

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1223

Late Application for Review of Hearing Decision 15-UI-44381 Dismissed
Hearing Decision 15-UI-44512 Affirmed
Ineligible Weeks 25-15 through 26-15

PROCEDURAL HISTORY: On August 3, 2015, the Oregon Employment Department (the Department) served notice of two administrative decisions concluding that claimant did not actively seek work from June 21 through 27, 2015 (decision # 91934), and that claimant was not available for work from June 21 through July 4, 2015 (decision # 92721). Claimant filed timely requests for hearing on both decisions, and on September 11, 2015, ALJ Vincent conducted a consolidated hearing. On September 16, 2015, ALJ Vincent issued Hearing Decision 15-UI-44381, affirming decision # 91934. On September 18, 2015, ALJ Vincent issued Hearing Decision 15-UI-44512, affirming decision # 92721. On October 6, 2015, Hearing Decision 15-UI-44381 became final without an application for review having been filed. On October 8, 2015, claimant filed, by mail, a late application for review of Hearing Decision 15-UI-44381 and a timely application for review of Hearing Decision 15-UI-44512 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-44381 and 15-UI-44512. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-1224 and 2015-EAB-1223).

EAB considered the entire hearing record and claimant's written argument.

FINDINGS OF FACT: (1) Claimant claimed benefits for the weeks from June 21 through July 4, 2015 (weeks 25-15 through 26-15), the weeks at issue. The Department did not pay claimant benefits for those weeks.¹

(2) During the weeks at issue, claimant sought work as a security guard. The usual hours and days of the week customary for security guard work are all shifts and all days of the week.

¹ We take notice of this fact, which is contained in Employment Department records. Any party that objects to EAB doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of EAB mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record.

(3) On May 7, 2015, claimant told his employer that he was not willing to work any day other than Sunday until June 15, 2015, the end of his spring term at school, because he needed time to study. Exhibit 1 at 19 to 25.

(4) Claimant also enrolled for classes during the summer term at Portland Community College (PCC). He attended classes during the weeks at issue on Mondays and Wednesdays from 9:00 a.m. to 11:30 a.m. He also had a math lab he was permitted to complete any day or time. Claimant received financial aid to pay for his classes, and could not change his class schedule during the weeks at issue.

(5) Claimant was not willing to quit school or miss classes to be available to work all shifts and all days of the week.

CONCLUSIONS AND REASONS: Claimant's application for review of Hearing Decision 15-UI-44381 is dismissed, because claimant filed it late and did not show good cause to extend the filing period. Claimant was not available for work during the weeks at issue.

Hearing Decision 15-UI-44381 – Work Search. ORS 657.270(6) required that claimant's application for review of Hearing Decision 15-UI-44381 be filed no later than October 6, 2015. OAR 471-041-0065(1)(b) (October 29, 2006) provides that the filing date of mailed documents is the postmark affixed to the envelope by the United States Postal Service. Claimant's application for review was postmarked October 8, 2015. Claimant therefore filed his application for review of Hearing Decision 15-UI-44381 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 that, "good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented a 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." Claimant did not include such a statement with his application for review of Hearing Decision 15-UI-44381. Accordingly, claimant's late application for review of Hearing Decision 15-UI-44381 is dismissed.

Hearing Decision 15-UI-44512 – Availability. To be eligible to receive benefits, unemployed individuals must be available for work during each week claimed. ORS 657.155(1)(c). An individual must meet certain minimum requirements to be considered "available for work" for purposes of ORS 657.155(1)(c). OAR 471-030-0036(3) (February 23, 2014). Among those requirements is that the individual be willing to work full time, part time and temporary work opportunities during all of the usual hours and days of the week customary for the work being sought. *Id.* Where, as here, the Department did not initially pay the claimant benefits, claimant has the burden to establish by a preponderance of evidence that he is eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

At hearing, when asked if he would refuse work to attend school, claimant testified that he did not want to "lose" either school or work, and he "could work out both [school and work] because there is availability for both." Transcript at 12. However, claimant's assertion that he would be available for

both school and work was implausible because he was unable to change his school schedule during the weeks at issue, and was seeking work that was customarily performed all days of the week, all hours of the day. Moreover, claimant told his employer during the prior school term that he was only willing to work Sundays due to his need to study for school. Because claimant was also enrolled in classes during the weeks at issue, we conclude it is more probable than not that claimant similarly limited his availability during the weeks at issue to ensure he had time to study for his classes. Thus, claimant's unwillingness to accept work if it conflicted with his classes or study time imposed a condition that substantially reduced his opportunities to return to work at the earliest possible time. Claimant therefore was not available for work during weeks 25-15 and 26-15, and is ineligible for benefits for those weeks.

DECISION: The late application for review of Hearing Decision 15-UI-44381 is dismissed. Hearing Decision 15-UI-44381 remains undisturbed. Hearing Decision 15-UI-44512 is affirmed.

Susan Rossiter and J. S. Cromwell.

DATE of Service: October 29, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.