

IN THE SUPREME COURT OF THE STATE OF NEVADA

PRICZ TATTOO STUDIO, LLC; AND
THE PIERCING SHOP,
Appellants,
vs.
STATE OF NEVADA DEPARTMENT
OF EMPLOYMENT TRAINING &
REHABILITATION-EMPLOYMENT
SECURITIES DIVISION; AND
SUMMER REESE,
Respondents.

No. 56792

FILED

DEC 29 2011

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Anderson*
DEPUTY CLERK

ORDER OF REVERSAL AND REMAND

This is an appeal from a district court order denying a petition for judicial review in an unemployment compensation action. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

On June 18, 2009, respondent State of Nevada Department of Employment Training & Rehabilitation-Employment Securities Division (DETR) mailed a letter to appellants determining that respondent Summer Reese was an employee of appellants, rather than an independent contractor, for NRS Chapter 612 unemployment taxation purposes. This letter was sent as certified mail through the United States Post Office but was not delivered to appellants until July 1, 2009. Appellants then filed an administrative appeal on July 9, 2009.

A DETR referee dismissed appellants' administrative appeal, concluding that NRS 612.495 provided appellants 11 days from the June 18 mailing date to appeal, and that therefore appellants' July 9 appeal was untimely. The referee also concluded that "good cause" for an extension of the deadline, under NRS 612.495(1), had not been established since the letter informed appellants of their appeal rights and because

appellants waited a full week after receipt of the letter to seek legal advice. After the DETR Board of Review summarily affirmed the referee's decision, appellants petitioned for judicial review. The district court denied the petition and appellants have now appealed to this court.

On appeal, appellants argue that DETR acted arbitrarily and capriciously in failing to extend the 11-day deadline under the statutory good cause exception.¹ Specifically, appellants argue that the Post Office did not deliver the letter until after the 11-day appeal period had run and that their administrative appeal was filed within 11 days of their receipt of DETR's letter.

In response, DETR argues that good cause was not established here because appellants had not returned telephone calls from DETR on prior occasions and because the Post Office typically leaves a notice after a failed attempt to deliver certified mail. DETR asserts that both of these facts suggest that appellants were purposefully avoiding DETR and refusing to pick up their mail. DETR also contends that appellants could have still met the NRS 612.495 deadline if they had filed their administrative appeal within one day of receiving the letter.

In reviewing an administrative decision, this court, like the district court, may not substitute its judgment for that of the administrative tribunal on the weight of evidence on any question of fact. NRS 233B.135(3); Law Offices of Barry Levinson v. Milko, 124 Nev. 355, 362, 184 P.3d 378, 383-84 (2008) (noting that this court's level of review of

¹In light of our resolution of this appeal, we need not reach appellants' alternative argument that the "mailing or personal service" portion of NRS 612.495 is vague or ambiguous.

administrative decisions mirrors that of the district court). Nonetheless, an administrative decision may be set aside if it is “affected by error of law,” Dredge v. State ex rel. Dep’t Prisons, 105 Nev. 39, 43, 769 P.2d 56, 58-59 (1989), or if the decision is arbitrary or capricious or constitutes an abuse of discretion. NRS 233B.135(3)(f); State, Emp. Security v. Hilton Hotels, 102 Nev. 606, 607, 729 P.2d 497, 498 (1986).

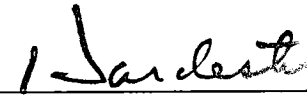
Under NRS 612.495(1), an appeal of an administrative unemployment compensation decision must be filed “within 11 days after the date of mailing or personal service of the notice of determination or redetermination.” If the decision is mailed, as was the case here, three additional days are added to the NRS 612.495(1) deadline. Hardin v. Jones, 102 Nev. 469, 471, 727 P.2d 551, 552 (1986). Here, as DETR’s letter was mailed on June 18, 2009, when three days for mailing are added, without a “good cause” extension of time, appellants would have had until July 2, 2009, to file their administrative appeal. Thus, they would have had, at most, only one day to file their appeal following the July 1 delivery of the notice of decision. While DETR assumes that the Post Office left notices of failed delivery attempts before delivering the notice of decision on July 1, there is nothing in the record to support this assertion. Further, demanding only one day for appellants to make a decision whether to appeal does not sufficiently permit considered reflection on the part of appellants in regard to the proper course they wish to pursue. Under these circumstances, we conclude that appellants established good cause under NRS 612.495(1) to have the deadline to administratively appeal extended.

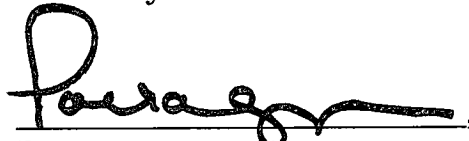
As good cause had been established, we further conclude that DETR acted arbitrarily and capriciously, so as to abuse its discretion, in

failing to extend the deadline for appellants to file their administrative appeal. Hilton Hotels, 102 Nev. at 607, 729 P.2d at 498 (explaining that this court reviews administrative decisions under the arbitrary and capricious standard). Therefore, as DETR's dismissal of appellants' appeal was an abuse of discretion, a remand is warranted in order for the merits of this dispute to be reviewed. Accordingly, we

ORDER the decision of the district court REVERSED AND REMAND this matter to the district court with instructions to REMAND this case to the Board of Review for further proceedings consistent with this order.


_____, J.
Douglas


_____, J.
Hardesty


_____, J.
Parraguirre

cc: Hon. Kathy A. Hardcastle, District Judge
Howard Roitman, Settlement Judge
Chesnoff & Schonfeld
State of Nevada/DETR
Eighth District Court Clerk