

**IN THE
MISSOURI COURT OF APPEALS
EASTERN DISTRICT**

JANET B. POTTS,

Appellant,

v.

**J&B FOODS OF SIKESTON, INC.
&
DIVISION OF EMPLOYMENT SECURITY,**

Respondents,

No. ED94887

**Appeal from the Labor & Industrial Relations Commission,
Division of Employment Security**

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. The Division of Employment Security lacked jurisdiction to entertain J&B Foods' untimely protest and to *sua sponte* invoke the misconduct defense invoked by J&B Foods.

The Division concedes that Section 288.070.1 requires an employer to file a protest to an application for unemployment benefits within 10 days of the Division's mailing of notice of the application. (RB 13). The Division also concedes that J&B Foods' protest was untimely. (RB 14). Nonetheless, the Division asserts that it had jurisdiction to deny Appellant unemployment benefits. The Division's arguments in support of this assertion are meritless.

The Division begins by implying that Appellant forfeited or waived her jurisdictional argument by failing to raise it before the Commission or the Appeals Tribunal. But "subject matter jurisdiction may not be waived, may not be conferred by consent, and can be raised at any time by any party or court, even in a collateral or subsequent proceeding[.]" Hightower v. Myers, 304 S.W.3d 727, 733 (Mo. 2010). As Appellant noted in her opening brief, an executive agency (unlike a circuit court, State ex rel. Webb ex rel. J.C.W. v. Wyciskalla, 275 S.W.3d 249, 252 (Mo. 2009)) has "only limited jurisdiction as is conferred upon it by statute." Sodipo v. University Copiers, 23 S.W.3d 807, 809 (Mo. Ct. App. E.D. 2000). (The Division is not a court, State ex rel. Keitel v.

Harris, 186 S.W.2d 31, 33 (Mo. banc 1945), and thus has no common-law or inherent powers to create procedural or other rules, absent a statutory authorization to do so, cf. McPherson v. U.S. Physicians Mutual, 99 S.W.3d 462 (Mo. Ct. App. W.D. 2003) (discussing the inherent powers of courts.) Accordingly, “time limits imposed on administrative agencies by statute are jurisdictional and . . . once the time limit passes, the agency is without jurisdiction to proceed in the matter.” Fehrman v. Blunt, 825 S.W.2d 658, 662 (Mo. Ct. App. E.D. 1992). Accord State ex rel. Missouri Health Care Ass'n v. Missouri Health Facilities Review Committee, 768 S.W.2d 559, 562 (Mo. Ct. App. W.D. 1988). The Division’s waiver argument is a nonstarter.

The Division’s second argument is that because, as the Appeals Tribunal found, Appellant had good cause for filing a late appeal, this Court must *assume* that the Division also concluded that J&B Foods had good cause excusing the untimeliness of its protest. (RB 14). But when no evidence appears in the record (a record prepared by the Commission, and a record the Division has made no attempt to supplement) supporting an agency finding, and the agency never makes or adverts to any such finding, this Court cannot assume the evidence existed. This Court can only consider evidence actually appearing in the record. Tucker v. United Healthcare Services, Inc., 232 S.W.3d 636, 638 (Mo. Ct. App. S.D. 2007) (“This court is prevented from receiving or reviewing matters outside the record.”). Here, there is no evidence in the record that J&B Foods ever

alleged, or had, good cause for filing an untimely protest. Ergo, the protest was untimely, and the Division lacked jurisdiction to entertain the protest, just as the Commission lacks jurisdiction to consider untimely requests to review *denials* of unemployment benefits. See Jones v. St. Louis Lead Prevention, 211 S.W.3d 645, 646 (Mo. Ct. App. E.D. 2007) (“Without a timely application for review, the Commission had no jurisdiction over Claimant's case.”).

Alternatively, the Division urges this Court to remand the case so that the Commission can clarify whether it found that J&B Foods had good cause. (RB 15). This is not a valid request. If the record on appeal, prepared by the Commission, is incomplete, the Division’s remedy was to move this Court to supplement the record. See Rule 81.12(f). Moreover, the Division cites no authority in support of its plea to allow J&B Foods a do-over, which generally offends due process. Windsor v. Windsor, 166 S.W.3d 623, 636 (Mo. Ct. App. W.D. 2005). Nor is Appellant seeking to invoke a new rule, but rather a long-established rule – namely, that administrative agencies have limited jurisdiction and hence cannot entertain applications, protests, or other request for relief when the statutory deadlines for administrative action have passed. See also Sumners v. Sumners, 701 S.W.2d 720, 723 (Mo. 1985) (noting that retroactive application of changes in the law effected by appellate decisions is the norm.)

Next, the Division seeks to intimidate this Court into ruling against Appellant by implying that accepting her argument will result in the cut-off of massive amount of federal funding and loans. (RB 15-18). The Division notes that if Missouri law, including its appellate decisions, fail to “substantially comply” with Title III of the Social Security Act and the Federal Employment Tax Act., Missouri could annually lose “\$990 million . . . in tax credits for Missouri employers and . . . \$35 million in federal unemployment insurance administrative grants[.]” (RB 18).

The Division’s parade of horrors should frighten nobody. First, whether Missouri law complies with federal grant and loan requirements has no bearing on whether the Division complied with *Missouri* law. If Missouri has failed to satisfy the federal requirements, the solution is to prospectively change state law (avoiding the dire results posited by the Division), not to punish Appellant for relying on that law, by changing the rules in the middle of the game because they are adverse to the Division.

Second, the Division’s argument, insofar as relevant, is undeveloped. The Division assumes that a ruling Appellant’s failure would result in a finding, by the U.S. Department of Labor, that Missouri is failing to “substantially comply” with the federal funding conditions – but no argument is made, nor any authority cited, in favor of the Division’s assumption. Appellant certainly hasn’t found any federal statute or regulation that prohibits States receiving federal funding under Title III from employing reasonable

deadlines on employer protests. To the contrary, the Secretary of the U.S. Department of Labor has concluded that (1) "if the information obtained in the first instance [by the state agency] discloses no essential disagreement and provides a sufficient basis for a fair determination [about eligibility for unemployment benefits], no further investigation is necessary," and (2) "the investigation [by the state agency of eligibility for benefits] should not be so exhaustive and time-consuming as to unduly delay the payment" of unemployment benefits and "to result in excessive costs." U.S. DEP'T OF LABOR, *Employment Security Manual*, Part V, Section 6013.A. Missouri's deadline on employer protests, in existence since 1945, is safe from federal challenge. (Practically speaking, too, it is farfetched to believe that the current presidential administration, which has sought to *extend* unemployment benefits, would even entertain the notion of terminating the funds Missouri needs to fund its unemployment compensation program, all because of a victory by Appellant.) Finally, there is no reason to believe that employers with any regularity file untimely protests or that the Division routinely entertains untimely protests. Absent evidence to the contrary, of which the Division provides none, this Court must presume the contrary, since the filing of a protest, and the determination of whether the protest is timely, is simple.

The Division's last argument is that because it has a statutory obligation "to administer the unemployment security law," MO. REV. STAT. §288.220.2 (2010), and

because the purpose of that law is to provide unemployment benefits to persons “unemployed through no fault of their own,” MO. REV. STAT. §288.020.1 (2010), the Division has the statutory authorization to disqualify a claimant, pursuant to Section 288.050, whether or not a timely protest is filed. (RB 19-21). “The only ramification to an untimely protest,” the Division maintains, “is that the employer has waived its right to appeal the Division’s determination.

The Division’s argument suffers from numerous defects. First, Appellant does not (*pace* the Division) believe that the Division is “just an administrative adjudicator of disputes raised by an employer.” (RB 20). The Division is doubtless a party to the unemployment benefits case, an advocate of proper distribution of the Trust Fund created from unemployment security taxes on employers. (That is why the Division has standing to appeal an adverse decision by the Commission, granting unemployment benefits. Dubinsky Bros., Inc. v. Industrial Commission, 373 S.W.2d 9, 12-14 (Mo. banc 1963).) The question here, though, is whether the Division has the power to entertain untimely protests (absent a “good cause” finding) or to *sua sponte* consider the defenses, such as misconduct, that could have been raised in a timely protest. The answer is, “No.”

An overview of Chapter 288 of the Missouri Revised Statutes helps clarify why this is so. Section 288.070, which the Division repeatedly invokes, specifies the procedure whereby unemployment-benefits claims are processed. A deputy of the Division is

required to ascertain the claimant's eligibility for benefits, which is controlled by the provisions of Section 288.040, not the disqualifying provisions of Section 288.050. Wheeler v. Poor Boy Tree Service, Inc., 252 S.W.3d 253, 257 (Mo. Ct. App. S.D. 2008) ("Section 288.040 addresses eligibility for benefits, while [Section] 288.050 deals with disqualification for benefits."). The Division must mail notice of the claim to the former employer. MO. REV. STAT. §288.070.1 (2010). The former employer can then file a protest, though it must be filed within ten days of the date the notice of the claim was mailed to the employer, unless the ten day period is extended by the Division for "good cause." MO. REV. STAT. §288.070.1, .7 (2010). If a timely protest is filed (or good cause found), the deputy must resolve "the issue or issues raised by the protest." MO. REV. STAT. §288.070.1 (2010). One such issue is whether the claimant is disqualified from receiving benefits because of misconduct connected with work, MO. REV. STAT. §288.050, which the employer has the burden of proving, Akers v. Barnes Jewish Hospital, 164 S.W.3d 136, 138 (Mo. Ct. App. E.D. 2005) – a burden that presupposes the filing of a timely protest, as required by Section 288.070.1.¹

¹ Appellant is not arguing that the Division can never recognize that a claimant is disqualified for receiving benefits because of misconduct unless raised in a timely protest. In the rare case where a claimant alleges facts in her (or his) application that, if true, would establish misconduct disqualifying the claimant from receiving unemployment benefits,

Neither Section 288.070 – the *only* statute that specifies the procedure for Division review of unemployment claims – nor any other statute authorizes the Division to consider untimely protests or to *sua sponte* raise issues that could have been raised in a timely protest. Section 288.220.4 authorizes the Director of the Division of Labor and Industrial Relations, which supervises the Division, to promulgate “methods of procedure,” in compliance with Missouri’s Administrative Procedure Act, MO. REV. STAT. §288.102 (2010). But the Director has never promulgated a rule allowing the Division to consider untimely protests unsupported by good cause (a rule that would be invalid, because flatly contrary to Section 288.070) or to *sua sponte* raise the defenses (e.g., misconduct) made available to employers by Section 288.050. In any event, the latter power would make the ten-day limitation on filing protests and the good-cause exception thereto mere empty words, contrary to this Court’s presumption “that the legislature did not insert superfluous language or idle verbiage” in its statutes. Dubinsky v. St. Louis Blues Hockey Club, 229 S.W.3d 126, 130 (Mo. Ct. App. E.D. 2007).

In short, the Division is an administrator of *all* the provisions of the law, including the procedural restrictions, and as an advocate of the Trust Fund it is constrained by the

the claimant has pleaded herself out of court, as it were. An employer is not required to protest its former employee’s admission that the employee is disqualified from receiving unemployment benefits.

statutes and regulations implementing them. The Division cannot be allowed to be a *selective* administrator or benefit, qua advocate, from nonexistent procedural rules.

The Division is correct that statutory purpose can help in interpreting statutes. But the best evidence of legislative purpose is the statutory text: “[E]very statute intends not only to achieve certain policy objectives, but to achieve them by the means specified. Limitations upon the means employed to achieve the policy goal are no less a ‘purpose’ of the statute than the policy goal itself.” Holloway v. United States, 526 U.S. 1, 18 (1999) (Scalia, J., dissenting). The means specified by the General Assembly for processing and reviewing claims for unemployment benefits are specified by Section 288.070 – period. Moreover, though the General Assembly “declare[d] that in its considered judgment the public good and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed *through no fault of their own*,” the General Assembly also stated that the law should be “*liberally construed* to accomplish its purpose to promote employment security both by increasing opportunities for jobs through the maintenance of a system of public employment offices and by providing for the payment of compensation to individuals in respect to their unemployment.” MO. REV. STAT. §288.020.1-2 (2010) (emphases added). In other words, the General Assembly posited a general purpose of helping those employed through no

fault of their own, but when it came time to instructing the courts how to construe the provisions, the instruction was to liberally construe the coverage and eligibility provisions, and to "strictly and narrowly" construe the disqualifying provisions, "in favor of finding that an employee is entitled to compensation." Sokol v. Labor and Indus. Relations Comm'n, 946 S.W.2d 20, 23 (Mo. Ct. App. W.D. 1997). Accord Clement v. Kelly Services, Inc., 277 S.W.3d 327 (Mo. Ct. App. E.D. 2009). The Division's attempt to invert the General Assembly's instructions on interpreting the provisions of Chapter 288 is a failure.

In sum: Because J&B Foods' protest was untimely and because no statutory provision (or procedural rule) authorized the Division to *sua sponte* raise a misconduct defense, the Division lacked the jurisdiction to disqualify Appellant from receiving benefits, and the Commission thus misapplied or misconstrued the law by failing to overturn the Division's decision.

II. The Commission erred, and clearly erred, in finding that Appellant committed misconduct warranting denial of unemployment benefits.

The Division contends that habitual tardiness or absences by an employee or an employee's habitual failure to provide timely notice of tardiness to the employer are valid bases for a Commission finding of employee misconduct, disqualifying the former

employee from receiving unemployment benefits. This is true, MO. REV. STAT. §288.050.3 (2010), but doesn't help the Division.

First and foremost, the Commission never found that Appellant had engaged in a pattern of tardiness or absenteeism or habitually failed to comply with J&B Foods' requirement that employees provide timely notice of impending tardiness or absenteeism. Rather, the Commission, which adopted the decision of the Appeals Tribunal, (LF 20), found that competent and substantial evidence supported the Appeals Tribunal's finding. The only misconduct finding made by the Appeals Tribunal is that Appellant was tardy on February 8, 2009, and failed to provide timely notice of her impending tardiness. As the Appeals Tribunal stated:

Claimant did not report for her shift and was tardy to work. Claimant did not call in per the employer's policy. Claimant asserts she was permitted to come in late. Employer credibility refuted the claimant's allegation. Employer testified that there was no such agreement with the claimant allowing her to come to work tardy after church. Claimant's failure to report to work as scheduled or properly report the tardy in accordance with employer policy is willful and reflects a substantial disregard for the employer's interest and of reasonable standards of behavior which the employer had a right to expect from her.

(LF 11-12). At the hearing before the Appeals Referee, moreover, Manager Bullard admitted that the proximate reason for terminating Appellant was the February 8th tardiness, and the Appeal Referee stated that "the issue is the one you discharged her for," referring to the February 8th tardiness. (TR 14-15). And when Manager Bullard attempted to testify about a matter beyond that issue (e.g., Appellant's manner of talking to customers), the Referee cut him off and instructed Bullard to "stick to the issue." (TR 36). What the foregoing establishes is that the only questions before the Commission was whether Appellant was tardy on February 8th and whether she had permission to be tardy and work through her lunch to make up missing time. As Appellant's opening brief establishes, and as the Division does not seriously contest, even if this Court accepts as true (as this Court must) all the testimony by J&B Foods' witnesses, Appellant had permission to arrive late on February 8th and work through her lunch, as she did.

Why does any of this matter? If this Court were reviewing the judgment of a circuit court, it wouldn't, for this Court will affirm – must affirm – any circuit court judgment that reaches the right result, even if the circuit court gave erroneous reasons for its judgment. But when an administrative agency's decision is reviewed, it is the agency's actual decision, based on the reasoning it actually gave, that is reviewed. See Williams v. Enterprise Rent-a-Car, 297 S.W.3d 139, 143 (Mo. Ct. App. E.D. 2009) ("The Division's reliance is misplaced, however, because the Commission, as the finder of fact, did not base its finding

of misconduct on this statutory provision.”). A “simple but fundamental rule of administrative law” is that a “reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which [the legislature] has set aside exclusively for the administrative agency.” S.E.C v. Chenery Corp., 332 U.S. 194, 196 (1947). “[A]n administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its actions can be sustained.” S.E.C. v. Chenery Corp., 318 U.S. 80, 95 (1943). So even if the Division were right about Appellant’s (alleged) pattern of absences and tardiness and failure to notify J&B Foods of them in a timely matter, this Court could not properly affirm the Commission’s decision on those grounds.

In any event, the Division is wrong that the record supports a (hypothetical) finding of the pattern posited by the Division. The only “evidence” cited by the Division is the bare allegations made by J&B Foods in its “Employer Statement.” This is hearsay, a statement made outside of the adjudicative body, introduced for the truth of the matter stated. Though “reception of hearsay evidence does not dictate a reversal of the agency

decision unless there is not sufficient competent evidence to sustain the decision," Moore v. City of University City, 851 S.W.2d 118, 120 (Mo. Ct. App. E.D. 1993) (internal quotations omitted), there is no other (sufficient) evidence that supports the pattern finding posited by the Division.

In sum: The record supports neither the actual grounds for the Commission's decision nor the grounds posited by the Division on appeal. Consequently, even if the Division had the jurisdiction to sua sponte invoke a misconduct defense on behalf of J&B Foods, the Commission erred in ratifying the Division's misconduct finding.

CONCLUSION

This Court should reverse the Commission's decision.

Respectfully submitted,



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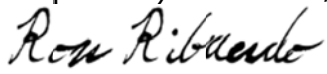
CERTIFICATE OF COMPLIANCE & SERVICE

I certify that:

1. Pursuant to Mo. Sup. Ct. R. 84.06, the attached brief contains 3,252 words, as determined by Microsoft Word 2010 software;
2. Pursuant to Special Rule 363, in lieu of filing a floppy disk of the brief, an email message was sent to this Court (moapped@courts.mo.gov) on November 4, 2010, which included as attachments copies (in .pdf and Word 2010 versions) of the brief, which were scanned and virus-free.
3. True and correct copies of the attached brief and CD disks containing copies of this brief were mailed, by first class mail, on November 4, 2010, to:

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