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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2366-20**

DANIELLE DURANTE,

Petitioner-Appellant,

v.

BOARD OF REVIEW,
DEPARTMENT OF LABOR,
and STATE OF NEW JERSEY,
DEPARTMENT OF JUDICIARY,
OCEAN COUNTY,

Respondents-Respondent.

Submitted April 4, 2022 – Decided April 20, 2022

Before Judges Rose and Marczyk.

On appeal from the Board of Review, Department of Labor, Docket No. 227332.

Danielle Durante, appellant pro se.

Matthew J. Platkin, Acting Attorney General, attorney for respondent Board of Review (Sookie Bae-Park, Assistant Attorney General, of counsel; Eric A. Zimmerman, Deputy Attorney General, on the brief).

PER CURIAM

Danielle Durante appeals from an April 16, 2021, final agency decision of the Board of Review, Department of Labor (Board) dismissing her appeal from the Appeal Tribunal (Tribunal) because the appeal was not filed in a timely manner pursuant to N.J.S.A. 43:21-6(c). We affirm.

I.

Durante filed a claim for unemployment compensation in May of 2020. She received a weekly benefit of \$334 and ultimately received \$6,012 as of September 12, 2020. On September 23, 2020, a deputy claims examiner notified Durante that she had been improperly granted unemployment benefits. She was determined to be ineligible because she left her position voluntarily without good cause and, therefore, was responsible to refund the State \$6,012. Thereafter, Durante appealed to the Tribunal and a telephonic hearing was conducted on November 3, 2020. On November 4, 2020, the Tribunal issued a ruling affirming the decision of the deputy holding Durante was disqualified from benefits because she left her job voluntarily. The Tribunal further determined Durante received an overpayment of benefits for approximately four months, for which she is now liable.

The Tribunal's decision included a notice indicating the decision would be final unless within twenty days of the date of the mailing or notification, a written appeal was filed with the Board. The notice further provided the appeal period could be extended if Durante demonstrated good cause for late filing.

Durante had to appeal the Tribunal's decision to the Board by November 24, 2020. However, Durante did not file an appeal until December 4, 2020—ten days out of time. The Board noted the appeal was filed subsequent to the expiration of the statutory period of twenty days from the date of notification or mailing of the Tribunal's decision pursuant to N.J.S.A. 43:21-6(c). The Board further determined Durante failed to show good cause for the late filing, as she did not demonstrate the delay in filing the appeal was beyond her control or for circumstances which could not be reasonably foreseen or prevented pursuant to N.J.A.C. 12:20-4.1(h)(1) and (2). Durante subsequently filed this appeal.

II.

On appeal, Durante argues she "sent out the mail in a timely manner but due to the pandemic and delays with the mail the office received the paperwork three days late." Similar to her argument before the Board, Durante does not support her argument with a sworn statement or additional information that would otherwise excuse the late appeal. Moreover, Durante does not submit any

specific information as to when the appeal was mailed and/or filed. In addition, Durante argues the Director should grant a waiver with respect to the overpayment of benefits pursuant to N.J.A.C. 12:17-14.2. Durante notes she had to leave work as she needed to care for her child who was having medical issues.

The Board counters the appeal was properly dismissed as untimely pursuant to N.J.S.A. 43:21-6(c). The Board contends Durante's appeal had to be postmarked or received on or before November 24, 2020, to be considered timely. The Board avers Durante did not file her appeal until December 4 — ten days late. The Board acknowledges there are exceptions to late filings pursuant to N.J.A.C. 12:20-4.1(h), however, the exceptions do not apply in this case. The Board argues Durante failed to offer an explanation for her late filing other than an uncorroborated claim she sent her appeal within the proper timeframe. With respect to Durante's request to waive the recovery of overpaid benefits pursuant to N.J.A.C. 12:17-14.2, the Board maintains the appeal should be denied for failure to exhaust administrative remedies because the Director has not yet issued a decision regarding Durante's request.

III.

The procedure for appealing an adverse Tribunal decision is set forth in N.J.S.A. 43:21-6(c). In relevant part, subsection (c) provides the Tribunal's decision "shall be deemed to be the final decision of the [Board], unless further appeal is initiated pursuant to [N.J.S.A. 43:21-6(e)] . . . within [twenty] days after the date of . . . mailing of such decision." The deadline in the statute for filing an appeal is mandatory. Lowden v. Bd. of Rev., 78 N.J. Super. 467, 470 (App. Div. 1963); see also Von Ouhl v. Bd. of Rev., 254 N.J. Super. 147, 151 (App. Div. 1992) (decision of Appeal Tribunal is final if appeal is not initiated within the prescribed time limits). However, in Rivera v. Board of Review, 127 N.J. 578, 586 (1992), the Supreme Court held that exceptions to the deadline must be permitted to protect a claimant's right to due process. After Rivera, the Department of Labor promulgated a regulation allowing a good cause exception for late appeals. N.J.A.C. 12:20-4.1(h) provides:

A late appeal shall be considered on its merits if it is determined that the appeal was delayed for good cause. Good cause exists in circumstances where it is shown that:

1. The delay in filing the appeal was due to circumstances beyond the control of the appellant; or

2. The appellant delayed filing the appeal for circumstances which could not have been reasonably foreseen or prevented.

Durante failed to demonstrate good cause for the delay in filing her appeal. The record is not a model of clarity, but it appears Durante's appeal was filed ten days late, not three days as she claims in her brief. She has provided no certification or affidavit attesting to when she mailed the appeal or any proof of service evidencing when the appeal was filed. The Board's decision indicates the appeal was not filed until December 4, 2020. Whether that date is when the appeal was received or postmarked is not clear, but it would be late in either event. The date on which an appeal is filed is the date of the postmark, or in the event the postmark is missing, the date of receipt by the Department of Labor and Workforce Development. N.J.A.C. 12:20-4.1(c). The Board's decision indicates the appeal was ten days beyond the deadline of November 24, 2020. Without a showing of good cause, the Board correctly dismissed Durante's appeal as untimely. We need not address the merits of Durante's appeal because her administrative appeal was out of time.

Finally, Durante's appeal pursuant to N.J.A.C. 12:17-14.2 is denied for failure to exhaust administrative remedies. N.J.A.C. 12:17-14.2 allows the Director to waive recovery of overpayments when the Director determines the

claimant did not misrepresent any material facts in obtaining benefits. Here, the Board indicated the Director has not yet issued a decision on Durante's waiver request, so this issue is not ripe for appeal. R. 2:2-3(a)(2)

Our standard of review is whether the decision of the Board was arbitrary, capricious, or unreasonable. Brady v. Bd. of Rev., 152 N.J. 197, 210 (1997). We find no such error in the ruling dismissing Durante's appeal.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION