

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0651

Hearing Decision 16-UI-59438 Affirmed
Hearing Decision 16-UI-59458 Affirmed

PROCEDURAL HISTORY: On March 14, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 85653). That decision stated that, to be timely, a request for hearing needed to be filed on or before April 4, 2016. On April 15, 2016, the Department served notice of an administrative decision assessing a \$4,356 overpayment, a \$653.40 monetary penalty and 32 penalty weeks based on decision # 85653 (decision # 194581). On April 15, 2016, claimant filed an untimely request for hearing on decision # 85653 and a timely request for hearing on the April 15, 2016 overpayment decision. On May 4, 2016, ALJ Frank conducted a consolidated hearing, and on May 12, 2016 issued two hearing decisions, the first dismissing claimant's request for hearing on decision #85653 as untimely (Hearing Decision 16-UI-59438) and the second assessing a \$4,356 overpayment but no penalties on decision # 194581 (Hearing Decision 16-UI-59458). On June 1, 2016, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Claimant submitted a written argument in which she offered new reasons for failing to timely file a request for hearing on decision # 85653. None of these reasons suggests why, having received and read decision # 85653 shortly after March 14, 2016, claimant was reasonably prevented from timely filing a request for hearing. Although claimant asserted she was not able to articulate the new reasons she offered in her argument during the hearing because she was "extremely nervous," those reasons do not address why she delayed in filing the request for hearing until she was contacted by the Department on April 15, 2016. Accordingly, EAB did not consider the new reasons that claimant sought to present to explain her untimely filing of the request for review. *See* OAR 471-041-0090 (October 29, 2006).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-59438 and 16-UI-59458. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0651 and 2016-EAB-0652).

FINDINGS OF FACT: (1) On April 29, 2015, claimant filed an initial claimant for unemployment benefits. The claim was determined valid and had a weekly benefit amount of \$484.

(2) Sometime before January 8, 2014, Northern Wasco County Parks & Recreation District hired claimant to perform general office work because one of its employees had left work. The employer and claimant understood that claimant's work was temporary and would last only until the employer had hired a permanent replacement for the employee who had departed. As of January 8, 2016, the employer had recruited the permanent replacement and expected claimant's position to end sometime before January 22, 2016.

(3) On January 8, 2016, claimant sent an email to the employer's executive director stating that she wanted to resign immediately to start another job which was permanent and full time. The executive director replied to claimant, stating he understood why she had taken the new job and that the employer would be able to accommodate an immediate resignation because another permanent employee was returning to work from vacation the following week. Exhibit 1 at 2, 3. Claimant later contacted the executive director and he told claimant she did not need to work during a notice period because the returning employee was able to handle any work that would otherwise have been assigned to claimant. Claimant did not return to work.

(4) Claimant claimed and was paid benefits for the weeks of January 3, 2016 through March 5, 2016 (weeks 01-16 through 09-16), the weeks at issue. When claimant made her weekly claim report for the week of January 3, 2016 through January 9, 2016, claimant answered "no" to the question, "Did you quit a job last week?" Audio at ~9:39. Claimant did not think she had quit work on January 8, 2016 because she on that day, she had offered to work longer and the executive director told her she did not need to do so, and the employer had already recruited the permanent employee whose work would replace claimant's work. For the weeks at issue, claimant was paid \$4,356 in benefits.

(5) On January 25, 2016, a Department representative telephoned claimant to inquire about the circumstances surrounding her separation from the employment with the employer. Claimant told the representative she had become unemployed due to a "lack of work." Audio at ~11:54, ~25:33. Claimant thought that since she had offered to stay at work longer, but the executive director had told her she did not need to do so, the correct way to characterize the separation was that the employer had no work for her rather than that she had quit.

(6) Within a couple of days after March 14, 2016, claimant received in the mail a copy of decision #85653, disqualifying her from benefits based on the January 8, 2016 work separation. Claimant read that decision. Audio at ~10:46, ~11:15. Claimant did not notice that the decision specified she was required to file a request for hearing on or before April 4, 2016. Between the date on which she received decision #85653 and April 4, 2016, claimant did not file a request for hearing on that decision. On April 4, 2016, decision # 85653 became final.

(7) On April 15, 2016, a Department representative called claimant to inform her that an overpayment decision had been issued that day. During the call, claimant filed by telephone requests for hearing on both administrative decisions # 85653 and # 194581.

CONCLUSIONS AND REASONS: Claimant's request for a hearing on decision # 85653 was not timely filed, good cause was not shown to extend the filing period and claimant is not entitled to a hearing on the merits of her work separation. During the period January 3, 2016 through March 5, 2016,

claimant was overpaid \$4,356 in benefits which she is liable to repay or to have deducted from any future benefits otherwise payable to her. Claimant is not liable for a monetary penalty or any penalty weeks arising from the overpaid benefits.

Untimely Request for Hearing on Decision # 85653. It is not disputed that claimant did not file a request for hearing on decision # 85653 on or before April 4, 2016, which she was required to do if she wanted a hearing on that decision. ORS 657.269 states that an administrative decision becomes final if a request for hearing is not filed within 20 days after the date the decision is mailed. ORS 657.875 states that that the period of time in which a request for hearing is required to be filed may be extended upon a showing of good cause for the delayed filing. OAR 471-040-0010(1) (February 12, 2012) provides that “good cause” for a late filing exists when the late filing resulted from an excusable mistake or factors beyond the applicant’s reasonable control. OAR 471-040-0010(1)(b)(B) states that good cause for a delayed filing does not include a claimant’s failure to understand the implications of a decision or notice when it is received.

At hearing, claimant was unable to offer a sound reason why she failed to request a hearing within 20 days after administrative decision # 85653 was mailed. Claimant testified she received and read the decision shortly after the date it was mailed and understood it disqualified her from receiving benefits. Audio at ~10:46. Although claimant contended she did not notice that one of the final paragraphs of the decision set out the date by which she needed to request a hearing on that decision, this lack of awareness does not constitute good cause for claimant’s delay in filing. Given that claimant knew the significance of the administrative decision on her claim for benefits and the importance of requesting a hearing if she wanted to overturn it, her failure to notice a paragraph in all upper case font toward the end of the decision stating “IF YOU DO NOT AGREE WITH THIS DECISION SEE THE ENCLOSED INFORMATION FOR YOUR APPEAL RIGHTS” and the final paragraph of the decision stating, “Any appeal from this decision must be filed on or before Apr 04, 2016 to be timely” was not an excusable mistake. Record Document, March 14, 2016 Administrative Decision at 2. A person would not be expected to overlook such conspicuous language in a decision affecting negatively their entitlement to benefits. As well, that claimant did not take the time to read the administrative decision in a fashion that would have alerted her to these prominent sentences was neither an excusable mistake nor a factor that was beyond her reasonable control.

Claimant also suggested during the hearing that she did not promptly file a request for hearing on decision # 85653 because she thought she was going to receive “more paperwork” before she needed to file the hearing request. Audio at ~13:18. Claimant did not explain why she thought she would receive additional papers, and nothing in the administrative decision alludes to such papers. That claimant supposedly entertained such a belief, when it was apparently based on nothing more than unfounded speculation, also was not an excusable mistake or a factor beyond her reasonable control leading to her untimely filing of a request for hearing. Absent evidence of an excusable mistake or factors beyond claimant’s reasonable control, there is insufficient evidence to conclude good cause exists to extend the period for filing a request for hearing beyond the April 4, 2016 date set out in administrative decision #85653. Because good cause has not been shown, administrative decision # 85653 became final on April 4, 2016 and claimant is not entitled to a hearing on the merits of that decision.

The Overpayment. ORS 657.310(1) states that if an individual receives benefits to which the individual was not entitled because the individual, regardless of the individual’s knowledge or intent, made or caused to be made a false statement or misrepresentation of a material fact, the individual is

liable to repay to amount of the overpaid benefits to the Department or to have the amount deducted from any future benefits otherwise payable to the individual.

It was not disputed at hearing that the Department would not have paid benefits to claimant if she had not represented that she was laid off from work rather than having voluntarily left work. It also was not disputed that claimant received \$4,356 in benefits that would not have been paid to her had she not mischaracterized her work separation to the Department. Since decision # 85653, finding that claimant voluntarily left work without good cause, became final on April 4, 2016, it is a matter of law that claimant's statement that the employer laid her off was false. Under ORS 657.310(1), even if claimant did not know her statement to the Department about the work separation being a layoff was false and did not intend to obtain benefits to which she was not entitled, the Department is nevertheless entitled to recover the benefits it overpaid to claimant. Claimant is liable to repay \$4,356 in overpaid benefits she received or to have that amount deducted from any future benefits otherwise payable to her.

The Penalties. ORS 657.215 and ORS 657.310(2), read together, provide that if an individual received benefits to which the individual was not entitled because the individual willfully made a false statement or misrepresentation, the individual must pay a monetary penalty to the Department and is disqualified from future benefits for a period not to exceed 52 weeks. To be assessed these penalties, claimant must have known she was inaccurately characterizing her work separation to the Department for the purpose of obtaining benefits to which she was not entitled.

Claimant explained that when the Department asked her to characterize her work separation from the employer, she selected the option that she was laid off from work because, although she had notified the employer she was resigning from work on January 8, 2016, when she offered to continue working during the notice period, the employer's executive director told her she did not need to do so because another employee would perform her work during that period. Audio of May 4, 2016 Hearing at 10:45 a.m. (Audio 2) at ~25:33, ~27:11, ~29:56. Claimant's testimony appeared sincere and credible. On this record, it appears that claimant was confused about how to characterize her work separation and most likely was not aware that she was mischaracterizing the separation to the Department. There is insufficient evidence to conclude that claimant willfully made a false statement or misrepresented the work separation to the Department. Claimant's state of mind when she represented the work separation to the Department, although the statement may have been inaccurate, does not support the assessment of penalties.

DECISION: Hearing Decision 16-UI-59438 is affirmed.
Hearing Decision 16-UI-59458 is affirmed.

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

DATE of Service: July 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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