

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1472

Reversed & Remanded

PROCEDURAL HISTORY: On February 9, 2010, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding claimant was not available for work from November 15, 2009 to January 9, 2010 (decision # 171400), and the other assessing a \$3,471 overpayment, \$520.65 monetary penalty and 29 penalty weeks. Both decisions became final on March 1, 2010 without claimant having filed timely requests for hearing. On November 12, 2015, claimant filed late requests for hearing on both decisions. On November 19, 2015, ALJ Kangas issued Hearing Decisions 15-UI-47988 and 15-UI-47989, dismissing claimant's late requests for hearing subject to his right to renew his requests by responding to appellant questionnaires by December 3, 2015. On November 23, 2015, the Office of Administrative Hearings (OAH) received claimant's responses. On November 24, 2015, ALJ Kangas reviewed claimant's responses and issued Hearing Decisions 15-UI-48246 and 15-UI-48247, re-dismissing claimant's late requests for hearing. On December 8, 2015, claimant filed an application for review with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-48246 and 15-UI-48247. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-1471 and 2015-EAB-1472).

FINDINGS OF FACT: (1) Claimant last claimed unemployment insurance benefits for the week ending January 8, 2010. On January 16, 2010, the Department learned that claimant was incarcerated.¹

(2) On February 9, 2010, the Department mailed notice of decision # 171400 and the overpayment decision to claimant at 275 Irvington Drive in Eugene, Oregon, which does not correspond to the address of any correctional institution located in Eugene, Oregon.²

¹ We take notice of the facts in this paragraph, which are contained in Employment Department records. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our 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.

CONCLUSIONS AND REASONS: The hearing decisions under review should be reversed, and these matters remanded for additional proceedings.

Under ORS 657.269, claimant had 20 days from the date of the administrative decisions at issue to file a timely request for hearing. The deadline for timely filings was March 1, 2010; claimant filed his requests on November 12, 2015, making his filings over five years late. Under ORS 657.875, the filing period may be extended a "reasonable time" if the party making the requests shows "good cause."

In Hearing Decisions 15-UI-48246 and 15-UI-48247, the ALJ concluded that claimant did not have good cause to extend the filing periods, and dismissed his late hearing requests, because he failed to provide the dates of his incarceration or any information why he was incarcerated, and, therefore, did not show that an excusable mistake or factors beyond his reasonable control caused the late filed hearing request. Although we agree with the ALJ about the deficiencies in claimant's explanations, we disagree with the ALJ's conclusion.

OAR 471-040-0010(1)(a)(A) specifically provides that an individual has "good cause" when his late filing was caused by his "[f]ailure to receive a document because the Employment Department or Office of Administrative hearings [*sic*] mailed it to an incorrect address despite having the correct address." OAR 471-040-0010(1)(b)(A) provides that an individual does not have "good cause" when his failure to receive a document occurs because he failed to notify the Department or OAH of an updated address while the person is claiming benefits or if he knows or reasonably should know of a pending appeal.

In this case, it appears that the Department mailed its February 9th notices to claimant at the Irvington Drive address despite knowing that he was incarcerated, and, necessarily, did not reside at that address.³ It also appears that claimant had no responsibility to update his address with the Department because he was not claiming benefits and there was no pending appeal at the time. The circumstances of claimant's request for hearing fall squarely within the definition of "good cause."

Parties' late requests for hearing may only be allowed if, in addition to showing "good cause," the party also proves he filed the late requests within "a reasonable time." ORS 657.875. "A reasonable time" is defined as "seven days after the circumstances that prevented a timely filing ceased to exist." OAR 471-040-0010(3). However, the record in this case fails to show when the circumstances that caused the timely filing ceased to exist, or whether claimant filed his late requests within seven days of that date. Therefore, the record in these matters is incomplete, and the cases must be remanded for additional evidence.

² We take notice that the address to which the Department mailed the February 9th notices was not the address of a Eugene, Oregon correctional institution, which is a generally cognizable fact. Any party that objects to our doing so must submit such objection to this office in writing, setting forth the basis of the objection in writing, within ten days of our 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 The Department must mail notices of administrative decisions to parties at "their last address of record." OAR 471-030-0039(2). By checking jail and prison records for record of claimant's incarceration, the Department has, effectively, updated claimant's address of record.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant filed his late requests for hearing within a "reasonable time," Hearing Decisions 15-UI-48246 and 15-UI-48247 are reversed, and these matters are remanded for development of the record.

DECISION: Hearing Decisions 15-UI-48246 and 15-UI-48247 are set aside, and these matters remanded for further proceedings consistent with this order.⁴

Susan Rossiter and J. S. Cromwell

DATE of Service: December 14, 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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⁴ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decisions 15-UI-48246 or 15-UI-48247 or return this matter to EAB. Only timely applications for review of the subsequent hearing decisions will cause these matters to return to EAB.