

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re:

BYRON WINTER,

APPELLANT,

Citation and Notice of Assessment No. W-
293-15,

OAH Docket No. 042015-LI-00052

DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

Joel Sacks, Director of the Washington State Department of Labor & Industries, having considered the Order Denying Motion To Vacate Default Order (Order) served on June 16, 2015, having considered the petition for review filed by Byron Winter (the Appellant) with the Director's Office on June 29, 2015, and briefing submitted to the Director's Office, and having reviewed the record, issues this Director's Order.

The parties in this matter are the Department of Labor & Industries and the Appellant.

The Director makes the following Findings of Fact, Conclusions of Law, and Final Decision and Order.

I. FINDINGS OF FACT

1. The Office of Administrative Hearings issued and served the Order on June 16, 2015.
2. On June 29, 2015, the Director received a timely filed petition for review from Appellant.

3. The Director adopts and incorporates all the Order's Findings of Fact.
4. The Director also adopts and incorporates the Order's "Order Summary."

II. CONCLUSIONS OF LAW

1. Based on the Appellant's timely filed petition for review, there is authority to review and decide this matter under RCW 49.48.084 and RCW 34.05.
2. The Director adopts and incorporates all the Order's Conclusions of Law and Order.

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusion of Law, the Citation and Notice of Assessment is AFFIRMED and the Order of June 16, 2015, is incorporated by reference herein.

DATED at Tumwater this 8 day of January, 2016.



JOEL SACKS
Director

SERVICE

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).

APPEAL RIGHTS

Reconsideration. Any party may file a petition for reconsideration. RCW 34.05.470. Any petition for reconsideration must be filed within 10 days of service of this Order and must state the specific grounds on which relief is requested. No matter will be reconsidered unless it clearly appears from the petition for reconsideration that (a) there is material clerical error in the order **or** (b) there is specific material error of fact or law. A petition for reconsideration, together with any argument in support thereof, should be filed by mailing or delivering it directly to Joel Sacks, Director of the Department of Labor and Industries, P. O. Box 44001 Olympia, Washington 98504-4001, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Director's Office. RCW 34.05.010(6).

NOTE: A petition for reconsideration is not required before seeking judicial review. If a petition for reconsideration is filed, however, the 30-day period will begin to run upon the resolution of that petition. A timely filed petition for reconsideration is deemed to be denied if, within twenty (20) days from the date the petition is filed, the Director does not (a) dispose of the petition **or** (b) serve the parties with a written notice specifying the date by which it will act on the petition. RCW 34.05.470(3).

Judicial Review. Any petition for judicial review must be filed with the appropriate court and served within 30 days after service of this Order. RCW 34.05.542. RCW 49.48.084(5) provides: "Orders that are not appealed within the time period specified in this section and Chapter 34.05 RCW are final and binding, and not subject to further appeal." Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement.

DECLARATION OF MAILING

I, Lisa Rodriguez, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 8 day of January 2016, to the following via regular and certified mail, postage prepaid.

Byron Winter
10229 Des Moines Mem. Dr. S., Apt. 5
Seattle, WA 98168

Scott Douglas
Office of the Attorney General
PO Box 40121
Olympia, WA 98504

DATED this 8 day of January, 2016, at Tumwater, Washington.

**STATE OF WASHINGTON
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF LABOR AND INDUSTRIES**

In the Matter of:

BYRON WINTER,

Appellant,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

OAH Docket No. 042015-LI-00052

Agency No. W-293-15

**ORDER DENYING MOTION
TO VACATE DEFAULT ORDER**

I. ORDER SUMMARY

Appellant's Motion to Vacate the Default Order of May 14, 2015 is denied.

II. MOTION HEARING

- 2.1 **Administrative Law Judge:** Jane Cantor Shefler
- 2.2 **Date of Hearing:** June 10, 2015
- 2.3 **Appellant/Movant:** Byron Winter
- 2.4 **Agency:** Department of Labor and Industries
- 2.4.1 **Agency Representative:** Scott Douglas, Assistant Attorney General

Based upon the file, the pleadings submitted by the parties, and the oral argument of the parties, I make the following Findings of Fact and Conclusions of Law:

III. FINDINGS OF FACT

3.1 On May 4, 2015, a prehearing conference was scheduled in this matter. On or around April 20, 2015, the Office of Administrative Hearings (OAH) sent the Appellant a Notice of Conference. In bold print in the middle of the front

page, this Notice of Conference set out the date, time, and WebEx code number for the May 4, 2015 prehearing conference. This Notice also stated in bold:

You must participate in the conference. If you do not, a default may be entered. This means you lose the opportunity to further challenge the agency action. RCW 34.05.440.

3.2 On May 4, 2015, at 9:30 a.m., I initiated the WebEx call for the prehearing conference. The Department appeared through Assistant Attorney General Scott Douglas. The Appellant did not attend. When, after 15 minutes, the Appellant had not joined the WebEx conference or had called OAH to check in, I convened the prehearing conference. The Department moved for a default order under RCW 34.05.440 for the Appellant's failure to appear.

3.3 On May 8, 2015, I issued a Default Order due to the Appellant's failure to appear at the prehearing conference on May 4, 2015. Within seven days thereafter, the Appellant sent in a written request to vacate the Default Order.

3.4 On June 9, 2015, at the hearing on Motion to Vacate, the Appellant acknowledged he had received the Notice of Prehearing Conference, but that he had misplaced it. He did not enter the event on his calendar when he received it. In early May, the Appellant was working long hours and this contributed to his failure to appear for the hearing. He did not locate the Notice until after the time for the conference had passed.

IV. CONCLUSIONS OF LAW

4.1 RCW 34.05.440 governs defaults in adjudicative proceedings under the Administrative Procedures Act ("APA").

4.2 Decisions to set aside a default judgment or order in cases arising under the APA are discretionary. *Graves v. The Employment Security Department*, 144 Wn.App.302, 309, 182 P.3d 1004, 1008 (2008); *citing Griggs v. Averbach Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979); *Hwang v. McMahill*, 103 Wn.App. 945, 949, 15 P.3d 172 (2000), *review denied*, 144 Wn.2d 1011 (2001).

4.3 A party requesting to vacate a prior order for failing to appear must establish "good cause" for failing to appear at a scheduled hearing. "Good cause" is defined as a situation which would effectively deter a reasonably prudent person from appearing. A reasonably prudent person is an individual who uses good judgment or common sense in handling practical matters. See, e.g., WAC 192-100-010. The actions of a person exercising common sense in similar situations are the guide in determining whether an individual's actions were reasonable.

4.4 Generally, circumstances which are within a person's control do not support a finding of good cause. Neither carelessness nor forgetfulness provide the requisite "good cause" for failing to appear for a hearing. For example, failure to check one's mail or to properly calendar an event, being a matter of carelessness or oversight, do not provide good cause. See, *Graves, supra*, 144 Wn.App. at 309 - 310.

4.5 Here, the Appellant misplaced the Notice of Prehearing Conference and did not locate it again until after the time of the conference had passed. This is a circumstance which was avoidable and within his control and does not rise to the level of good cause for missing the May 4, 2015 prehearing conference. Based upon the foregoing findings of fact and conclusions of law, the Default Order issued May 8, 2015 remains in effect.

V. ORDER

IT IS ORDERED that the Motion to Vacate the Default Order is **DENIED**.

Signed and Issued at Tacoma, Washington, on the date of mailing.



Jane Cantor Shefler
Administrative Law Judge
Office of Administrative Hearings

NOTICE OF APPEAL RIGHTS – PLEASE READ CAREFULLY

Pursuant to RCW 49.48.084 and RCW 34.05.464, any party that disputes this Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries. A Petition for Administrative Review may be mailed to the Director or delivered to the Director at the Department's physical address listed below.

Mailing Address:

Director
Department of Labor and Industries
PO Box 44001
Olympia, WA 98504-4001

Physical Address:

Director
Department of Labor and Industries
7273 Linderson Way SW
Tumwater, WA 98501

Whether you mail or deliver the Petition for Administrative Review, the Director *must actually receive* the Petition for Administrative Review during office hours at the Director's office within **thirty (30)** days of the date this Order was mailed to the parties. Part of filing a Petition is providing copies to the other parties at the same time.

If the Director does not receive a Petition for Administrative Review within **thirty (30) days** from the date of this Order, this Order shall become final with no further right to appeal.

If you timely file a Petition for Administrative Review, the Director will conduct an administrative review under chapter 34.05 RCW.


CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 04-2015-LI-00052

I certify that true copies of this document were served from Tacoma, Washington upon the following as indicated:

<p>Byron Winter 10229 Des Moines Memorial Drive S. Apt 5 Seattle, WA 98168</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Scott Douglas Assistant Attorney General Office of the Attorney General PO Box 40121 Olympia, WA 98504</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>JP Logistics, Inc. PO Box 716 Kent, WA 98035</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Raymond V. Gessel 12932 SE Kent Kangley Rd Kent, WA 98030</p>	<p><input checked="" type="checkbox"/> First Class Mail, Postage Prepaid <input checked="" type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Date: Tuesday, June 16, 2015

OFFICE OF ADMINISTRATIVE HEARINGS


 Melanie Barnhill
 Legal Secretary