

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0647

Affirmed
Late Request for Hearing Dismissed

PROCEDURAL HISTORY: On February 12, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant was not unemployed while claiming benefits from November 1, 2015 to February 6, 2016 (decision # 105858). On March 3, 2016, decision # 105858 became final without claimant having filed a request for hearing. On April 1, 2016, claimant filed a late request for hearing by phone. On April 5, 2016, ALJ Kangas issued Hearing Decision 16-UI-56475, dismissing claimant's request for hearing as late, subject to his right to renew the request by responding to an appellant questionnaire no later than April 19, 2016. On April 22, 2016, the Office of Administrative Hearings (OAH) received claimant's response.¹ On April 26, 2016, OAH mailed a letter canceling Hearing Decision 16-UI-56475. On May 11, 2016, ALJ Holmes-Swanson conducted a hearing and issued Hearing Decision 16-UI-59387, dismissing claimant's late request for hearing. On May 31, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) Claimant's unemployment insurance claim was for regular unemployment insurance (UI) benefits. On February 6, 2016 or February 12, 2016, claimant spoke with two Department employees about his claim. During the second call, the Department employee informed claimant that he could "appeal" to the Department to switch his claim from UI benefits to benefits under the self-employment assistance (SEA) program. The Department employee "strongly recommended" that claimant not do so, stating that it would not be worth his time to pursue that appeal because the amount of time left on his claim was insufficient to deal with all the paperwork on his claim. Claimant concluded on the basis of those two calls that the Department intended to stop paying him UI benefits.

(2) On February 12, 2016, the Department mailed decision # 105858 to claimant. That decision denied claimant UI benefits based on the Department's conclusion that claimant was employed full time in a self-employment venture. Decision # 105858 stated, in pertinent part,

¹ The record on review does not include any explanation why OAH considered claimant's untimely response to the questionnaire.

**IF YOU DO NOT AGREE WITH THIS DECISION SEE THE ENCLOSED
INFORMATION FOR YOUR APPEAL RIGHTS.**

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NOTICE: This decision results from information obtained after the original decision to pay or not pay benefits, and may create an overpayment if you were previously allowed benefits. If this decision becomes final, and you were overpaid benefits, you will be notified of the amount.

Claimant received decision # 105858 within a couple of days after it was mailed. He read the decision and disagreed with it. Claimant decided not to appeal the decision based on the recommendation he had received advising against trying to switch his claim from UI to the SEA program. Claimant thought his benefits would stop based on decision # 105858, but did not understand that he might have an overpayment. Claimant did not recall reading the portion of decision # 105858 advising him that the decision might have created an overpayment.

(3) Sometime after decision # 105858 became final on March 3, 2016, claimant received another decision from the Department that assessed an overpayment. Claimant thought the decision was incorrect and, on March 21, 2016, called the Department's overpayment unit to discuss the overpayment. The Department employee with whom claimant spoke told claimant that the overpayment was based upon the Department's February 2016 administrative decision (decision # 105858). Claimant told the employee that he had not received that decision. The employee advised claimant to contact the adjudicator about decision # 105858. Claimant did not request a hearing on decision # 105858 during that call.

(4) On March 24, 2016, claimant contacted the adjudicator by phone and left a voicemail. He did not request a hearing during that message. On April 1, 2016, claimant spoke with the adjudicator. During that call, he filed a telephone request for hearing.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant's late request for hearing should be dismissed.

ORS 657.269 requires that parties file a request for hearing within 20 days after the date the decision was mailed. In order to be timely, claimant's request for hearing had to be filed no later than March 3, 2016. Claimant filed it on April 1, 2016, making it late. ORS 657.875 allows that deadline to be extended, but it may only be extended "a reasonable time," and only if the party also shows "good cause" to extend the deadline. OAR 471-040-0010(3) defines "a reasonable time" as seven days after the circumstances that prevented a timely filing ceased to exist.

The Department witness testified that claimant said he did not know of decision # 105858 until March 21, 2016. Claimant testified that he knew of the decision within a couple of days after it was mailed and decided not to appeal it based on the confusing or inaccurate advice he had previously received from a Department employee. Regardless which reason caused claimant's late filing, or even whether claimant established he had "good cause" for the late filing, claimant's late request for hearing must be dismissed because he did not file the late request for hearing within "a reasonable time." Assuming for the sake of argument that claimant was misled or unaware of decision # 105858 or his appeal rights, and assuming further that either of those reasons constituted "good cause" for a late filing, claimant only had seven

days after the date the circumstance that had prevented a timely filing ceased to exist to file his late request for hearing.² The record in this case shows that by March 21, 2016 whichever circumstances preventing claimant from filing a timely request for hearing ceased to exist when a Department employee informed claimant that decision # 105858 existed, and told him that it had caused an overpayment he would be required to repay. After receiving that information on March 21st, claimant did not request a hearing until April 1, 2016, eleven days later. Regardless of the circumstances that caused the late filing, claimant is not entitled to have the deadline extended more than the seven-day "reasonable time" period. Therefore, his late request for hearing must be dismissed.

DECISION: Hearing Decision 16-UI-59387 is affirmed.

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

DATE of Service: June 8, 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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² Although our analysis assumed for the sake of argument that claimant had good cause, we note that the record showed he did not. To the extent he filed his request for hearing late because he did not understand the implications of decision # 105858, OAR 471-040-0010(1)(b)(B) specifically states that not understanding the implications of a decision is not good cause. To the extent he filed his request for hearing based on the advice he received about requesting SEA benefits, it is notable that he did not claim that the employee with whom he spoke advised him not to request a hearing on a decision that denied him benefits because he was self-employed and suggested that he might have been overpaid, nor did he show that the advice he received concerning filing a claim for SEA benefits was false or misleading as to the process or timelines for requesting SEA benefits. As such, claimant was not prevented from filing a timely request for hearing by factors or circumstances beyond his reasonable control or an excusable mistake, and, thus, did not show he had good cause for the late filing.