *Hernandez II* spoke only Spanish, and he received a letter from IDES informing him of the claims adjudicator's decision that his claim for unemployment benefits had been denied and that he had a right to appeal. *Id.* at 514. The plaintiff testified before the referee that a friend translated the letter for him, but the translation did not include his appeal rights or requirements. *Id.* The plaintiff tardily filed his appeal only after he visited an unemployment office and learned of his appeal rights. His appeal, however, was dismissed as being untimely. *Id.* The appellate court in *Hernandez v. Board of Review, Illinois Dept. of Labor*, 79 Ill. App. 3d 635, 639 (1979)

(*Hernandez I*), reversed the dismissal on the ground that the plaintiff had not received actual notice of the decision.

¶ 28 The supreme court overturned the appellate court's decision, rejecting the plaintiff's argument that the lack of actual notice served to excuse his failure to timely appeal. *Hernandez II*, 83 Ill. 2d at 518-21. The supreme court based its decision on the fact that section 800 "does not provide for late filings for excusable neglect or good cause." *Id.* at 519. It found that a court may not engraft onto section 800 a provision which would permit the appeal period to be extended based upon an argument that the claimant did not understand the notice which was given by IDES. *Id.* at 519-20. The supreme court reasoned that procedural rules must be enforced as written, and any amendments to section 800 which would address hardships caused by the time limitation must be made by the legislature. *Id.* at 520-21; see, also, *Quinones v. Board of Review, Illinois Dept. of Labor*, 104 Ill. App. 3d 227, 231 (1982) (holding that the inability to understand English did not excuse the plaintiff's tardy request for extended unemployment benefits).

¶ 29 Because the thirty-day limitation is mandatory and section 800 does not provide extensions based on good cause or excuse, plaintiff's argument regarding mitigating circumstances fails.

¶ 30 Plaintiff next argues that the "lack of actual notice" deprived him of due process. He maintains the determination should have been written in Polish, or transmitted to Ms. Staw because IDES was aware of her presence at the time he made the claim for unemployment benefits. This argument is made without legal or factual support in the administrative record. In

particular, there was no evidence that IDES was aware of Ms. Staw's involvement in making plaintiff's claim.

¶ 31 As to the notice requirement, due process is a flexible concept and is determined based on the interest at risk and the context in which the deprivation is said to have occurred. *Colquitt v. Rich Township High School Dist. No. 227*, 298 Ill. App. 3d 856, 863 (1998). "The immutable minimum requisites of due process, however, are notice and a meaningful opportunity to be heard." *Id.* Due-process mandates "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). A notice to a non-English speaker may be sufficient if it communicates the need for further inquiry. See, e.g., *Soberal-Perez v. Heckler*, 717 F. 2d 36, 43 (2d Cir. 1983).

¶ 32 In *Hernandez II*, our supreme court also addressed and rejected arguments that the plaintiff's due-process rights were violated based on a lack of actual notice because the plaintiff was Spanish speaking. *Hernandez II*, 83 Ill. 2d at 519. The supreme court specifically stated:

"Similarly without substance is the claim that the due process clauses contained in the Illinois (Ill. Const. 1970, art. I, sec. 2) and United States (U.S. Const., Amend. XIV) constitutions require us to allow plaintiff's appeal of the ineligibility determination. Such claims have been thoroughly considered and rejected under principles we need not belabor here. (See *Commonwealth v. Olivo* (1975), 369 Mass. 62, 337 N.E. 2d 904; *Guerrero v. Carleson* (1973), 9 Cal. 3d 808, 109 Cal. Rptr. 201, 512 P. 2d 833, cert. denied (1974), 414 U.S. 1137, 94 S. Ct. 883, 38 L. Ed. 2d 762.). No persuasive distinction of those cases has been offered." *Hernandez II*, 83 Ill. 2d at 519.

The cases cited by the supreme court, *Olivo* and *Guerrero*, found that due process was satisfied where the notice at issue placed a reasonable person on notice that further investigation or translation was required to understand the nature of the proceedings and the opportunity to be heard. *Olivo*, 369 Mass. at 70; *Guerrero*, 9 Cal. 3d at 811, fn 4.

¶ 33 Here, at the time plaintiff received the determinations he had already filed a claim with IDES, been informed of Parsec's protest, received notice of a phone interview with the claims adjudicator, and participated in the interview. Under the holding in *Hernandez II*, plaintiff's due-process rights were not violated where the determination informed him of the claims adjudicator's denial of his claim, his right to and requirements for an appeal to the referee, and a means to obtain further information. At that point in the claim process, the determination would have put plaintiff on notice that further inquiry was necessary even if, as he claims, his knowledge of English was limited.

¶ 34 Further, on appeal plaintiff relies on cases which do not support his due-process argument. Plaintiff relies heavily on *Hernandez I*, 79 Ill. App. 3d at 639. *Hernandez I*, however, was reversed by our supreme court in *Hernandez II*, 83 Ill. 2d at 520-21. Plaintiff's reliance on *Hernandez I* is therefore unavailing.

¶ 35 In *Flores v. Board of Review, Illinois Department of Labor*, 74 Ill. App. 3d 667 (1979), which was decided before *Hernandez II*, the appellate court reversed the determination of IDES that it could not consider the claimant's appeal from a referee's decision denying benefits because she did not timely appeal under section 801 of the Act. *Id.* at 671. The plaintiff in *Flores* spoke Spanish, and a friend who translated the referee's decision did not communicate that her claim had been denied. *Id.* The court there stated that, based on *Hernandez I*, "if actual notice is

required under section 800 [of the Act], then it is likewise necessary under section 801 [of the Act]," which governs appeals from a referee's decision. *Id.* at 670. However, as discussed, *Hernandez II* overruled the decision that actual notice was required. *Hernandez II*, 83 Ill. 2d at 518-20.

¶ 36 Further, *Figueroa v. Dougherty*, 303 Ill. App. 3d 46 (1999), did not concern the deadline requirement of section 800 of the Act, nor address the inadequacy of notice for due process purposes. *Id.* at 50. Instead, this court addressed whether the referee violated his duty under section 801 of the Act to provide the plaintiff, who did not speak fluent English, a fair hearing. At the hearing, the referee permitted the claimant to be aided by a translator supplied by the claimant, but severely limited the translator's assistance, resulting in an inaccurate and incomplete translation. *Id.* at 51-52. Additionally, the referee failed to ask the plaintiff questions which would have clarified his position. *Id.* at 52. The Board's decision affirming the denial of benefits was reversed and remanded to provide the plaintiff a fair hearing. *Id.* *Figueroa* has no application to the issue presented here. As *Hernandez II* remains established and settled law and is directly on point, we reject plaintiff's due-process argument.

¶ 37 Plaintiff next argues that the claims adjudicator erred in determining that he engaged in misconduct and in denying his claim. However, the Board did not address whether his claim for benefits had merit in its decision, as it had determined plaintiff's appeal was untimely and therefore deprived the referee of jurisdiction. Because our review is limited to the decision of the Board as to the timeliness of his appeal, we will not address the merits of this claim. See *Thompson*, 399 Ill. App. 3d at 394.

¶ 38 Finally, plaintiff requests that we remand this matter to the circuit court or the Board with directions to reverse the decision of the Board affirming the dismissal of his appeal. Plaintiff maintains the remand is necessary because IDES did not file a responsive brief as set forth in a briefing order of the circuit court, and should therefore be found to have been in default. However, in the circuit court IDES did file an answer and had otherwise participated in the action. Moreover, plaintiff cites no authority in support of this default argument and has therefore forfeited the issue. Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013).

¶ 39 III. CONCLUSION

¶ 40 For the reasons stated above, we find that plaintiff failed to file a timely appeal to the referee after receiving notice of his appeal rights which complied with due process. The Board properly affirmed the referee's dismissal of plaintiff's appeal for lack of jurisdiction,

¶ 41 Circuit court affirmed; Board's decision confirmed.