

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0420

Reversed & Remanded

PROCEDURAL HISTORY: On February 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant voluntarily left work with the Kroger Co. without good cause (decision # 104547). On February 22, 2016, decision # 104547 became final without a request for hearing having been filed. On March 3, 2016, claimant filed an untimely request for hearing. On March 8, 2016, ALJ Kangas issued Hearing Decision Hearing Decision 16-UI-54553, dismissing claimant's request for hearing on decision # 10457, subject to claimant's right to renew the request by submitting a response to an appellant questionnaire to the Office of Administrative Hearings (OAH) within 14 days. On April 11, 2016, claimant filed an application for review of Hearing Decision 16-UI-54553 with the Employment Appeals Board (EAB).

LATE APPLICATION FOR REVIEW: OAR 657.270(6) and (7) required that claimant's application for review be filed on or before March 28, 2016; claimant filed her application on April 11, 2016. Under OAR 471-041-0070(2) (March 20, 2012), the period for filing an application for review may be extended a reasonable time upon a showing of "good cause." "Good cause" exists if an applicant demonstrates that "factors or circumstances beyond the applicant's reasonable control prevented timely filing." OAR 471-041-0070(2)(a). In her application for review, claimant stated that she mailed her response to the appellant questionnaire on March 14, 2016, and "[o]n March 28th, I called to see why I had not received anything and she told me they had never received it." Claimant asserted that she requested that another appellant questionnaire be mailed to her, but had not received it as of April 11, 2016. The failure of the OAH to receive, acknowledge and process claimant's response to the appellant questionnaire, and OAH's subsequent failure to send claimant a duplicate copy of the appellant questionnaire constitute circumstances beyond claimant's reasonable control that prevented her from timely filing an application for review. The late application for review is therefore allowed.

CONCLUSION AND REASONS: Hearing Decision 16-UI-54553 is reversed, and this matter remanded for further development of the record.

As discussed above, claimant asserted in her application for review that on March 14, 2016, that she timely responded to the appellant questionnaire she received with Hearing Decision 16-UI-54553, and

that she followed up with a telephone call on March 28, 2016 to determine why she had heard nothing further from OAH about her response. Also in her application for review, claimant asked that she be allowed a hearing on her work separation from Kroger. Claimant's request for relief is construed as a request to have EAB consider additional evidence under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider new information if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The circumstances described by claimant constitute circumstances beyond her reasonable control that prevented her from presenting evidence regarding her late request for a hearing. Claimant's request for a hearing on her late hearing request is therefore allowed. Due process of law requires that the employer be permitted to respond to claimant's late hearing request, and to participate in a hearing on the merits of claimant's work separation, if the ALJ grants claimant's hearing request. Hearing Decision 16-UI-54553 is therefore reversed, and this matter remanded pursuant to ORS 657.275(1) for a hearing on claimant's late request for hearing. At the hearing, the ALJ must supplement the record with notes or records of any telephone calls or other communications that claimant may have had with OAH regarding her request for a hearing on the work separation from Kroger. If the ALJ allows claimant's hearing request, then the ALJ must proceed to conduct a hearing on the merits of claimant's work separation from Kroger.¹

DECISION: Hearing Decision 16-UI-54553 is set aside, and this matter remanded for further proceedings consistent with this order.²

Susan Rossiter and J. S. Cromwell;
D. P. Hettle, not participating.

DATE of Service: April 14, 2016

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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¹ In her application for review, claimant provided an email address. Because the information claimant provided in her application for review indicates possible problems with mail delivery, OAH should communicate with claimant both by U.S. Postal service and email.

² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-54553 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.