

**EMPLOYMENT APPEALS BOARD DECISION**  
**2014-EAB-0638**

*Affirmed*  
*Late Request for Hearing Dismissed*

**PROCEDURAL HISTORY:** On May 20, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not available for work from December 2, 2012 to February 16, 2013 and February 24, 2013 to April 20, 2013 (decision # 112559). Claimant filed a timely request for hearing. On July 17, 2013, ALJ S. Lee issued Hearing Decision 13-UIB-11267-D, dismissing claimant's request for hearing for failure to appear. On July 22, 2013, claimant filed a request to reopen the July 17th hearing.

On August 29, 2013, the Department served notice of an administrative decision assessing a \$2,670 overpayment (the overpayment decision). On September 18, 2013, the overpayment decision became final without claimant having filed a request for hearing.

On October 7, 2013, claimant filed a telephone request for hearing. The request was construed as a re-request for hearing on decision # 112559. On November 5, 2013, ALJ Kangas issued Hearing Decision 13-UI-03996, re-dismissing claimant's request for hearing on decision # 112559, this time as untimely, subject to claimant's "right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed.<sup>1</sup>

On November 12, 2013, claimant filed a late request for hearing on the overpayment decision. On January 16, 2014, ALJ Kangas issued Hearing Decision 14-UI-08609, dismissing claimant's request for hearing on the overpayment decision as untimely, subject to claimant's "right to renew" the request by submitting a response to the "Appellant Questionnaire" attached to the hearing decision within 14 days of the date the decision was mailed.<sup>2</sup> On January 27, 2014, OAH received claimant's response to

<sup>1</sup> See Hearing Decision 13-UI-03996. Hearing Decision 13-UI-03996 was issued without authority, as Hearing Decision 13-UIB-11267-D had already been issued on this matter on July 17, 2013, and had become final on August 6, 2013.

<sup>2</sup> Hearing Decision 13-UI-08609.

Hearing Decision 13-UI-08609. On February 20, 2014, OAH mailed claimant a letter entitled "cancellation of hearing decision", canceling Hearing Decision 14-UI-08609.

On April 3, 2014, ALJ Monroe conducted a hearing on claimant's late request for hearing on the overpayment decision, and on April 7, 2014 issued Hearing Decision 14-UI-14460, dismissing claimant's request. On April 18, 2014, claimant filed an application for review of Hearing Decision 14-UI-14460 with the Employment Appeals Board (EAB).

**Claimant's request to reopen the July 17th hearing.** The record fails to show that the Office of Administrative Hearings (OAH) held a hearing or otherwise ruled on claimant's July 22, 2013 request to reopen the July 17th hearing on decision # 112559 (correspondence from claimant titled "request to reopen hearing"). Ordinarily this would require remand; however, based on evidence from the proceedings below, a formal ruling on the request is immaterial to the outcome of this matter for two reasons. First, claimant chose not to attend the July 17th hearing because he did not understand the implications of correspondence and notice of the hearing received from the Department and OAH. Under OAR 471-040-0040(2)(b)(B), failure to understand the implications of a decision or notice does not constitute good cause for missing a hearing. Second, claimant presented evidence in these proceedings conclusively establishing that he was not available to work during all the customary days and hours when the work he sought was performed during the weeks at issue because of an obligation to attend a weekly event during those hours. Even though claimant had good reasons for attending that event, his unavailability compels the conclusion that he was not "available for work" within the meaning ascribed by OAR 471-030-0036(3). Because the amount or existence of the overpayment in the matter at issue is not materially affected by OAH's failure to rule on claimant's request to reopen, we proceed to claimant's late request for hearing on the overpayment decision.

**Late request for hearing on the overpayment decision.** A party who expresses a present intent to appeal a matter by mail is considered to have filed a valid request for hearing. OAR 471-040-0005(1) and (2). In Hearing Decision 14-UI-14460, the ALJ concluded that claimant's request for hearing on the overpayment decision was not valid, as "nowhere in the set of documents submitted on November 12, 2013, does claimant ever reference the overpayment decision . . . and, similarly, neither do any of the documents attached to the "Appellant Questionnaire."<sup>3</sup> We disagree for the following reasons.

Claimant expressed significant confusion about the administrative process associated with his unemployment insurance claim. At one point during the hearing, he responded to the ALJ's attempt to help him differentiate between the Department's May 20th decision about his availability to work, June 4th and June 25th letters about an audit of his claim, and the August 29th decision about his overpayment by asking, "I'm confused. Isn't it all the same decision?" *See* audio recording at 23:37. Given claimant's confusion, his inability to expressly reference the August 29th decision is not determinative of his intent when completing the November 12th hearing request. In this hearing request, claimant referred to the Department's letter concerning an audit of his claim for potential overpayment and misrepresentation, as well as a \$9 overpayment the Department assessed and he paid to resolve an overpayment issue associated with this claim, stated his understanding that the letter and payment had resolved the overpayment issue, and specifically requested a hearing. Moreover, claimant had already

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<sup>3</sup> Hearing Decision 14-UI-14460 at 5-6.

requested a hearing on the other administrative decision potentially at issue (the May 20th decision concerning claimant's availability for work) on two occasions, and received two hearing decisions on that issue, both of which were final at the time of his November 12th hearing request. Considered in the context of his entire claim and those events, claimant's November 12th request for hearing could only be related to the Department's overpayment assessment, and constituted a valid request for hearing on the Department's August 29th overpayment decision.

ORS 657.269 provides that a party has 20 days from the mailing date of an administrative decision to file a request for hearing. The overpayment decision at issue was mailed on August 29th, making the deadline for a timely filing September 18, 2013. Claimant filed his request for hearing on the overpayment decision on November 12, 2013, making his request for hearing late.

ORS 657.875 provides that the period in which a party may request a hearing may be extended upon a showing of good cause. "Good cause" "exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control." OAR 471-040-0010(1).

In this case, claimant acknowledged that he was "sure" he received the overpayment decision shortly after it was mailed, and that he disagreed with it. *See* audio recording ~ 16:00. He did not articulate any specific reason why he waited until several weeks after the deadline for requesting a hearing had passed before he contacted the Department to request a hearing. It appears generally from claimant's testimony that he was confused or otherwise did not understand the implications of the decisions and letters the Department mailed to him about his unemployment insurance claim, that he did not understand the processes associated with his claim, and that some of the materials he received from the Department and OAH about his claim and hearings appeared to him to contain conflicting information, causing him additional confusion. Claimant's confusion might be understandable given the circumstances. As discussed above, however, OAR 471-040-0010(1)(b)(B) provides that "[n]ot understanding the implications of a decision or notice when it is received" is not "good cause" to extend the deadline for filing a request for hearing.

Claimant's late request for hearing on the overpayment decision is dismissed, and the Department's August 29, 2013 decision assessing a \$2,670 overpayment remains undisturbed.

**DECISION:** Hearing Decision 14-UI-14460 is affirmed.

Susan Rossiter and Tony Corcoran;  
D. E. Larson, not participating.

**DATE of Service:** May 2, 2014

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310, or visit the website at <http://courts.oregon.gov/OJD/OSCA/acs/records/AppellateCourtForms.page>.

Note: the above link may be broken due to unannounced changes to the Court of Appeals website, in which case you may contact the Appellate Records at (503) 986-5555.

