

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0246

Reversed
Request to Reopen Allowed

PROCEDURAL HISTORY: On December 24, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 133059). On December 29, 2014, the employer filed a timely request for hearing. On January 13, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for January 20, 2015. The employer did not appear at the hearing. On January 21, 2015, ALJ McGorin issued and mailed Hearing Decision 15-UI-32111, dismissing the employer's request for hearing for failure to appear. On January 27, 2015, the employer filed a timely request to reopen the hearing. On March 3, 2015, ALJ Wymer conducted a hearing, and on March 4, 2015 issued Hearing Decision 15-UI-34454, denying the employer's request to reopen. On March 6, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. The employer failed to certify that it provided a copy of its written argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and failed to show that factors or circumstances beyond the employer's reasonable control prevented it from offering the information during the hearing as required by OAR 471-041-0090 (October 29, 2006). EAB therefore did not consider the employer's argument, and considered only information received into evidence at the hearing. *See* ORS 657.275(2).

FINDINGS OF FACT: (1) On January 12, 2015, the Department mailed the employer a letter stating that it had received the employer's request for hearing on decision # 133059, and that it would notify the employer when a hearing was scheduled. On January 14, 2015, the employer received the letter at its corporate office in Wilsonville, Oregon. The employer scanned the document and emailed a copy to the employer's human resources manager in Boardman, Oregon, who was going to represent the employer at the hearing. The human resources manager received the document, and discussed the matter with the human resources assistant on January 15 or 16, 2015.

(2) Prior to January 20, 2015, the employer received the notice of hearing at its corporate office in Wilsonville. The employer scanned the document and emailed a copy to the human resources manager in Boardman. Due to a previously unknown glitch in the employer's computer system, however, the email failed to deliver due to the size of the attached file. The human resources manager therefore did not receive the email, and was unaware that a hearing had been scheduled for January 20, 2015. The employer received no error message or other indication that the email had failed to deliver.

CONCLUSIONS AND REASONS: The employer's request to reopen is allowed.

After issuing a hearing decision, an ALJ may reopen the hearing if the party requesting the reopening failed to appear at the hearing, files a written request to reopen within 20 days of the date of mailing of the hearing decision, and has good cause for failing to appear at the hearing. ORS 657.270(5); OAR 471-040-0040 (February 10, 2012). "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 471-040-0040.

In the present case, the employer did not know, and had no reason to know, that its email to its human resources manager failed to deliver, or that the human resources manager therefore was unaware that a hearing had been scheduled for January 20, 2015. The employer's failure to notify its human resources manager that a hearing had been scheduled therefore was an excusable mistake. In Hearing Decision 15-UI-34454, however, the ALJ found that the human resources manager was aware through prior experience that he should have received a notice of hearing, and that it therefore was within his reasonable control to contact the employer's corporate office to determine whether a notice of hearing had been received.¹ However, the Department did not even acknowledge receipt of the employer's request for hearing until two weeks after it was filed. The human resources manager did not testify that he knew or should have known through prior experience that he should have received a notice of hearing before January 20, 2015, and there is no evidence he otherwise knew or should have known the OAH would schedule a hearing so quickly after sending an acknowledgment of the request for hearing. Indeed, the ALJ himself determined that it was logical for the human resources manager to believe that the employer had not yet received a notice of hearing.² We therefore conclude that the employer had good cause for failing to appear at the January 20, 2015 hearing. Hearing Decision 15-UI-34454 is reversed; in accordance with ORS 657.275(1), this matter is remanded to OAH for a hearing and a decision on the merits of claimant's work separation.

DECISION: Hearing Decision 15-UI-34454 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: April 27, 2015

¹ Hearing Decision 15-UI-34454 at 2, 4.

² *Id.* at 6.

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 Court of Appeals website at courts.oregon.gov. Once on the website, use the ‘search’ function to search for ‘petition for judicial review employment appeals board’. A link to the forms and information will be among the search results.

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