

DIRECTOR OF THE DEPARTMENT OF LABOR & INDUSTRIES
STATE OF WASHINGTON

In re:

VETERAN'S INDEPENDENT
ENTERPRISES OF WASHINGTON,
DONALD HUTT, and GARY
PETERSON as individuals,

APPELLANTS,

Citation and Notice of Assessment No. W-
259-18

OAH Docket No. 06-2018-LI-00783

2019-009-WPA

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 Petition to Vacate Order Dismissing Appeal (Order) served on February 21, 2019, having considered the Appellant's petition for review and briefing submitted to the Director's Office, and having reviewed the record, issues this Director's Order.

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

I. FINDINGS OF FACT

1. The Director adopts findings of fact 4.1 through 4.10 of the Order.

II. CONCLUSIONS OF LAW

1. The Director adopts conclusions of law 5.1 through 5.7 of the Order.

2019-009-WPA

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DIRECTOR'S ORDER

RCW 49.48.084(4); RCW 34.05

III. DECISION AND ORDER

Consistent with the above Findings of Fact and Conclusions of Law, the Citation and Notice of Assessment is AFFIRMED.

DATED at Tumwater, Washington this 27 day of September, 2019.



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 emailing it to directorappeal@lni.wa.gov or 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 Deck, hereby declare under penalty of perjury under the laws of the State of Washington, that the DIRECTOR'S ORDER was mailed on the 27 day of September 2019, to the following via regular mail, postage prepaid.

Veterans Independent Enterprises of Washington
c/o Rosemary Hibbler
6919 24th Street West
University Place, WA 98466

Donald Hutt
4630 16th Street E., Suite B16
Fife, WA 98424

Gary Peterson
4630 16th Street E., Suite B16
Fife, WA 98424

Heather Leibowitz, AAG
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Robert Peters
4114 80th Street NE
Marysville, WA 98270

DATED this 27 day of September 2019, at Tumwater, Washington.



Lisa Deck

**WASHINGTON STATE
OFFICE OF ADMINISTRATIVE HEARINGS**

In the matter of:

Veteran's Independent Enterprises of
Washington, Donald Hutt and Gary
Peterson as individuals,

Appellants/Employer.

Docket No. 06-2018-LI-00783

**ORDER DENYING PETITION TO VACATE
ORDER DISMISSING APPEAL**

Agency: Department of Labor and
Industries

Program: Wage Payments

Agency No. W-259-19

1. ISSUE

1.1. Whether the Order Dismissing Appeal issued February 5, 2019 should be vacated under RCW 34.05.440(3)?

2. ORDER SUMMARY

2.1. No. Appellant has presented insufficient grounds for vacating the February 5, 2019 Order Dismissing Appeal.

3. MOTION HEARING

3.1. Motion Hearing Date: February 20, 2019

3.2. Administrative Law Judge: Dawn Bettinger

3.3. Appellant: Veteran's Independent Enterprises of
Washington

3.3.1. Representative: Rosemary Hibbler

3.4. Agency: Labor and Industries

3.4.1. Representative: Heather Leibowitz, Assistant Attorney General
(AAG)

3.5. Other: Robert Peters, wage claimant; also
attended

4. FINDINGS OF FACT AS A MATTER OF LAW

4.1. On December 12, 2018, the Office of Administrative Hearings (OAH) sent Appellant a notice of status conference scheduled for January 8, 2019 at 9:00 a.m. Below the call-in information on the front page, this notice stated: **"You must call in to the conference. If you fail to call in, the administrative law judge may hold you in default and dismiss your appeal. RCW 34.05.440(2)"**

- 4.2. On January 8, 2019 at 9:00 a.m., counsel for Labor and Industries appeared for the status conference. At 9:15 a.m., when Appellant had not yet appeared, Labor and Industries moved for a default order, which the undersigned administrative law judge granted and issued in writing on January 9, 2019.
- 4.3. On or about January 16, 2019, OAH received Appellant's Petition to Vacate the default dismissal order.
- 4.4. A Notice of Motion hearing was issued and the motion hearing was set for February 4, 2019 at 9:00 a.m., to address the failure to appear at the January 8, 2019 status conference.
- 4.5. On February 4, 2019 the appellant did not appear by 9:15 a.m., and counsel for the Department of Labor and Industries again moved for a default. The undersigned administrative law judge granted and issued in writing on February 5, 2019.
- 4.6. At 2:02 p.m. on February 4, 2019, the appellant called the Office of Administrative Hearings to update a mailing and to inform the Office of Administrative Hearings that the office had a power outage and that was the basis for the failure to appear.
- 4.7. On February 5, 2018 the Office of Administrative Hearings received a Petition to vacate the default finding. A notice of motion hearing was sent to the parties for the show cause motion for February 20, 2019.
- 4.8. All parties attended the February 20, 2019 show cause motion hearing.
- 4.9. Mr. Hibbler, on behalf of the appellant, indicated that the reason for the failure to appear was due to a power outage related to a snow storm. The appellant closed the business office.
- 4.10. Ms. Hibbler has a cell phone and has access to the internet but despite this did not either call the Office of Administrative Hearings for the motion hearing nor ask to be connected into the hearing until well after the hearing was scheduled. No explanation was given why Mr. Hutt or Mr. Peterson did not call in either.

5. CONCLUSIONS OF LAW

Based upon the facts above, I make the following conclusions:

Jurisdiction

- 5.1. I have jurisdiction over the persons and subject matter of this case under Chapters 69.50 and 34.05 RCW, and 10-08 WAC.

Appellant Has Shown Insufficient Basis for Vacating the Default Order.

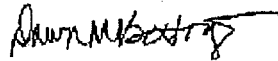
- 5.2. If a party fails to attend or participate in a hearing or other stage of an adjudicative proceeding, other than failing to timely request an adjudicative proceeding as set out in subsection (1) of this section, the presiding officer may serve upon all parties a default or other dispositive order, which shall include a statement of the grounds for the order. RCW 34.05.440(2) Within seven days after service of a default order under subsection (2), or such longer period as provided by agency rule, the party against whom it was entered may file a written motion requesting that the order be vacated, and stating the grounds relied upon. RCW 34.05.440(3).
- 5.3. The Administrative Procedures Act does not have a good cause provision for vacating a default judgment. See RCW 34.05.570(3)(i); RCW 34.05.440. The closest analog is that that the order is arbitrary and capricious. *Ogden v. Washington State Criminal Justice Training Commission*, 179 Wn.App. 1052, at 6 (2014)(unpublished opinion).
- 5.4. Although state superior court civil rules are not binding in this case, Civil Rule 55(c) provides for setting aside a default judgment “for good cause shown”, “upon such terms as the court deems just”, and “in accordance with rule 60(b).” Civil Rule 60(b) provides, “the court may relieve a party or the party’s legal representative from a final judgment, order, or proceeding for the following reasons: (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.”
- 5.5. As a general matter, default judgments are not favored. *Little v. King*, 160 Wn.2d 696, 704 (2007). “But we also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court rules.” *Id.* The fundamental principle when balancing these competing policies is “whether or not justice is being done.” *Id.*
- 5.6. A party moving to vacate a default judgment must be prepared to show (1) that there is substantial evidence supporting a prima facie defense; (2) that the failure to timely appear and answer was due to mistake, inadvertence, surprise, or excusable neglect; (3) that the defendant acted with due diligence after notice of the default judgment; and (4) that the plaintiff will not suffer a substantial hardship if the default judgment is vacated. *Id.*, at 703-704, citing *White v. Holm*, 73 Wn.2d 348, 352 (1968). “Factors (1) and (2) are primary; factors (3) and (4) are secondary.” *Little* at 704.
- 5.7. In this case, the default order was not arbitrary or capricious, but rather entered after that appellants failed to appear for a duly noted Motion hearing. The Appellants received approximately two weeks’ advance notice of the proceeding, which boldly stated the consequences of failing to appear. The Appellants nor a

representative thereof called in for the motion hearing when scheduled, but found a way to call in the afternoon after the default was issued for a second time. Nor did the Appellants make any showing of substantial evidence supporting Appellant's position in the underlying matter.

6. INITIAL ORDER

IT IS HEREBY ORDERED THAT:

6.1. The Order Dismissing Appeal issued February 5, 2019 is AFFIRMED.
Issued from Tacoma, Washington on the date of mailing.



Dawn Bettinger
Administrative Law Judge
Office of Administrative Hearings

CERTIFICATE OF SERVICE ATTACHED

PETITION FOR REVIEW

Any party that disputes this Initial Order may file a Petition for Administrative Review with the Director of the Department of Labor and Industries.¹ You may e-mail your Petition for Administrative Review to the Director at directorappeal@lni.wa.gov. You may also mail or deliver your Petition for Administrative Review 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:

7273 Linderson Way SW
Tumwater, WA 98501

If you e-mail your Petition for Administrative Review, please do not mail or deliver a paper copy to the Director.

Whether you e-mail, 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 30 days of the date this Initial Order was mailed to the parties. You must also provide a copy of your Petition for Administrative Review to the other parties at the same time.

If the Director does not receive a Petition for Administrative Review within 30 days from the date of the Initial Order, the Initial Order shall become final with no further right to appeal.²

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

¹ RCW 49.48.084 and RCW 34.05.464.

² RCW 49.48.084 and Chapter 34.05 RCW.

CERTIFICATE OF SERVICE FOR OAH DOCKET NO. 06-2018-LI-00783

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

<p>Veterans Independent Enterprises of Washington c/o Rosemary Hibbler 6919 24th Street West University Place, WA 98466 Appellant/Employer 9489 0090 0027 6081 1294 07</p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6081 1294 07 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Donald Hutt 4630 16th Street East, Suite B16 Fife, WA 98424 Appellant/Employer 9489 0090 0027 6081 1293 91</p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6081 1293 91 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Gary Peterson 4630 16th Street East, Suite B16 Fife, WA 98424 Appellant/Employer 9489 0090 0027 6081 1293 84</p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6081 1293 84 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Heather Leibowitz, AAG Office of the Attorney General MS: TB-14 800 Fifth Ave., Ste. 2000 Seattle, WA 98104 Agency Representative</p>	<p><input type="checkbox"/> First Class Mail <input type="checkbox"/> Certified Mail, Return Receipt <input type="checkbox"/> Hand Delivery via Messenger <input checked="" type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>
<p>Robert Peters 4114 80th Street NE Marysville, WA 98270 Intervenor/Wage Claimant 9489 0090 0027 6081 1293 77</p>	<p><input checked="" type="checkbox"/> First Class Mail <input checked="" type="checkbox"/> Certified Mail, Return Receipt 9489 0090 0027 6081 1293 77 <input type="checkbox"/> Hand Delivery via Messenger <input type="checkbox"/> Campus Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> E-mail</p>

Date: Thursday, February 21, 2019

OFFICE OF ADMINISTRATIVE HEARINGS

Carla Sullivan

Carla Sullivan
Legal Assistant 2