



VIRGINIA:

IN THE CIRCUIT COURT OF FAIRFAX COUNTY

Emmanuel Georgios Mavromatakis)
)
 Petitioner,)
)
 v.)
)
 Virginia Employment Commission)
)
 Respondent.)
)

Civil Case CL-2023-11460

MEMORANDUM OPINION AND ORDER

THIS MATTER comes before the Court on Emmanuel Mavromatakis’ *Petition for Judicial Review of a Virginia Employment Commission Ruling* (Decision No. 135589-C). For the reasons stated herein, the Court reverses the decision of the Virginia Employment Commission (hereafter “VEC” or the “Commission”) and remands the matter to the VEC for further proceedings.

A. Summary

The term “perfect storm” became part of the popular vernacular after the 1997 publication of Sebastian Junger’s book, *The Perfect Storm*, which described a freakish confluence of meteorological events resulting in a tragic maritime disaster. According to Merriam-Webster, the term has come to describe any “critical or disastrous situation created by a powerful concurrence of factors.”¹ This case concerns just such a perfect storm.

Like many perfect storms, this one began with clear skies. The Petitioner, an IT systems administrator, was gainfully employed from May 2018 until January 2020. However, on January 15, 2020, he was laid off due to a reduction in force. On April 20, 2020, the Petitioner filed a claim for unemployment benefits with the VEC. His claim was processed promptly and uneventfully. The Petitioner’s benefits were authorized and paid out, with the “benefit year” beginning on April 19, 2020 and ending on April 17, 2021.

In November 2020, the Petitioner was re-employed. However, he was laid off again on February 16, 2021. Less than a week later, on February 22, 2021, the Petitioner filed a new claim with the VEC for unemployment benefits. Thus began the Petitioner’s troubles, exacerbated by a “powerful concurrence of factors.” Those factors included the following:

¹ *Perfect Storm*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/perfect%20storm> (last visited December 7, 2023).

- (1) The Petitioner had very limited experience dealing with the VEC and was unfamiliar with its procedural requirements.
- (2) The Petitioner was acting in a *pro se* capacity, and thus was entirely dependent on the VEC itself for assistance.
- (3) The unemployment compensation claim that the Petitioner filed with the VEC on February 22, 2021, was met with radio silence from the VEC. It was not granted; nor was it denied. In fact, the Petitioner received no substantive response at all.² Of all the unfortunate events that would occur during the next two years, the VEC's failure to respond to the Petitioner's February 22, 2021 claim submission is certainly one of the most unfortunate. It is likely that *if* the VEC had responded, and *if* it had told the Petitioner *why* his February 22, 2021 claim would neither be granted nor denied, the difficulties that ensued might have been avoided.³
- (4) Unfortunately, this did not happen. The Petitioner could only envision one remedy: *He would ask the VEC for assistance.* The VEC, however, was swamped, overwhelmed with pandemic-related claims and inquiries.⁴ Over the next several months, the Petitioner made “hundreds and hundreds” of fruitless and frustrating phone calls to VEC customer service, and equally futile attempts to use the online interactive chat “helpline”. He could reach no one who could help him.
- (5) In early July 2021 – after months of being unemployed *without* unemployment compensation – the Petitioner sought help from the staff of his state legislator. With their assistance, he was finally able to obtain advice from the VEC: In order to obtain backpay for the months he had been unemployed and uncompensated, the Petitioner would need to file a *new* claim with the VEC. The new claim was filed immediately. The date was July 7, 2021.

² While the record before the Court contains the February 2021 unemployment compensation claim, it does not contain *any* response from the VEC. Given that the VEC would certainly have included its response in the record if one had existed – as it did with the Petitioner's April 2020 claim, and as it did with the Petitioner's July 2021 claim, and as it was required to do pursuant to Va. Code §60.2-625(a) – the Court assumes that there was no response made to the Petitioner's February 2021 claim.

³ It appears that the reason the VEC never responded to the Petitioner's February 2021 claims submission was because the Petitioner's *prior* claim for unemployment compensation was still active. The “benefit year” approved in connection with that claim was not due to expire until April 17, 2021. Thus, the February 2021 claims submission was premature and – if the Petitioner became re-employed prior to April 17, 2021 – unnecessary. Had this actually been explained to the Petitioner, he would almost certainly have known to file a new claim on April 18, 2021 if he remained unemployed.

⁴ At oral argument, the Petitioner quoted statistics from a Joint Legislative Audit and Review Commission (“JLARC”) Report, indicating that in June 2020, the VEC received three million calls and answered only 6% of them, and a year later, in June 2021 – which was one of the time periods in which the Petitioner was vainly trying to get assistance from the VEC – the percentage of answered calls decreased even further. According to the Petitioner, JLARC's Report indicated that in June 2021, the Commission received four million calls and answered only 4% of them.

- (6) It took just 24 hours for the Petitioner’s hopes to be dashed. On July 8, 2021, the VEC issued a Monetary Determination that addressed *prospective* unemployment compensation only. The determination was entirely silent regarding *retroactive* unemployment compensation, even though the claim submission made clear that the Petitioner had not been employed since February 16, 2021. It did not deny – or even address – retroactive compensation; rather, the Monetary Determination appeared to simply have nothing to do with it.
- (7) Once again – and despite the “ordeal” he had just been through of trying, and failing, to reach someone at the VEC who could help him – the Petitioner decided he needed to try again. Unfortunately, his post-July 8, 2021 experience was just as futile and just as fruitless as his pre-July 8, 2021 experience. So, on August 30, 2021, the Petitioner turned again to his state legislator for help. Through the intervention of the legislator’s staff, the Petitioner was able to speak with a VEC representative. This is what he was told: In order to obtain the retroactive unemployment compensation he had been seeking for months, the Petitioner needed to file an appeal of the July 8, 2021 VEC Monetary Determination.
- (8) The Petitioner acted immediately. He filed the appeal on September 2, 2021, which was either the same day or the day following his phone call with the VEC.
- (9) Almost two years would pass before the Petitioner learned the final result of his appeal: *The VEC would provide him no relief*. And the reason had nothing to do with the merits of his claim for retroactive pay.

There were two levels of administrative appeal available to a petitioner aggrieved by a VEC decision: a “First Level” appeal, presided over by a VEC Appeals Examiner, and resulting in a document entitled “Decision of Appeals Examiner”; and a “Second Level” appeal, presided over by a VEC Special Examiner, and resulting in a document entitled “Decision of Commission”. The Petitioner availed himself of both levels of appeal, and both were denied.

- a. The VEC Appeals Examiner responsible for considering the Petitioner’s “First Level” appeal convened a hearing, took sworn testimony from the Petitioner, and then issued a decision denying the Petitioner’s appeal without ever reaching the merits. The Appeals Examiner held that the appeal was untimely and that there was no “good cause” for an extension of time. Therefore, the Monetary Determination issued by the Commission on July 8, 2021 was now “final”.
- b. The “Second Level” appeal was no more successful than the first. A hearing was convened, the Petitioner testified, and the Commission issued its decision a little over a month later. Once again, the appeal was denied without the merits ever being reached. The Commission recounted the Petitioner’s futile efforts to get help from the VEC, and stated that it did not want to “diminish[]” the Petitioner’s “difficult experience.”⁵ Yet, despite this expression of

⁵ That characterization – a “difficult” experience – is a considerable understatement. Petitioner’s own description of his experience – in his VEC testimony and submissions – more accurately capture what he went through: it was “agonizing”; it was “daunting”; he was “dead in the water”; it was “hurtful”; it was “agony; “I was trapped”; and “It was absolutely terrible.” As the Petitioner said at one point in his testimony: “[T]he VEC was absolutely unresponsive in every single way.” (R. 65).

sympathy for what the Petitioner would later describe as his “multi-year VEC ordeal” (Pet. Exh. D, at 1), the Commission gave that “ordeal” no weight in its decision. It rejected the Petitioner’s assertion of “good cause” for an extension of the appeals deadline.

For the reasons set forth in this Opinion, the Court reverses the VEC. Specifically, the Court finds that the VEC’s determination that there was no “good cause” for an extension of the appeal deadline was unsupported by the evidence, even in the light most favorable to the Commission.⁶

The Commission essentially relied on just four facts to find no “good cause”: (1) the July 8, 2021 Monetary Determination was mailed to the Petitioner’s correct address; (2) the Petitioner assumed he received it; (3) the Monetary Determination contained a statement that the Appeals Deadline was August 7, 2021; and (4) the Petitioner did not file his appeal by August 7, 2021. If the standard was “strict liability,” these four facts would be sufficient. But the standard is not “strict liability.” The General Assembly explicitly provided petitioners a statutory exception from the rigid application of the appeals deadline, apparently in recognition that, in some cases, there are extenuating circumstances of such significance that they warrant excusing a petitioner’s failure to file a timely appeal.

This was just such a situation. The Petitioner’s testimony regarding *his* extenuating circumstances was both compelling and unchallenged.⁷

Although the Commission denied the Petitioner’s request for a “good cause” extension of the appeal submission deadline, it certainly was not because the Commission questioned the Petitioner’s credibility or truthfulness. To the contrary, the Commission acknowledged and accepted the Petitioner’s “difficult” experience attempting to get assistance from the VEC. What it did not acknowledge or accept was that this difficulty had any bearing on the Petitioner’s ability to file a timely appeal. This finding was not only erroneous but without evidentiary support.

⁶ The Petitioner also asserts that his Due Process rights were violated, thus raising both a state and federal constitutional issue. (Pet. at 2, 3). Given that the Court resolves this matter on statutory grounds, the Court will not reach the Due Process issue. *See, e.g., Commonwealth v. White*, 293 Va. 411, 419 (2017) (citations and internal quotations omitted) (“As we have often said, [t]he doctrine of judicial restraint dictates that we decide cases on the best and narrowest grounds available.”). This principle applies with particular vitality when constitutional issues are involved, given the Court’s obligation “to avoid deciding constitutional issues if possible.” *Cody v. Commonwealth*, 68 Va. App. 638, 657 (2018) (citations omitted.)

⁷ The VEC, in its brief in opposition to the Petition now before the Court, states that the Commission is “not required to state its reasons for believing one witness over another.” (VEC Brief, at 2.) True enough, but it also was not an issue in *this* case. Only one witness testified at either appeal hearing and that was the Petitioner.

Therefore, the Court reverses and remands the matter to the VEC for an evaluation of the *merits* of the Petitioner's claim for retroactive unemployment compensation.⁸

B. Factual Background

By profession, the Petitioner is an IT Systems Administrator.

On **April 20, 2020**, the Petitioner filed a claim for unemployment insurance benefits with the VEC. In his claim, he stated that, on May 1, 2018, he had begun work for a company named Digital Consultants but was laid off on January 15, 2020, due to a reduction in force. (R. 1-7).

On **April 21, 2020**, the VEC issued a Monetary Determination, authorizing 26 weeks of unemployment insurance with an "Effective Date" of April 19, 2020, and a "Benefit Year Ending Date" of April 17, 2021. (R. 8-9).

On **February 22, 2021**, the Petitioner filed a second claim for unemployment insurance benefits with the VEC. In his claim, he indicated that he started working at an employer named TEK Systems on November 16, 2020, but was laid off on February 17, 2021, due to "Lack of Work" and "Reduction in Force." (R. 10-12). He stated that his last day worked was February 16, 2021. *Id.* There is no indication in the record that the VEC ever made a substantive response to this claim.⁹

On or about **July 6, 2021**, the Petitioner's mother contacted Delegate Dan Helmer, of the Virginia House of Delegates, for assistance in reaching the VEC. Delegate Helmer's Chief of Staff, Noah Bardash, sought additional information in order to submit a legislative inquiry to the VEC on behalf of the Petitioner. (R. 27-28). On July 7, 2021, the Petitioner provided Mr. Bardash with the requested information by email. (R. 27). He also told Mr. Bardash that he had "continuously tried to get in contact with the VEC customer contact center regarding the status of my claim and my numerous missing payments. I have also tried using the VEC online interactive chat help line – but I have never been able to get through to customer service." (R. 27). On July 9, 2021, Mr. Bardash emailed the Petitioner that his request for unemployment benefits was "being submitted on your behalf from our office as a legislative inquiry." (R. 26).

On **July 7, 2021**, a claim for unemployment insurance benefits was filed with the VEC. The claim states that the Petitioner's last day worked was on February 16, 2021. (R. 13-15).¹⁰

⁸ The Court expresses no view as to the ultimate relief sought by the Petitioner, *i.e.*, eleven weeks of unemployment compensation backpay, covering the time period of April 18, 2021 to July 3, 2021. This is because the Commission never reached the merits of the Petitioner's claim to retroactive unemployment compensation. The sole issue the Commission did address is whether or not there was "good cause" for an extension of the appeals deadline. Therefore, that is also the sole issue addressed in this judicial review.

⁹ The Petitioner stated that he did receive a "PIN" number, with an effective date of February 23, 2021. (R. 99).

¹⁰ The Court assumes that this is the request for unemployment benefits that Mr. Bardash told the Petitioner was being submitted on his behalf.

On **July 8, 2021**, the VEC issued a Monetary Determination, authorizing 21 weeks of prospective unemployment insurance with an “Effective Date” of July 4, 2021, and a “Benefit Year Ending Date” of July 2, 2022. (R. 16-17). Significantly, the Monetary Determination made no reference to denying the approving, denying, or even addressing, the Petitioner’s effort to obtain backpay unemployment compensation for the time period between April 18, 2021 (the day *after* his first claim’s benefit year *expired*), and July 3, 2021 (the day *before* his third claim’s benefit year *began*).¹¹

The July 8, 2021 Monetary Determination contained the following statement:

APPEAL RIGHTS

APPLIES TO ALL DETERMINATIONS. This determination becomes final unless an appeal is filed within thirty days after it is delivered in person or mailed to the last known address. The appeal must be in writing and should set forth the grounds upon which the appeal is sought.

(R. 17). The Monetary Determination also stated that the “FINAL DATE FOR APPEAL FROM THIS DETERMINATION IS 08/07/21.” (R. 16).¹²

The July 8, 2021 Monetary Determination expressly recognized that a petitioner might need additional assistance from the VEC.¹³

On **August 30, 2021**, the Petitioner sought further assistance from Delegate Helmer’s staff:

I’m in need of some additional assistance scheduling a call with the VEC. I have been unable to get through to them again myself. After 6+ months of waiting, I was previously only able

¹¹ The Petitioner stated in an email to Delegate Helmer’s Chief of Staff that he did not recall receiving the Monetary Determination. (R. 26). Since the Monetary Determination was sent to the Petitioner’s address of record, the Court will presume that he received the Monetary Determination. At the first appeals hearing on January 5, 2023, the Petitioner acknowledged that “I believe it, it did come....” (R. 64).

¹² There was an additional Monetary Determination on August 16, 2021, but it does not appear to be germane to the issues now before the Court. The Monetary Determination was entitled “Pandemic Emergency Unemployment Compensation.” The determination stated: “YOU MAY RECEIVE AN EXTRA \$300.00 EACH WEEK THAT YOU RECEIVE BENEFITS FROM BENEFIT WEEK ENDING 01/02/21 THROUGH 09/04/21 UNDER THE CAA [Consolidated Appropriations Act of 2020] AND ARPA [American Rescue Plan Act of 2021].” (R. 18-19).

¹³ The Monetary Determination advised petitioners: “You should visit www.vec.virginia.gov and select “frequently asked questions” to learn more about the monetary determination, weekly eligibility requirements and how to access job services through the VEC.” (R. 17). The VEC also advised claimants to “be sure to contact the VEC by calling 1-866-832-2363 (toll free) or visit the nearest VEC local office” in the event a claimant believed that certain wages were not included in the “base period” or were not correct. (R. 17).

to get through to a VEC customer service representative through the direct assistance of your legislative office. Could you please initiate contact with them again on my behalf and instruct them to contact me as soon as possible? I have a few questions regarding my missing claim for benefits that I cannot answer myself as I require their assistance.

(R. 25). That same day, Mr. Bardash responded that “[w]e are following up once again with the VEC on your behalf.” (R. 25). Finally, on or about September 2, 2021, the Petitioner was able to speak with a VEC representative, who told him he needed to file an appeal of the July 8, 2021 Monetary Determination in order to recover unpaid unemployment compensation.

On **September 2, 2021**, pursuant to the guidance he had finally received from the VEC, the Petitioner filed an appeal from the VEC’s July 8, 2021 Monetary Determination. (R. 22-24).¹⁴ In part, the appeal read as follows:

I have not worked since February 16th, 2021, when I was laid off from my previous employment. It has taken me over six months + time to get a hold of someone from the VEC to assist me with my claim issues and confusion. There was an issue with my existing claim in the system that prevented me from being compensated when I initially lost my job. I did not know what the issue was – and the VEC was not accepting any phone calls. It took me more than 6 months time to get a hold of someone from the VEC. I have contacted my local senator and congressional delegates in need of their assistance. If not for their assistance as the ‘middle men’ between the VEC and myself, I would still potentially be waiting to speak to someone from the VEC – in order to figure out what was wrong with the original claim filed in February. That is the short summary for the delay in submitting this appeal. After finally getting in contact with VEC and speaking to an actual customer service representative, I have been instructed to file an appeal here online in order to “backdate the effective date of my existing claim to start on April 18th, 2021. Backdating the claim to start on April 18th, 2021 will allow me to be compensated/paid out for an additional 11 weeks of missed weekly payments from 04/24/2021 to 07/03/2021 that were not included in the PEUC claim application I recently submitted. This amounts to an additional \$6600 dollars with the inclusion of the additional \$300 per week. I am in desperate need of this money to pay my bills as I have depleted all of my savings! I honestly did not know what was wrong with the claim and it was literally impossible to get in contact with the VEC in order to obtain guidance. As a result, I did not know what to do. Please change the effective date of the existing claim to April 18th, 2021 and compensate me for the additional 11 weeks of unemployment I did not receive in the amount of ~\$6600 USD.

¹⁴ The “Claimant Appeals Filing” states that it was submitted on “9/2/2021 – 6:37:43 pm.” (R. 22). The date of filing is confirmed by the VEC’s “Notice of Appeal,” which states that “[a]n appeal has been filed from a Deputy’s Decision concerning the claimant’s unemployment claim. This appeal is dated September 2, 2021, and was filed by the claimant.” (R. 20). The Notice of Appeal states that a hearing would be scheduled before an appeals examiner. (R. 20).

(R. 22).¹⁵ The appeal form also directed a petitioner who filed an appeal after the deadline set forth in the Monetary Determination to “explain” why. This is what the Petitioner wrote:

I do apologize for the delay, but I did not know what was wrong with my claim and I had no assistance from the VEC. As mentioned above, I have contacted local congressional delete [sic] Dan Helmers office and Government [sic] Northams [sic] staff in order to fascinate [sic] contact with the VEC. If not for their assistance, I would still be waiting to figure out what was wrong with my claim and why I wasn't being contacted. I just recently was able to speak to a VEC customer service representative after waiting more than 6 months to speak to someone who had access to review my claim data. This appeal is requesting a backdate of my existing claim to start on April 18th, 2021. This will allow me to be paid for an additional 11 weeks of missing payments that I am in dire need of. To summarize, I did not know what to do and what was wrong with my account. I did not get a chance to speak to someone from the VEC until the month of July/2021. I didn't know what was wrong with the claim and what needed to be done to correct it. Subsequently, I also did not understand the way the claim system works and there was no one and no way to reach out to for [sic] anyone for additional assistance. I tried to call the VEC main number and local offices hundreds and hundreds of times – but my calls were always rejected and terminated as the automated phone attendant said that there were no agents available to help me. The initial date that I contacted congressional delegate Helmers office was July 6, 2021. Please see the attached .pdf that outlines a snippet of our lengthy conversations back and fourth [sic] in request of assistance from the VEC. I apologize for the delay in submitting this appeal, but I really did not know what to do as the VEC was totally unresponsive and would not provide any customer service or feedback. Please allow me to backdate the effective date of my existing claim to April 18th, 2021 in order to receive the additional 11 weeks of unemployment that I desperately require. Thank you so very much. Emmanuel Mavromatakis. [Phone number and Email Address deleted by the Court.]

(R. 23-24).

On January 5, 2023, an Appeals Examiner convened the hearing on the Petitioner's appeal, introduced certain exhibits without objection, and took sworn testimony from the Petitioner. The first issue which the Examiner addressed with the Petitioner was his failure to file his appeal by the August 7, 2021 deadline and, specifically, whether there was “good cause” to extend the deadline, as permitted by Va. Code §60.2-619(D).

In his testimony, the Petitioner addressed the “agonizing” and “daunting” process of trying “to get ahold of the VEC” to determine why he was not getting unemployment benefits after the April 17, 2021 expiration of his first claim for benefits. The Petitioner testified:

¹⁵ The Court assumes that the Petitioner received unemployment benefits for the time period of February 17, 2021 to April 17, 2021, since he was only seeking benefits from April 18, 2021 forward. The benefits for the time period of February 17, 2021 to April 17, 2021 would have been based on the Petitioner's earlier April 2020 claim, since the benefit year contained in the Monetary Determination arising out of that claim ran from April 19, 2020 to April 17, 2021. Therefore, it would still have been active after the Petitioner became unemployed again on February 16, 2021.

“... I was unable to get ahold of the VEC in any way to get assistance. It wasn’t until July that I was able to finally talk to someone to figure out what was wrong with the account and that’s when we were able to, um, submit the claim” (R. 64).

“I tried calling. There was no way to go to one of the actual physical addresses, because they were all closed down with COVID. The only way that I was able to get ahold of the VEC was through a third-party by using my, uh, Congressman’s office as the middle man for me in order to talk to you guys there at the VEC” (R. 64-65).

“... the VEC was absolutely unresponsive in every single way.” (R. 65).

“... there was a period of inactivity probably more than six months before the VEC improved that customer service that, there was absolutely no way to get assistance with anything with your account, or speak to anyone, or e-mail anybody, or go to an office. We were just dead in the water....” (R. 65).

The Petitioner explained to the Appeals Examiner that since the Monetary Determination covered only a *prospective* time period, *i.e.*, July 4, 2021 to July 2, 2022, the Petitioner did not understand the Monetary Determination to be “pertinent” to the *retrospective* time period for which he was seeking unemployment compensation:

Q. Okay. When you received the Monetary Determination in the mail did you read your appeal rights section on page two?

A. Um, you know? I, I may have. I may not have. I don’t remember. Uh, you know? Again, it had taken to, all that time to get to the point, so yeah. I mean, uh, in, in this case though, the determination, it wasn’t pertinent to the effective date. The effective date was, uh, that I’m trying to backdate to was because I wasn’t able to get ahold of someone at the VEC in, in anyway, so, um, I don’t know how to answer your question that, you know, con-, concisely. Um, I’m sure, -

Q. Okay.

A. I know that it, there’s a date listed there in the paperwork, but, in this case, it’s not pertinent to what I’m trying to do, because there was no way to get ahold of you guys in any fashion in, in the local offices, as well. Like, I wanted to go in-person to, to figure it out, but, you know, at that time, and I even checked to see if the offices were open. You know? They were not open under the, you know, stipulation that, you know, for COVID precautions, our offices our permanently closed, and you have to, you know, try to contact the VEC in, in another way, so I, I did all I could to get ahold of you guys, and I was unsuccessful, and only through the, the use of my delegates’ office or the Congressman’s office, I was able to finally get ahold of someone, so if the paperwork shows, uh, you know, a date that I should have filed an appeal by, it’s not pertinent in this case, because, uh, of the sit-, of the situation at hand.”

(R. 69-70).

It was not until on or about September 1, 2021, or September 2, 2021, that the Petitioner finally learned what he needed to do in order to receive his backpay. It was on one of those days that – through the intervention (again) of his delegate’s staff – he was able to speak with someone from the VEC. In the call, he was advised by the VEC representative that he needed to file an appeal of the July 8, 2021 Monetary Determination in order to seek recovery of the 11 weeks of unemployment (between April 18, 2021 and July 3, 2021) for which he had not previously been compensated. (R. 68). Once he was told that by the VEC, “I did everything as fast as possible.” (R. 68).

The Examiner asked the Petitioner if he remembered when he had that “conversation” with the VEC. (R. 68). The Petitioner testified: “I’ve been waiting for, at that moment, I was waiting for this for months, so as soon as they told me to submit the appeal is probably when I did it, so, I mean, in fact, I know that was the case, so, uh, I would say on the, the date that I submitted the appeal, which was on September 2nd is the date that they told me to do that. Like, it, it had taken all the way until September 2nd to get to that point.” (R. 68-69).

The Appeals Examiner indicated that she was reserving her ruling on “timeliness” and would “proceed to the merits of the case.” (R. 72). The remainder of the hearing was largely devoted to the merits of the Petitioner’s entitlement to unemployment benefits for the 11-week time period preceding July 4, 2021. (R. 72-82).¹⁶

On or about February 3, 2023, the Appeals Examiner issued her “Decision of Appeals Examiner.” First, the Appeals Examiner found that the appeal was not filed on time. It was due no later than August 7, 2021, and was filed on September 2, 2021. Second, the Appeals Examiner found that there was no “good cause” for an extension pursuant to Va. Code §60.2-619(D).

The Examiner noted that the “appeal was not filed on time because the claimant did not believe the determination was pertinent to his desire to receive back pay.” (R. 33) The Examiner found that this did not constitute “good cause” for an extension of time. *Id.* Therefore, the Appeals Examiner held that “the Monetary Determination has become final, and the Appeals Examiner has no authority to address the merits of the appeal.”¹⁷ *Id.*

On or about February 28, 2023, the Petitioner appealed the “Decision of Appeals Examiner.” (R. 34-38). In his appeal submission, the Petitioner asserted that the Appeals Examiner did not “adequately comprehend the reasoning behind the appeal modification being filed past the August 7, 2021, appeals determination deadline.” (R. 36). Specifically, the Petitioner asserted:

¹⁶ Although the appeals examiner took testimony from the Petitioner with regard to the merits of his claim for unemployment backpay, the examiner did not ultimately reach the merits in her decision. (R. 32-33).

¹⁷ The “Decision of Appeals Examiner” makes no reference to the Petitioner’s lengthy and detailed testimony about his many unsuccessful efforts to reach someone at the VEC to obtain further guidance with regard to the back pay issue. (R. 33).

I made it crystal clear to the first level appeals representative that there was no possible way for me to contact the VEC and obtain assistance myself. Out of no fault of my own, the appeal was filed after the determination deadline. This [was] done at the direct guidance of a VEC agent who advised me that an appeal needed to be submitted to claim the missing PEUC weeks.

(R. 36). The Petitioner added:

Due to the nature of the VECs inaccessibility, there was nothing I could have done differently to obey the mandated final date for appeal (as printed) in the monetary determination. I filed the appeal as instructed by the VEC agent as soon as I was told to do so. Up until speaking with the VEC agent (and obtaining guidance from them), I was unsure what was wrong with my account, my claim, or what I needed to do in order to start receiving benefits again. (emphasis in original).

(R. 36-37.) The Petitioner included several bullet points in his appeal:

- “The VEC was unable to provide ANY assistance prior to the influence and direction of the congressional oversight channels.”
- “I contacted local congressional Delegate Dan Helmer and Governor Northams [sic] staff in order to facilitate a forced response from the VEC.”
- “There was no way to reach out to anyone from the VEC myself.”
- “I did not get a chance to speak to anyone from the VEC until after the final date for appeal in question had lapsed.” [Underline in Original.]
- “There was no way for me to figure out what was wrong with my account and claim without the direct assistance of the VEC agents.”

(R. 37-38).

On June 8, 2023, a hearing was convened before a Special Examiner for the VEC. The Petitioner testified, and again described his inability to reach someone at the VEC who could give him guidance as to how to obtain the 11 weeks of unemployment compensation to which he believed he was entitled. (R. 130-149). The Petitioner reiterated that it was only when he was “finally” able to “get ahold” of a VEC customer services agent – through the intercession of his legislator – that he learned that he needed to “file the appeal to receive the backpay.” (R. 134, 137).

On or about July 13, 2023, the “Decision of Commission” was issued. The Special Examiner described the sole issue before the Commission as follows:

Did the appellant file a timely appeal from the Monetary Determination, and if not, does the appellant have good cause to extend the 30-day appeal period as provided in Section 60.2-619(D) of the Code of Virginia (1950), as amended?

(R. 49). The Special Examiner concluded that the Petitioner did not file a timely appeal and that there were “no ‘uncontrollable, necessitous, or compelling circumstances’ that prevented him from filing a timely appeal.” (R. 53) (citations omitted). The Special Examiner recounted the “claimant’s difficult experience” regarding his multiple, unsuccessful efforts to contact the Commission for guidance, but stated that “[t]he

claimant had the choice to file the appeal to protect his interests, and continue to seek assistance. He chose not to file an appeal.” (R. 52). Therefore, “the Commission finds the claimant has not established good cause to extend the 30-day appeal period, and the Monetary Determination with the effective date of July 4, 2021, has become final.” (R. 53).

The Petitioner filed a timely petition for judicial review with the Circuit Court.

C. Position of Petitioner

In his Petition for Judicial Review, the Petitioner, *pro se*, reiterated what he characterized as his “multi-year VEC ordeal.” (Pet. Exh. D, at 1). This included the following statements:

- “The agency provided no means of communication, no means of customer support, and directly prevented the Petitioner from obtaining the support he needed to apply for the lost benefits in question.” (Pet. at 1).
- “[T]he petitioner had no way of obtaining customer service from the VEC – as the VEC was not answering any customer service phone calls, not allowing any in-person scheduled appointments, nor providing customer support to their website which was not allowing unemployed persons the ability to log in – or the ability to chat with a customer service agent for help.” (Pet. at 2).
- “The Petitioner has shown ample good cause for the appeals submission, and monetary determination modification – due to – uncontrollable and compelling circumstances out of his control....” (Pet. at 3).

The relief sought by the Petitioner was 11 weeks of unpaid unemployment compensation, representing the time period of April 24, 2021¹⁸ to July 3, 2021. (Pet. Exh. D, at 2.)¹⁹

D. Position of the VEC

The VEC filed a brief in opposition to the Petition for Judicial Review and asks this Court to affirm the Commission’s decision.

In support of its position, the VEC cites the limited and deferential standard governing the Court’s review of VEC’s determinations, as well as the definition of “good cause” that has been adopted by the Commission in past decisions.

¹⁸ In some places in the record, the starting date for that 11-week period is referred to as April 18, 2021, rather than April 24, 2021. The Court assumes that both dates refer to the same time period, i.e., the week immediately after the April 17, 2021 expiration of the benefit year authorized by his April 2020 claim.

¹⁹ The Petitioner also seeks three weeks of unemployment compensation for payments that he states were “stolen” from him by hackers. The three weeks involved were the weeks of September 25, 2021, October 2, 2021, and October 9, 2021. (Pet. Exh. D, at 2-3). Since the alleged thefts occurred after both the July 8, 2021 Monetary Determination and the September 2, 2021 appeal, the Court expresses no view with respect to these matters.

With regard to the underlying facts, the VEC's brief does not challenge or contest the Petitioner's factual representations, nor does it question the Petitioner's credibility. What the VEC's brief does challenge is the Petitioner's claim that his inability to get any assistance from the VEC over a period of many months bears directly and substantially on the "good cause" analysis. In words virtually identical to that used by the Special Examiner in the Decision of Commission, *see* R. 52-53, the VEC brief says the following:

The Monetary Determination provided detailed information on how to file the appeal, and by which date it must be filed. (R. at 69, 104-105). The Petitioner had the choice to file the appeal to protect his interests, and continue to seek assistance. He chose not to file an appeal.

Filing the appeal within the appeal period was within his control. There were no "uncontrollable, necessitous, or compelling circumstances" that prevented him from filing a timely appeal.

(VEC Brief, at 5).

The Court heard oral arguments on November 3, 2023, and took the matter under advisement.

E. Law

1. Standard of Review

Va. Code §60.2-625 sets out the Standard of Review for a Circuit Court reviewing a decision of the VEC:

In any judicial proceedings under this chapter, the findings of the Commission as to the facts, if supported by evidence and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law.

In addition, the evidence must be considered in "the light most favorable to the finding by the Commission." *Virginia Emp. Comm'n v. Peninsula Emergency Physicians, Inc.*, 4 Va. App. 621, 626 (1987).

2. Definition of the "Good Cause" Standard

Va. Code §60.2-619(D) provides that the 30-day deadline for filing a VEC administrative appeal "may be extended" for "good cause shown." The term "good cause" is not defined in the statute but, as the VEC states in its brief to this Court, "the Commission has consistently held that an appellant must show the existence of compelling and necessitous circumstances beyond her control that prevented the filing of a timely appeal," citing *George v. Kentucky Fried Chicken*, Commission Decision 13353-C (April 10, 1980). (VEC Brief, at 3). This interpretation has been applied by several circuit courts, including the Circuit Court of Fairfax County. *See Cruz v. Virginia Emp. Comm'n*, 25 Va. Cir. 525 (1991), quoting *Barnes v. Economy Stores Inc.*, Commission Decision 82644-C (November 22, 1976) ("A reasonable construction of the good cause provision of the 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.").

However, “good cause” does not *require* proof of impossibility. If it did, the General Assembly could simply have said that the 30-day deadline may only be extended where a timely filing was impossible. The statute contemplates that there will be circumstances, short of impossibility, that warrant relief. This is consistent with the recognition that “the Unemployment Compensation Act should be liberally construed to effect its beneficent aims.” *Virginia Emp. Comm'n v. Peninsula Emergency Physicians, Inc.*, 4 Va. App. 621, 626 (1987) (citing *Virginia Emp. Comm'n v. A.I.M. Corp.*, 225 Va. 338, 346 (1983); *see also Browne v. Virginia Emp. Comm'n*, 9 Va. Cir. 427, at *(1978) (“Considering the beneficial purpose of the Act, the Courts should construe provisions of this Act to effect its purpose without applying strict standards of construction where such a construction would result in an unjust or unfair result to either the employer or the employee. In most cases, an extension of an appeal period would benefit the employee and should be allowed if good cause exists.”)).

F. Analysis

As an initial matter, the Court dispenses with two potential grounds for relief, neither of which are applicable (or asserted) in the instant case. First, there is no question regarding the correctness of the Commission’s determination that the appeal filed by Petitioner was untimely. The deadline was August 7, 2021, and the appeal was filed on September 2, 2021. Second, there is no allegation or evidence of fraud.

This leaves the Court with just one issue to resolve: whether the Commission had evidence to support its determination that there was no “good cause” to grant an extension of the appeal deadline. Put another way, did the Petitioner prove “some compelling and necessitous reason beyond his control which prevented him from filing an appeal within the enunciated statutory time limit.” *See Cruz v. Virginia Emp. Comm'n, supra*. For the following two reasons, the Court finds that the Commission’s decision denying the Petitioner’s “good cause” claim is without evidentiary support and that the Petitioner has satisfied his burden of proof.²⁰

Reason #1

In most cases – perhaps in all but the rarest of cases – a party that is the recipient of a decision from an administrative body can tell immediately and conclusively whether that decision is adverse or favorable or even relevant. If adverse, the deadline for the appeal becomes a critical and looming date, and the party receiving that adverse ruling is assumed to understand that failure to meet the deadline – whether through ignorance, neglect, or inadvertence – will not excuse an untimely appeal. If favorable, however, the appeal deadline has little or no significance – *for why appeal a favorable ruling?* So, too, with an irrelevant ruling – a ruling that does not even concern or address the relief requested – *for what is there even to appeal?*

²⁰ It is important to be precise as to what the Court is *not* saying. It is not saying that it was *impossible* for the Petitioner to file a timely appeal. The July 8, 2021 Monetary Determination (which is the subject of the appeal) was not sent to the wrong address. The Court presumes it was received and read, even if the Petitioner does not recall doing so. The August 7, 2021 appeal deadline appears plainly (and boldly) on the first page of the Monetary Determination. The nation was in the midst of a terrible pandemic, but there is no allegation that the pandemic physically prevented the submission of a timely appeal. Therefore, if “good cause” meant “impossibility” (and only “impossibility”), the Court would readily affirm the Commission. But that is not the definition of “good cause.”

Each of these outcomes – the adverse ones, the favorable ones, the irrelevant ones – have something essential in common: In order to determine whether to file an appeal, the recipient *must* be able to discern which it is: *Adverse, Favorable, or Irrelevant?*

On July 7, 2021, the Petitioner submitted a claim for unemployment compensation to the VEC, seeking to recover what was then 11 weeks of unpaid compensation. On July 8, 2021, the VEC issued a Monetary Determination. The Court presumes that the Petitioner received it and read it (including the appeal deadline). But there was nothing in this document – explicitly or implicitly – to even suggest to the Petitioner that this was actually an *adverse* decision, or even a *relevant* decision, with respect to *retroactive* unemployment compensation. On that issue, the Monetary Determination was silent.

Moreover, what the Monetary Determination was not silent about – *prospective* unemployment compensation – was entirely favorable, and undoubtedly welcomed by the Petitioner. After all, the Petitioner – who had been unemployed since February 16, 2021 – was *still* unemployed. He needed what the Monetary Determination gave him: a right to unemployment compensation (if he remained unemployed) for the year that began on July 4, 2021, and ended on July 2, 2022.

An appeal deadline is only meaningful if a petitioner recognizes that he has something to appeal. The Commission, in its decision denying the Petitioner a “good cause” extension of time, says that the Petitioner should have gone ahead and appealed anyway – even if he still needed assistance from a VEC representative – in order to “protect his interests.” But what “interests” could the Petitioner have recognized a need to “protect” from a Monetary Determination that generously granted him a prospective year’s worth of potential unemployment compensation?

Had the Monetary Determination contained even the hint of a denial of retroactive unemployment compensation, the Petitioner would have known what “interests” needed protection, and he would have been on notice that he needed to file an appeal. But the Monetary Determination contained no such hint. It would not be until the first week of September 2021, when at long last he was able to speak with a VEC representative, that the Petitioner would finally learn that, in order to claim retroactive unemployment compensation, he needed to appeal the July 8, 2021 Monetary Determination. By then, however, the appeal deadline had come and gone.

Nor does the Court find it at all persuasive that the Petitioner should have had the perspicacity to decipher the Monetary Determination and somehow figure out that by employing an “Effective Date” of July 4, 2021, the Monetary Determination *implicitly* rejected retroactive unemployment compensation. Understanding a Monetary Determination should not require a law degree, although in this case even a law degree would have been no guarantee that the Monetary Determination would have been understood to be adverse. On its face, it appeared to contain only good and welcome news and to only be concerned with *future* relief.

If the Commission was, in fact, also doing something else in that Monetary Determination – *i.e.*, denying the Petitioner retroactive unemployment compensation – it needed to say so explicitly and unambiguously. It did neither.²¹

In each of his appeals, the Petitioner was closely questioned by the examiner regarding the *mechanics* of notice.²² But it is the *content* of notice, not the address on the envelope, that was the problem in this case. Simply put, the Monetary Determination never told the Petitioner he had lost what he had sought to gain.

This brings the Court to the second reason it concludes that the Petitioner met his burden of proving “good cause” for an extension of time.

Reason #2

The July 8, 2021 Monetary Determination obviously did not end the Petitioner’s effort to recover that 11 weeks of backpay, but this is what it did tell him – or, at least, *appeared* to tell him: His July 7, 2021 unemployment claim submission was the *wrong* vehicle to obtain that backpay.

And so, the Petitioner went back to the phones, seeking help from the only source of help available to him, the VEC. But the Commission was still not answering his phone calls. It remained, according to the Petitioner, “totally unresponsive.” July became August and August became September. The deadline for appealing the July 8, 2021 Monetary Determination – August 7, 2021 – had expired. But that deadline had *never* been circled in red by the Petitioner – for he had no reason to believe it had any relevance to his backpay request. On or about September 2, 2021, that all changed.

After months of attempting, and failing, to get assistance from the VEC, the Petitioner asked his delegate (once again) to intervene with the VEC – and was finally able to speak with a VEC representative. The Petitioner learned that in order to obtain the 11 weeks of backpay, he would need to appeal the July 8, 2021 Monetary Determination. By then, however, it was too late to file a timely appeal. Only a “good cause” extension could save his appeal. So that is what the Petitioner sought.

Here was an individual, acting in a *pro se* capacity, with limited familiarity with the VEC and its procedures, who had been employed, then unemployed, then employed again, then unemployed again, who reasonably believed he needed to file a new claim for unemployment compensation (but, unfortunately, did so prematurely), received no reply from the VEC, called the Commission “hundreds” of times for help (but found no help), enlisted his delegate in his search for answers and actually got one (he needed to file a new claim), filed that claim immediately (only to learn the next

²¹ This also raises a serious due process issue, given that proper and adequate notice is an essential element of due process. *See, e.g., In re Oliver*, 333 U.S. 257 (1948). However, for the reasons stated in Footnote 6, the Court is not reaching the due process issue in this opinion.

²² *See, e.g.*, these questions from the Special Examiner: “Did you receive the Monetary Determination, um, at your address that you just outlined?” (R. 131.) “[D]o you remember reading it, reviewing it?” (R. 133.) “[D]o you remember reading anything about an appeal date of August 7th, 2022?” (R. 134.)

day that his claim only addressed *prospective* compensation), made more fruitless and futile calls to the VEC, enlisted his delegate again and, finally, was told by a VEC representative (too late, it turned out) that what he needed to do is appeal. The Petitioner described this as an “ordeal,” as “agonizing,” as “hurtful,” as “terrible”. Yet, through it all, he persisted – only to learn on July 13, 2023, that the Commission did not believe he had “good cause” for a 27-day extension.

Had the VEC responded to the Petitioner’s February 2021 claim and told him it was premature and to re-file on April 18, 2021, this matter would almost certainly not be before the Court today. **Had** the VEC answered the Petitioner’s repeated requests for assistance in April 2021, May 2021, or June 2021, the Petitioner could have immediately filed a new claim and there would have been no need, or certainly less need, for *retroactive* unemployment compensation. **Had** the VEC explicitly told the Petitioner in the July 8, 2021 Monetary Determination that it was denying him retroactive unemployment compensation, the Petitioner could have immediately filed an appeal, and that appeal would have been timely. **Had** the VEC answered the Petitioner’s phone calls at any time in the thirty days after July 8, 2021 – and told the Petitioner what he needed to do to obtain that backpay – he still could have filed a timely appeal. That none of these things happened makes it all the more inexplicable that the Commission determined that there was no “good cause” to extend the Petitioner’s appeals deadline by 27 days.

The Court recognizes, as the Special Examiner noted in the Decision of Commission, that the foregoing events occurred during “unprecedented” times. (R. 52). The Covid-19 pandemic was an existential crisis, like none this country has ever faced. For both public and private entities, it placed crushing demands on resources, and shattered assumptions that we as a nation were prepared for any eventuality. The pain and suffering it inflicted on the stricken, on their families and their communities, was devastating. No one entirely escaped the catastrophe, and, for many, it proved fatal.

State unemployment compensation systems, like the VEC, were especially slammed by the pandemic, because they were charged with the critical responsibility of providing a safety net for millions of workers who suddenly and unexpectedly found themselves without work and without income. The demand for unemployment compensation was overwhelming and beyond the logistical and administrative capacity of agencies like the VEC. But if these extraordinary circumstances were *beyond* the VEC’s control, they were certainly *beyond* the Petitioner’s control as well. This Petitioner was faced with a complex and challenging issue – how to recover unpaid unemployment compensation – that was outside his experience, his expertise, and his ability to figure it out on his own. He needed help from the Commission. And the Commission failed him.

The VEC, in its Brief in Opposition, asks this Court to “review the entire Transcript and the Record of the Commission hearings and proceedings.” (VEC Brief, at 5). The Court has done so, and finds the Commission’s judgment to be unsupported by evidence, and further finds that the Petitioner has established compelling and necessitous circumstances beyond his control to warrant an extension of his appeal deadline.

WHEREFORE, the Court reverses the VEC and remands the case to the Commission for consideration of the merits of the Petitioner's claim for retroactive unemployment compensation for the time period of April 18, 2021 to July 3, 2021.

SO ORDERED, this 11 day of December, 2023.

A solid black rectangular box redacting the signature of Judge Randy I. Bellows.

JUDGE RANDY I. BELLOWS

ENDORSEMENT OF THIS ORDER BY COUNSEL OF RECORD AND PRO SE PARTIES IS WAIVED IN THE DISCRETION OF THE COURT PURSUANT TO RULE 1:13 OF THE SUPREME COURT OF VIRGINIA.