

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1119

Reversed
Late Request for Hearing Allowed

PROCEDURAL HISTORY: On June 15, 2015, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 102845). On July 5, 2015, decision # 102845 became final without a request for hearing having been filed. On August 5, 2015, claimant filed an untimely request for hearing. On August 27, 2015, ALJ Vincent conducted a hearing, and on September 4, 2015 issued Hearing Decision 15-UI-43959, dismissing claimant's hearing request because it was untimely filed. On September 25, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) On June 15, 2015, the Department sent claimant administrative decision # 102845, which concluded claimant was discharged for misconduct.

(2) On June 17, 2015, claimant received the decision. The same day, claimant sent a request for hearing on the decision via facsimile to the Office of Administrative Hearings (OAH), but claimant was uncertain if the fax transmission was received by OAH. OAH did not receive it.

(3) Within three days of having sent the faxed hearing request to OAH, claimant called the Department by telephone and asked if her "document" had been received, and also asked about the "status of [her] appeal." Audio Record at 10:40 to 10:44, 11:44 to 12:00. The Department representative told claimant that her claim was "currently being adjudicated," and that the process usually took three to six weeks. Audio Record at 10:45 to 10:55. Claimant understood the Department representative's statements to mean that her request for hearing had been received, and that she would receive notification of how to proceed with her appeal in three to six weeks.

(4) During the next six weeks, claimant did not receive further information about her appeal. On August 5, 2015, claimant called the Department and asked about the status of her appeal. Claimant told the Department representative it had been seven weeks since she had sent in a request for a hearing by facsimile. The representative told claimant to contact OAH.

(5) On August 5, 2015, claimant contacted OAH and filed a request for hearing.

CONCLUSION AND REASONS: We disagree with the ALJ and conclude that claimant has shown good cause for filing a late hearing request. Claimant is entitled to a hearing on the merits of decision # 102845.

A Department decision becomes final unless a request for hearing is filed within 20 days after the date the decision was mailed to a party's last known address. ORS 657.269. This 20-day time limit may be extended a reasonable time upon a showing of good cause. ORS 657.875. "Good cause" exists when a party's failure to timely file results from an excusable mistake or from factors beyond the party's reasonable control. OAR 471-040-0010(1) (February 10, 2012). A "reasonable time" is defined as seven days after the circumstances that prevented a timely filing cease to exist. OAR 471-040-0010(3).

At hearing, the ALJ concluded that claimant failed to show good cause for extending the time limit to file a request for hearing because her failure to verify that OAH received the faxed hearing request was not an excusable mistake. Audio Record at 15:31 to 15:39. The ALJ reasoned that claimant should have verified that OAH received the hearing request by printing and reviewing a fax confirmation receipt, or by asking the Department when she called it three days later if the request had been received. Audio Record at 13:59 to 15:00. The ALJ found that claimant failed to ask the Department about her hearing request when she called the Department and merely asked about "the status of [her] case."¹ Audio Record at 14:54 to 15:01.

It is undisputed that claimant did not use a fax confirmation receipt to verify the hearing request was received. However, claimant's failure to use a fax confirmation did not cause the late filing. Claimant called the Department within three days after the failed fax attempt, which was within the appeal period, and asked whether her "document" had been received and also asked about the "status of her *appeal*." (emphasis supplied). The ALJ's finding that claimant merely asked about "the status of [her] case," is not supported by the record. Claimant testified that, had the Department told claimant then that there was no record of her request for hearing having been filed, she would have immediately resubmitted the request. Audio Record at 12:32 to 12:41. Thus, claimant's mistaken belief that the hearing request had been received and that she could expect to wait six weeks to receive additional information about her case caused the late filing. We conclude that claimant's mistaken belief was an excusable mistake because it was based on information she received from the Department when she asked about her "appeal." Thus, the 20-day time limit is extended a reasonable time, which is seven days after claimant called the Department on August 5, 2015 and learned there was no record of her request for hearing.

Claimant has shown good cause for filing an untimely request for hearing. Claimant filed her late request for hearing within a reasonable time as defined by OAR 471-040-0010(3), having filed the request the same day she learned OAH had not received her faxed hearing request. Claimant's late request for hearing is therefore allowed and she is entitled to a hearing on the merits of decision # 102845.

¹ Hearing Decision 15-UI-43959 at 2.

DECISION: Hearing Decision 15-UI-43959 is set aside, as outlined above.²

Susan Rossiter and J.S. Cromwell

DATE of Service: October 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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² NOTE: The failure of any party to appear at the hearing OAH schedules on the merits of decision # 102845 will not reinstate Hearing Decision 15-UI-43959 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.