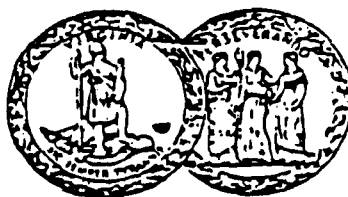


COMMONWEALTH OF VIRGINIA  
VIRGINIA EMPLOYMENT COMMISSION

PROCEDURE: 10.1  
Timeliness of Appeal --  
Filing an Appeal.



DECISION OF COMMISSION

In the Matter of:

Allan Gonzalez  
████████████████████

John E. Thornhill  
Roanoke, Virginia

Date of Appeal  
to Commission: May 9, 1990  
Date of Hearing: June 1, 1990  
Place: RICHMOND, VIRGINIA  
Decision No.: 33733-C  
Date of Mailing: June 22, 1990  
Final Date to File Appeal  
with Circuit Court: July 12, 1990

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This matter comes before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-9004101), mailed April 13, 1990.

APPEARANCES

None

ISSUE

Did the claimant file a timely appeal from the decision of the Appeals Examiner, and if not, does he have good cause to extend the statutory appeal period as provided in Section 60.2-620B of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

By letter postmarked May 9, 1990, the claimant filed an appeal from the decision of the Appeals Examiner (UI-9004101), which was mailed on April 13, 1990. In that decision, the Appeals Examiner

found that the claimant was disqualified from receiving benefits, effective January 7, 1990. The basis for that disqualification was the Appeals Examiner's findings that the claimant had left his job voluntarily for reasons that would not constitute good cause.

The Appeals Examiner's decision was mailed to the claimant at 2305 Coachman Circle, Roanoke, Virginia 24012. This was the claimant's correct, last-known address that he had provided to the Commission. It is the same address that he provided the Commission when he initiated this appeal. On the front page of the Appeals Examiner's decision, a notice appears which informed the claimant and the employer of their appeal rights, the procedure for filing an appeal, and the final date for doing so. In this case, the final date for appealing the Appeals Examiner's decision was May 4, 1990.

The claimant's letter of appeal was dated May 3, 1990; however, it was postmarked by the U. S. Postal Service in Roanoke, Virginia on May 9, 1990. The claimant did not offer any explanation in his letter of appeal regarding its untimely filing. The Commission scheduled an evidentiary hearing for 4:00 p.m. on June 1, 1990. The purpose of that hearing was to afford the claimant and the employer an opportunity to appear and offer evidence and argument regarding the timeliness issue. Both parties were put on notice that, in lieu of a personal appearance, sworn affidavits could be submitted. Neither the claimant nor the employer appeared for the Commission hearing, and neither of them submitted affidavits for the Commission to consider.

#### OPINION

Section 60.2-620B of the Code of Virginia provides that an Appeals Examiner's decision shall become the final decision of the Commission unless an appeal is filed within twenty-one days of the date which it was mailed to the last known address of the party requesting the appeal. For good cause shown, the appeal period may be extended.

In the case of Barnes v. Economy Stores, Inc., Commission Decision 8624-C (November 22, 1976), it was held:

The aforementioned statute enunciates the statutory time limit in which an appeal from a decision of an Appeals Examiner must be filed. It allows an extension of that 14-day (subsequently extended to 21 days) time limit where good cause is shown. A reasonable construction of the good cause provision of that statute is that in order for good cause

to be shown the appellant must show some compelling and necessitous reason beyond his control which prevented him from filing an appeal within the enunciated statutory time limit.

When appeals are filed by mail, the Commission has consistently used the postmark date affixed by the U. S. Postal Service as the date of filing. The Commission has followed this practice because the independent action of the U. S. Postal Service in postmarking an envelope clearly shows when the letter left the control of the appellant. In cases where the letter is dated within the appeal period, but postmarked after the appeal period has expired, the Commission has scheduled an evidentiary hearing to give the appellant an opportunity to show that the letter passed from his control within the appeal period. Accordingly, in a number of cases where the appellants have presented credible evidence that the appeal was deposited with the post office within the appeal period, the appeal has been deemed timely. (Underscoring supplied)

In this particular case, the claimant's appeal was postmarked on May 9, 1990, five days after the appeal period expired. Although afforded the opportunity to do so, the claimant neither appeared before the Commission nor submitted an affidavit which would have explained the discrepancy between the date on his appeal letter and postmark date affixed by the U. S. Postal Service. In the absence of any credible evidence to establish that the appeal was deposited with the U. S. Postal Service on or before May 4, 1990, the Commission has no alternative but to conclude that good cause to extend the appeal period has not been shown. Consequently, the decision of the Appeals Examiner has become final and the Commission does not have any authority to review, reconsider or modify it.

#### DECISION

The claimant's appeal is hereby dismissed pursuant to the provisions of Regulation VR 300-01-4.3A3 of the Rules and Regulations Affecting Unemployment Compensation since his appeal was not timely filed and good cause to extend the appeal period has not been proven.

*M. Coleman Walsh, Jr.*

M. Coleman Walsh, Jr.  
Special Examiner