

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0559

Late Application for Review Dismissed
No Disqualification

PROCEDURAL HISTORY: On March 20, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 144729). Claimant filed a timely request for hearing. On April 8, 2015, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for April 21, 2015 at 2:30 p.m. On April 21, 2015, ALJ Jarry conducted a hearing, at which the employer did not appear, and on April 22, 2015 issued Hearing Decision 15-UI-37264 concluding the employer discharged claimant, but not for misconduct. On May 12, 2015, Hearing Decision 15-UI-37264 became final without an application for review having been filed. On May 14, 2015, the employer filed an untimely application for review.

CONCLUSIONS AND REASONS: The employer's late application for review is dismissed.

ORS 657.270(6) required that the employer's application for review of Hearing Decision 15-UI-37264 be filed no later than May 12, 2015. OAR 471-041-0065(1)(c) (October 29, 2006) provides the filing date of faxed documents is the receipt date stamped or written on the fax transmission by the public employee who receives the document. The employer's faxed application for review was stamped as received on May 14, 2015, two days late.

OAR 471-041-0070 (August 30, 2011) provides that the filing period may be extended a reasonable time upon a showing of good cause as provided by ORS 657.875. OAR 471-041-0070(2)(a) provides: "Good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing. OAR 471-041-0070(3) requires that an individual filing a late application for review include with the late application "a written statement describing the circumstances that prevented a timely filing."

The written statement that accompanied the employer's application for review stated, "I understand that this request for review should have been filed on May 12 and request that the time be extended. I received two notices of decision on April 27, one for Denise and one for her husband Aaron. Aaron's notice had to be filed on May 14. I read both decisions and did not realize that the time for appeal was

different on each of them.” The employer’s failure to carefully read the hearing decision and the instructions that accompanied it and note the deadline was not a circumstance beyond the employer’s reasonable control that prevented timely filing of the application for review. The employer did not provide satisfactory evidence that factors or circumstances beyond its reasonable control prevented its participation in the hearing or from timely filing its application for review. Therefore, good cause has not been shown.

The employer also requested that the hearing in this matter be reopened, arguing that it was unable to attend to its mail until after the hearing had passed because of a series of events that took priority over attending to the mail. However, because the employer did not establish good cause for filing a late application for review, the employer is not entitled to further review or further opportunity to provide evidence about claimant's work separation.

Even if we had allowed the employer's late application for review, we would still have ruled against the employer's request. The employer’s request for relief would have been construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing.¹ The employer argued that its additional information should be considered because the employer did not receive the notice of hearing until the day after the hearing. However, to show that a failure to receive notice constituted a circumstance beyond its reasonable control that would allow EAB to consider the employer’s new information, the employer must show, in essence, that its failure to receive the notice was not caused by its own failure to either process its mail or take steps to resolve any known postal service interruptions or delays. Here, it was the employer's knowing failure to collect and process its mail that caused its failure to receive notice in time to participate during the hearing; the employer's decision to prioritize other matters over processing the mail was a circumstance within the employer's reasonable control. As such, EAB would not consider the employer's new information.

Finally, the employer requested that, even if its requests were not allowed, claimant be sanctioned for lying during the hearing. For the reasons already explained, however, we cannot consider the employer's new information, and the employer's failure to establish good cause for filing a late application for review means that EAB will not examine the evidence the ALJ collected during the hearing. Without reviewing the evidence from the hearing and comparing it to the new information, we have no basis for concluding that claimant perjured herself during the hearing.

In conclusion, because the application for review was filed after the 20-day deadline provided by ORS 657.270(4), and good cause to extend the time allowed has not been shown, the employer's application for review must be dismissed.

¹ The employer’s written statement might also have been construed as a request to reopen and forwarded to OAH for processing. We have not done so in this case for two reasons. First, the issue before us is whether the employer had good cause to file its late application for review with EAB. Second, the ‘good cause’ standards applied by OAH for requests to reopen and by EAB for late applications for review are substantially similar, making it likely that the outcome of a reopen proceeding at OAH would be the same as the outcome at EAB, making it unnecessary and inefficient to subject the employer to additional proceedings.

DECISION: The application for review filed May 14, 2015 is dismissed. Hearing Decision 15-UI-37264 remains undisturbed.

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

DATE of Service: May 20, 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 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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