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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0043

Late Application for Review of Hearing Decision 14-UI-17405 Allowed
Hearing Decision 14-UI-17405 Affirmed - Overpayment Assessed
Hearing Decision 14-UI-26178 Reversed and Remanded
Hearing Decision 14-UI-19337 Reversed and Remanded
Late Request for Hearing on Decision # 93204

PROCEDURAL HISTORY AND FINDINGS OF FACT: On July 2, 2012, claimant filed an initial claim for benefits with the Oregon Employment Department (the Department). Her weekly benefit amount was \$339. When she filed her initial claim for benefits, claimant reported to the Department that she had voluntarily left work with a former employer. The Department failed to adhere to its normal practice of suspending payment of benefits until completing an investigation of the work separation, and paid claimant a total of \$8,814 based on her weekly claims for benefits from July 8, 2012 through January 5, 2013.

On October 17, 2013, the Department issued notice of an administrative decision concluding that claimant was not eligible for EUC program benefits from January 6, 2013 through October 5, 2013 (decision # 93518). On November 4, 2013, the Department issued notice of an administrative decision concluding that claimant voluntarily left work at Destination Sunriver Resort without good cause (decision # 93204).¹ On November 6, 2013, decision # 93518 (the EUC eligibility decision) became final. On November 25, 2013, decision # 93204 (the quit decision) became final.

On March 12, 2014, the Department issued notice of two additional decisions, decision # 151913, which assessed an overpayment of regular benefits in the amount of \$8,814 that claimant was required to repay, and was based on decision # 93204 (the quit decision), and decision # 152244, which assessed an overpayment of EUC benefits in the amount of \$11,634 that claimant was required to repay, and was based on decision # 93518 (the EUC eligibility decision).

¹ Claimant earned less than \$600 during the weeks at issue that followed her work separation. That amount totals less than four times her weekly benefit amount. Therefore, claimant did not end her disqualification based on the Destination Sunriver, Inc. work separation during any of the weeks at issue.

On March 19, 2014, claimant requested a hearing by fax. In her request, claimant wrote,

“I [] request a hearing based on the Oregon Employment Department decision that I must repay back benefit payments. I was eligible [*sic*] to receive these benefits, I did not voluntarily leave work. I was following Oregon Employment Department instructions and proper procedures on my behalf.”

Included with her request were copies of the front pages of decisions # 151913 and # 152244. At the time of claimant's March 19 filing, decision # 93518 denied claimant EUC benefits because she was ineligible, decision # 93204 denied claimant benefits because she voluntarily left work, decision # 151913 assessed an \$8,814 overpayment based on the voluntary quit decision, and #152244 assessed an \$11,634 overpayment based on the EUC eligibility decision.

On April 8, 2014, the Office of Administrative Hearings (OAH) mailed claimant a notice of hearing scheduling one hearing on decision #151913 (the overpayment based on the quit decision) for April 22, 2014. The same day, OAH mailed a notice rescheduling that same hearing from April 22, 2014 to May 5, 2014. Each notice of hearing stated on it that the claim type at issue in the scheduled hearing was "EUC."² Although claimant's March 19, 2014 hearing request specifically addressed paying back benefits, her work separation and her adherence to proper procedures when filing claims for benefits, OAH did not process claimant's request for hearing as applying to decision # 93204, # 93518 or #152244.

On May 5, 2014, ALJ R. Frank held a hearing. On May 12, 2014, ALJ Frank issued Hearing Decision 14-UI-17405, in which he affirmed the Department's assessment of the \$8,814 overpayment based on the quit decision, but concluded that she was liable to have that overpayment debt deducted from future benefits otherwise payable rather than having to repay it to the Department.

On June 2, 2014, claimant faxed correspondence to OAH re-requesting a hearing on the Department's March 12, 2014 \$11,634 EUC overpayment decision (decision #152244). OAH construed claimant's filing as an original, late request for hearing on decision # 152244. On June 10, 2014, ALJ Kangas issued Hearing Decision 14-UI-19337, which dismissed claimant's late request for hearing on decision # 152244 subject to claimant's right to renew her request by submitting a response to an appellant questionnaire, if received by OAH within 14 days of the mailing date of the decision. On June 24, 2014, the 14-day response period expired without OAH having received a response from claimant. On June 30, 2014, Hearing Decision 14-UI-19337 became final without a timely application for review having been filed.

On September 9, 2014, claimant drove to the Department's central office in Salem, Oregon to speak with an employee about her case. She was placed on a call with an employee. During the call, claimant attempted to change her address of record with the Department from her address in Bend to one in LaPine. The Department did not record claimant's new address in its records.

² Although the claim type on the notices of hearing stated "EUC," and at the time the notices were issued claimant had two EUC-related matters pending (the EUC eligibility case and the EUC overpayment case), OAH processed only the overpayment case based on the quit decision, a regular benefits case, and ALJ Frank conducted only one hearing on that matter.

On September 15, 2014, claimant mailed a letter to OAH in which she filed a late request for hearing on decision # 93518 (the EUC eligibility denial). Claimant's letter included her change of address information. OAH did not record claimant's new address in its records.

On October 1, 2014, ALJ Kangas mailed Hearing Decision 14-UI-26178 to claimant's old address, dismissing claimant's late request for hearing on decision # 93518 subject to her right to renew the request by filing a response to another appellant questionnaire, if received within 14 days of the mailing date of the decision. On October 15, 2014, the 14-day response period expired without OAH having received a response from claimant.

On October 16, 2014, OAH received documents from claimant and construed them as a late response to Hearing Decision 14-UI-19337. OAH did not take any further action with respect to that decision based on claimant's submission of documents.

On October 17, 2014, claimant faxed her response to Hearing Decision 14-UI-26178. OAH received the response but did not process it.³ On December 10, 2014, claimant re-sent her October 17th response. On December 11, 2014, ALJ Kangas issued letter to claimant, at her old address, stating that her response to Hearing Decision 14-UI-26178 was late, and, as such, would not be considered.

On January 13, 2015, claimant filed an application for review of Hearing Decisions 14-UI-26178, 14-UI-19337 and 14-UI-17405 with the Employment Appeals Board (EAB).⁴

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 14-UI-17405, 14-UI-26178 and 14-UI-19337. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2015-EAB-0035, 2015-EAB-0043 and 2015-EAB-0044).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-17405 should be affirmed. However, additional proceedings at OAH are required with respect to Hearing Decisions 14-UI-26178 and 14-UI-19337 and with respect to administrative decision # 93204.

Late Request for Hearing on Decision # 93204 (Work Separation from Destination Sunriver, Inc.)⁵: OAR 471-040-0005(1) (July 14, 2011) states that "A Request for hearing may be filed on forms provided by the Employment Department or similar offices in other states. Use of the form is not

³ Claimant submitted a fax transmission sheet showing that, on October 17, 2014, she faxed a 6-page packet to OAH's correct fax number, and the transmission sheet reflects that the fax transmission was successful. Thus, it is more likely than not that OAH received claimant's fax and failed to process it due, probably due to a clerical error or technical problem.

⁴ Claimant's application for review did not reference all three cases or hearing decision numbers, but its contents indicated that in addition to contesting the outcome of case number 2014-UI-13955, she also contested the Department's EUC overpayment decision, the EUC eligibility issue and the "couple" of late hearing requests. After a review of Department records, we have identified the EUC overpayment decision and late hearing request issue as case number 2014-UI-17837, and the EUC eligibility and late hearing request case as case number 2014-UI-22717. We have, therefore, construed claimant's application for review as applying to all three of those cases.

⁵ This issue involves administrative decision # 93204. No case number has been assigned, and no additional proceedings have been held with respect to this work separation.

required provided the party specifically requests a hearing or otherwise expresses a present intent to appeal."

On March 19, 2014, claimant sent a fax to OAH in which she wrote "I [] request a hearing," contested the assessment of overpayments, which were based in part on the voluntary leaving decision, and wrote, among other things, wrote "I did not voluntarily leave work." In so doing, claimant specifically requested a hearing and expressed a present intent to contest the Department's decision that she voluntarily left work. Claimant's March 19, 2014 fax constituted a valid request for hearing on decision # 93204. Due to reasons not attributable to claimant, however, claimant's request was never processed, and claimant has never been heard on that matter.

We note that the decision concluding that claimant voluntarily left work with Destination Sunriver, Inc. was issued November 4, 2013, and became final on November 25, 2013. Claimant did not file a timely request for hearing on that matter. Therefore, at any future proceedings at OAH concerning this matter, claimant must prove that she had "good cause" for failing to file a timely request for hearing on decision # 93204, and that she filed her March 19th request for hearing within seven days of the date on which the circumstances that prevented her from a timely filing ceased to exist. *See* OAR 471-040-0010 (February 10, 2012). Only if claimant proves both of these elements will she then be allowed to present evidence concerning her work separation from Destination Sunriver, Inc.

Late Request for Hearing on Claimant's EUC Eligibility⁶: Claimant submitted correspondence to OAH that was construed as a late request for hearing filed in September 2014. Based on that construction, On October 1, 2014, ALJ Kangas issued Hearing Decision 14-UI-26178, dismissing claimant's request for hearing pending receipt of a response by claimant within a 14-day period. Claimant failed to respond within the time allowed.

The October 1, 2014 decision must be set aside. As a preliminary matter, we note that claimant changed her address of record with the Department on September 9, 2014, and provided OAH with her address change information on September 15, 2014. In spite of claimant's attempts to change her address, OAH continued to mail notices pertaining to claimant's request for hearing to her old address. OAR 471-040-0030(4) (August 1, 2004) requires that decisions be mailed to parties' addresses of record. OAH's failure to mail notice of the ALJ's decision to claimant's address of record violated its own procedural rules, and constituted a failure to provide claimant with due process.

Moreover, the issue in this matter is not whether claimant can prove she had good cause for filing a late request for hearing in September 2014, but whether she had good cause to file it on March 19, 2014. . In claimant's March 19 hearing request, claimant wrote that she was eligible to receive the benefits she had received, contested the Department's requirement that she repay benefits, including the repayment of EUC benefits based on decision # 93518, and argued that she "was following Oregon Employment Department instructions and proper procedures on my behalf." The Department's assessment of the \$11,634 overpayment was based on its EUC program eligibility denial because claimant was paid from the wrong program despite having filed purportedly valid continued claims for EUC benefits. In

⁶ This issue involves administrative decision # 93518, case number 2014-UI-22717, Hearing Decision 14-UI-26178 and the December 11, 2014 letter order issued by OAH.

context, and upon review of claimant's claim, we conclude that claimant specifically requested a hearing concerning the EUC denial, and we conclude that claimant's March 19, 2014 request for hearing was a valid request for hearing on decision # 93518. As such, claimant's failure to respond to the appellant questionnaire attached to Hearing Decision 14-UI-26178 concerning a September 2014 late filing is immaterial.

Claimant is entitled to notice and an opportunity to be heard on her March 19, 2014 request for hearing on decision # 93518.

Claimant's March 19, 2014 request for hearing was filed approximately five months after decision # 93518 became final. Therefore, just as claimant will have to prove good cause for her late filing on decision # 93204, claimant will have to prove that she had good cause for filing a late request for hearing in this matter, and that she filed her request for hearing within seven days of the date on which the circumstances that prevented a timely filing ceased to exist. Only if claimant is able to prove both of these elements will she then be allowed to present evidence as to her eligibility for EUC benefits.

EUC Overpayment⁷: OAH construed claimant's June 2, 2014 filing as a late request for hearing on the EUC overpayment decision (decision # 152244), dismissed the request for hearing as late, and sending claimant an appellant questionnaire which claimant failed to timely return. However, OAH erred in doing so because claimant had already filed a timely request for hearing on that matter on March 19, 2014.

Claimant's March 19, 2014 fax stated "I [] request a hearing," contested the assessment of an overpayment, and included a copy of the front page of decision # 152244. Because she specifically requested a hearing, as well as expressed a present intent to appeal the Department's EUC overpayment decision, claimant's March 19 request for hearing was valid.

Decision # 152244 was issued March 12, 2014, and claimant's request for hearing was filed only seven days later, making it a timely request for hearing. As such, the record fails to support the ALJ's conclusion in Hearing Decision 14-UI-19337 that claimant filed a late request for hearing in this matter, and, therefore, that decision must be reversed. Claimant is entitled to an opportunity to be heard on the merits of the Department's EUC overpayment decision (decision # 152244).

Late Application for Review on Hearing Decision 14-UI-17405 (the Work Separation Overpayment): Hearing Decision 14-UI-17405, in which ALJ Frank affirmed the Department's assessment of an \$8,814 overpayment of regular benefits and concluded that claimant is liable to have the debt deducted from future benefits otherwise payable, became final on June 2, 2014, without record of an application for review having been filed at EAB.

OAR 471-041-0070 (March 20, 2012) provides that the deadline for filing an application for review may be extended upon a showing of good cause, which is defined as factors or circumstances beyond the party's reasonable control.

⁷ This issue involves administrative decision # 152244, case number 2014-UI-17837, and Hearing Decision 14-UI-19337.

We have reviewed the record in these matters and identified a faxed document claimant filed with OAH on June 2, 2014 in which she wrote, in pertinent part, "I [] would like to appeal the decision from my unemployment benefit hearing." It is immaterial that the document was submitted to OAH instead of EAB because EAB accepts applications for review that are faxed, mailed or delivered to EAB or to any office of the Department, including OAH. *See* OAR 471-041-0060 (January 8, 2008). A review of Department records also shows that the only unemployment benefit hearing claimant had as of June 2, 2014 was the hearing that culminated in Hearing Decision 14-UI-17405, making claimant's request for an "appeal" from "the decision from my unemployment benefit hearing" an application for review of that hearing decision.

Had claimant's June 2, 2014 fax been forwarded to EAB, it would have been construed as a timely application for review of Hearing Decision 14-UI-17405, but for the factors outside claimant's control that prevented it from arriving at EAB for processing. Claimant's application for review of this matter is, therefore, allowed, and claimant is entitled to a review of the work separation overpayment decision that was the subject of Hearing Decision 14-UI-17405.

Work Separation Overpayment⁸: ORS 657.315(1) provides, in relevant part, that an individual who has been overpaid benefits because of an error not caused by the individual's false statement, misrepresentation of a material fact or failure to disclose a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter for any week or weeks within 52 weeks following the week in which the decision establishing the erroneous payment became final.

The Department paid claimant \$8,814 in regular unemployment insurance benefits that claimant was not entitled to receive because she should have been disqualified from receiving benefits due to her work separation from Destination Sunriver, Inc. The Department paid claimant those benefits because of a Department-caused error, and the Department's initial decision to pay benefits to claimant was subsequently reversed by decision # 93204, resulting in the \$8,814 overpayment. Because claimant received benefits she was not entitled to receive, through no fault of her own, we agree with the ALJ that claimant does not have to repay those benefits to the Department, but is instead liable to have the amount of her overpayment, \$8,814, deducted from future benefits otherwise payable to her during the 52 weeks following the week in which the decision establishing the erroneous payment became final.

We note that one of the matters addressed here is claimant's unprocessed late request for hearing on decision # 93204, which is the decision that caused the \$8,814 overpayment. We also have noted that claimant is entitled to proceedings at OAH, first to determine whether her late request for hearing should be allowed, and, if so, proceed to a hearing on the merits of the work separation. Should claimant's late request for hearing be allowed, and should she prove that her work separation was not disqualifying, the \$8,814 overpayment that is the issue of decision # 152244, Hearing Decision 14-UI-17405 and this decision would then cease to exist. However, should claimant's late request for hearing on decision # 93204 be denied, or should the ALJ handling that matter conclude that claimant's work separation was disqualifying, this decision would then remain undisturbed.

⁸ This issue involves administrative decision # 151913, case number 2014-UI-13955, and Hearing Decision 14-UI-17405.

In summation, claimant is entitled to proceedings at OAH with respect to her late request for hearing on decision # 93204 (the quit decision), her late request for hearing on decision # 93518 (the EUC eligibility decision) and her timely request for hearing on decision # 152244 (the EUC overpayment decision). Unless decision # 93204 is set aside, claimant is liable to have the \$8,814 overpayment of regular benefits deducted from future benefits otherwise payable.

DECISION: Hearing Decision 14-UI-17405 is affirmed. Hearing Decisions 14-UI-26178 and 14-UI-19337 are set aside, and both matters remanded to the Office of Administrative Hearings for additional proceedings consistent with this order.

NOTE: The failure of any party to appear at any proceedings on remand will not reinstate Hearing Decisions 14-UI-26178 or 14-UI-19337 or return any portion of this matter to EAB. Only timely applications for review of any subsequent hearing decisions will cause these matters to return to EAB.

Susan Rossiter and J. S. Cromwell;
Tony Corcoran, not participating.

DATE of Service: January 22, 2015

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 court.oregon.gov. Once on the website, click on the blue tab for “Materials and Resources.” On the next screen, click on the tab that reads “Appellate Case Info.” On the next screen, select “Appellate Court Forms” from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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