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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0611-R

Hearing Decision 16-UI-56890 Reversed & Remanded on Reconsideration

PROCEDURAL HISTORY: On February 26, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 105920). Claimant filed a timely request for hearing. On March 30, 2016, ALJ Murdock conducted a hearing at which claimant and the employer appeared, and on April 8, 2016 issued Hearing Decision 16-UI-56890, concluding the employer discharged claimant, but not for misconduct. On April 13, 2016, the employer filed a document with the Office of Administrative Hearings (OAH) that OAH treated as a request to reopen the March 30, 2016 hearing, and not an application for review of Hearing Decision 16-UI-56890. On April 22, 2016, ALJ Kangas issued Hearing Decision 16-UI-57944, denying the employer's request for a reopening because the employer appeared at the March 30, 2016 hearing.[1]

On May 9, 2016, the employer filed an application for review with the Employment Appeals Board (EAB), which EAB construed as an application for review of both Hearing Decisions 16-UI-57944 and 16-UI-56890. On May 16, 2016, EAB notified the parties that an application for review of Hearing Decisions 16-UI-57944 and 16-UI-56890 had been received. On May 26, 2016, EAB issued EAB Decisions 2016-EAB-0556 and 2016-EAB-0611, affirming Hearing Decision 16-UI-57944, but reversing Hearing Decision 16-UI-56890 and remanding the matter to OAH for another hearing because the March 30, 2016 hearing record fails to show a full inquiry into the facts necessary for consideration of whether claimant's discharge was for misconduct.

On June 8, 2016, claimant filed a timely request for reconsideration of EAB Decision 2016-EAB-0611 under OAR 471-041-0145 (October 29, 2006), which included written argument and a statement that a copy had been provided to the employer. On June 10, 2016, EAB served notice that it was allowing

[1] ORS 657.270(5) and OAR 471-040-0040 (February 10, 2012) provide that an ALJ may reopen a hearing only if the party requesting the reopening failed to appear at the hearing.

claimant's request for reconsideration and withdrawing EAB Decision 2016-EAB-0611, returning the matter to EAB for *de novo* review of the record under ORS 657.275 and consideration of claimant's timely filed written argument. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

EVIDENTIARY MATTER: In her request for reconsideration, claimant stated that the employer did not provide her a copy of the document it filed with OAH on April 13, 2016, or of the appliation for review it filed with EAB on May 9, 2016. Request for Reconsideration at 2. The employer was not required to provide claimant copies of those documents. *See* OAR 471-040-0040 and OAR 471-041-0060 (January 8, 2008). The document filed on April 13, 2016 was part of the hearing record before ALJ Kangas, received into evidence as Exhibit 5, and is attached to this decision. The application for review filed on May 9, 2015, which is part of the record before EAB, has been marked as EAB Exhibit 1, also is attached to this decision.

CONCLUSIONS AND REASONS: On reconsideration, Hearing Decision 16-UI-56890 is reversed, and this matter remanded to OAH for another hearing on whether claimant's discharge was for misconduct.

In her request for reconsideration, claimant argued that EAB erred in issuing EAB Decision 2016-EAB-0611 before the deadline for the parties to submit written argument as set forth in OAR 471-041-0080(1) (October 29, 2016), which states that parties may submit written argument within 20 days of the date EAB notifes the parties that an application for review has been received. Request for Reconsideration at 3. Claimant also argued that EAB erred failing to dismiss the employer's application for review of Hearing Decision 16-UI-56890 under OAR 471-041-0070 (March 20, 2012), which states that an application for review is timely if it is filed within 20 days of the date that OAH mailed the hearing decision sought to be reviewed, and that EAB shall dismiss a late application for review unless the filing period is extended a reasonable time upon a showing of good cause.[2] Request for Reconsideration at 3. Finally, claimant argues that EAB erred in failing to affirm Hearing Decision 16-UI-56890, which concluded that claimant's discharge was not for misconduct. Request for Reconsideration at 3-4.

We agree with claimant that EAB erred in issuing EAB Decision 2016-EAB-0611 before the deadline for the parties to submit written argument. However, because EAB allowed claimant's request for reconsideration to consider her timely filed written argument, the error has been remedied. We next address claimant's argument that EAB erred in failing to dismiss the employer application for review of Hearing Decision 16-UI-56890 as untimely without good cause.

The procedural history section of EAB Decision 2016-EAB-0611 states, without analysis, that on April 13, 2016 the employer filed a request to reopen the March 30, 2016 hearing. EAB Decision 2016-EAB-0611 at 1. It further states that on May 9, 2016, the employer filed an application for review with EAB that EAB construed, in part, as an application for review of Hearing Decision 16-UI-56890, which was issued on April 8, 2016. EAB Decision 2016-EAB-0611 at 1. Claimant argued that the employer's application for review of Hearing Decision 16-UI-56890 therefore was late, and that the employer failed

[2] OAR 471-041-0070(2) states that "good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing, and that "a reasonable time" is seven days after the circumstances that prevented timely filing ceased to exist.

to establish good cause for extending the filing period. Request for Reconsideration at 2. In support of that argument, claimant asserted that the employer's April 13, 2016 request to reopen the March 30, 2016 hearing was not an application for review of Hearing Decision 16-UI-56890, which explicitly instructed the parties on how to appeal the decision and included a form to complete an application for review with EAB, and that the employer chose only to request a reopening. Request for Reconsideration at 2. Claimant emphasized that although under OAR 471-040-0040(6) an application for review to EAB that should have been properly addressed to OAH as a request to reopen the hearing will in certain circumstances be treated as a request to reopen, there is no inverse administrative rule providing that a request to reopen to OAH, which may have more appropriately been an application for review to EAB, be treated as an application for review, and that it was the employer's responsibility to select the method it deemed appropriate to appeal the decision. Request for Reconsideration at 2-3.

We agree with claimant that if the employer did not file an application for review of Hearing Decision 16-UI-56890 until May 9, 2015, the request was late. On reconsideration, however, we construe the document the employer filed with OAH on April 13, 2016 as a timely filed application for review of Hearing Decision 16-UI-56890.[3] We therefore need not, and do not, decided whether the employer established good cause for extending the filing period to May 9, 2016.

An application for review may be filed on the form provided by OAH, but that use of the form is not required, provided the party requests review of a specific hearing decision, or otherwise expresses intent to appeal a specific hearing decision. OAR 471-041-0060(1). An application for review may be filed with EAB or any office of the Department, including OAH.[4] OAR 471-041-0060(2). The fact that the document filed by the employer on April 13, 2016 was not the form for filing an application for review of Hearing Decision 16-UI-56890 provided by OAH, and that the employer filed the document with OAH, and not EAB, therefore does not determine whether the document should be construed as an application for review. The issue is whether the employer requested review of Hearing Decision 16-UI-56890 or otherwise expressed an intent to appeal that decision.

Hearing Decision 16-UI-56890 states, in relevant part:

> If you did not appear at the hearing, you may request to reopen the hearing. These requests are governed by OAR 471-040-0040 . . . and should be filed with the Office of Administrative Hearings. Your request to reopen the hearing must: 1) be in writing; 2) show good cause for failing to appear at the hearing; "Good cause" exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control. [5]

[3] No party asked EAB to reconsider whether the document the employer filed on April 13, 2016 was an application for review of Hearing Decision 16-UI-56890. However, EAB has the authority reconsider that issue under ORS 657.290(3), which states that EAB reconsider any previous EAB decision upon its own motion in its discretion at any time irrespective of whether the decision has become final.

[4] *See* ORS 183.605(1) (OAH is established within the Employment Department).

[5] Hearing Decision 16-UI-56890 at 5.

Here, the employer appeared at the March 30, 2016 hearing, and did not state in the document filed on April 13, 2016 that it was requesting that the hearing be reopened. Nor did the employer refer to OAR 471-040-0040, allege that it failed to appear at the hearing, or attempt to show "good cause" for failing to appear. The employer instead stated that, "Per OAR 471-041-0090, [the employer] requests that the "case," reference number 2016-UI-47177, be reopened, and "additional information be received into evidence." Exhibit 5 at 2. OAR 471-041-0090 (October 29, 2006) states under what circumstances EAB will consider information not received into evidence at the hearing when an application for review of the hearing decision has been filed. OAR 471-041-0090(2) states that new information may be considered when the party offering the information establishes that the new information is relevant and material to EAB's determination, and that factors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing.

In the document filed on April 13, 2016, the employer acknowledged that it appeared at the March 30, 2016 hearing, but argued that factors or circumstances beyond its reasonable control prevent it from offering information into evidence that was "relevant and material to the EAB's determination" of whether claimant's discharge was for misconduct, and that the information could be provided upon request. Exhibit 5 at 2. The document therefore shows the employer was expressing intent to appeal Hearing Decision 16-UI-56890, and requesting that EAB review of Hearing Decision 16-UI-56890 after considering the employer's new information under EAB's administrative rule. The document therefore constitutes a timely application for review of Hearing Decision 16-UI-56890 under OAR 471-041-0060 and OAR 471-041-0070.[6] Claimant's request for EAB, on reconsideration, to dismiss claimant's application for review as untimely without good cause therefore is denied. We next address claimant's argument that EAB erred in failing to affirm Hearing Decision 16-UI-56890, which concluded that claimant's discharge was not for misconduct.

OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. In a discharge case, the employer has the burden to establish misconduct by a preponderance of evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). For an act to be isolated, the exercise of poor judgment must be a single or infrequent occurrence rather than a repeated act or pattern of other willful or wantonly negligent behavior. OAR 471-030-0038(1)(d)(A). Acts that violate the law, acts that are tantamount to unlawful conduct, acts that create irreparable breaches of trust in the employment relationship or otherwise make a continued employment relationship impossible exceed mere poor judgment and do not fall within the exculpatory provisions of OAR 471-030-0038(3). OAR 471-030-0038(1)(d)(D).

[6] For purposes of this decision, we need not, and do not, determine whether the document filed by the employer on April 13, 2016 also constituted a request to reopen the March 30, 2016 hearing under ORS 657.270(5) and OAR 471-040-0040.

In Hearing Decision 16-UI-56890, the ALJ found that the employer discharged claimant at a January 4, 2016 meeting for "failing to use paid-time-off [PTO] or unpaid time for her vacation and sick days."[7] The ALJ further found that although the employer had a written policy stating that salaried, exempt employees such as claimant were required to use accrued PTO or take unpaid time off for absences in excess of three hours per day, claimant was unaware of the employer's policy and expectations in that regard.[8] Based on those findings, the ALJ concluded the record failed to show claimant was discharged for a willful or wantonly negligent violation of the employer's expectations because the evidence as to whether claimant was aware of the employer's policy, and therefore knowingly violated the policy was, at best, equally balanced.[9]

In her request for reconsideration, claimant agreed with the ALJ's findings, analysis and conclusion, and further asserted that claimant's conduct was, at worst, an isolated instance of poor judgment, and not misconduct, because even if she did record her PTO incorrectly several times, it was based on the same misjudgment. Request for Reconsideration at 3-4. As we stated in EAB Decision 2016-EAB-0611, however, the employer alleged at hearing that claimant failed to use PTO or unpaid time off when she went on vacation from July 15 through 17, August 20 and 21, September 4, November 24 and 25 and December 21 through 23, 2015, or when she was out sick on September 18, October 2 and December 30, 2015. Audio Record at 15:00-15:50. Claimant testified that although she was not aware of the employer's PTO policy, she understood that when she was absent from work, "As long as I worked from home or away, that I would still get paid," and that, "If I wasn't in the office, as long as I worked, I still got paid." Audio Record at 22:00-22:45. Claimant also testified that she understood she was supposed to go unpaid on at least some days that she did not work for the employer, such as when she had surgery and "didn't work that day and didn't get paid." Audio Record at 23:45-24:15.

Thus, although the record may not show claimant was aware of the specifics of the employer's PTO policy, her own testimony indicates she understood that the employer expected her to use PTO or unpaid time off for time she did not work, under some circumstances. However, the ALJ failed to conduct a sufficient inquiry into the facts necessary for consideration of that issue. For example, the ALJ did not ask claimant or the employer under what circumstances, if any, claimant had ever used PTO or unpaid time off for days on which she did not work. Nor did the ALJ ask the employer or claimant, who as of late May or early June 2015 was in charge of processing payroll,[10] under what circumstances, if any, she processed PTO or unpaid time off for days on which other salaried, exempt employees did not work. Nor did the ALJ ask claimant whether she was absent from work on the days alleged by the employer and, if so, the reasons she was absent, whether she used PTO or unpaid time off, and why or why not. Nor did the ALJ conduct an inquiry into the facts necessary for consideration of whether claimant's exercise of poor judgment, if any, with respect her use non-use of PTO or unpaid off was part of a pattern of other willful or wantonly negligent behavior during her employment.

[7] Hearing Decision 16-UI-56890 at 1.

[8] *Id*. at 1-2.

[9] *Id*. at 3.

[10] Audio Record at 12:20-12:40.

Absent such inquiries into claimant's understanding of the employer's expectations, her alleged failure to comply with those expectations on the days at issue, and whether she engaged in any other willful or wantonly negligent behavior during her employment, we cannot determine whether claimant violated the employer's expectations willfully or with wanton negligence, or whether her conduct can be excused as a good faith error. Nor can we determine whether claimant's exercise of poor judgment, if any, was a single or infrequent occurrence rather than a repeated act or part of a pattern of other willful or wantonly negligent behavior, or whether it created an irreparable breach of trust in the employment relationship that made a continued relationship impossible. We therefore cannot determine whether claimant's conduct can be excused as an isolated instance of poor judgment.

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's discharge was for misconduct, Hearing Decision 16-UI-56890 is reversed, and this matter remanded to OAH for further development of the record.

DECISION: On reconsideration, Hearing Decision 16-UI-56890 is set aside, and this matter remanded to OAH for further proceedings consistent with this order.[11]

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

DATE of Service: <u>July 6, 2016</u>

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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[11] The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-56890 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.