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

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<p>EMPLOYMENT APPEALS BOARD DECISION 2016-EAB-0936</p>
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Hearing Decision 16-UI-64446 Reversed – Late Request for Hearing Allowed
Hearing Decision 16-UI-64445 Modified – Overpayment Subject to Collection by Deduction, Not Repayment

PROCEDURAL HISTORY: On April 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 134551). On May 12, 2016, decision # 134551 became final without claimant having filed a timely request for hearing. On June 7, 2016, the Department served notice of an administrative decision based on decision # 134551 concluding that claimant was overpaid in the amount of \$13,041.00 and liable to repay that amount to the Department (decision # 93921). On June 14, 2016, claimant filed a late request for hearing on decision # 134551 and a timely request for hearing on decision # 93921. On July 19, 2016, ALJ M. Davis conducted two hearings, and on July 26, 2016 issued Hearing Decision 16-UI-64446, dismissing claimant's late request for hearing on decision # 134551, and Hearing Decision 16-UI-64445, affirming decision # 93921. On August 11, 2016, claimant filed timely applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-64445 and 16-UI-64446. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2016-EAB-0935 and 2016-EAB-0936).

EAB considered claimant's argument when reaching this decision.

FINDINGS OF FACT: (1) Effective August 17, 2015, claimant filed an initial claim for unemployment insurance benefits. Claimant reported to the Department at that time that he was not working because he was on a forced unpaid medical leave of absence from Unified Grocers.

(2) The Department investigated claimant's unemployment insurance claim, made a determination that claimant was eligible for benefits and not disqualified from receiving payments, and, beginning August 23, 2015, paid claimant \$567 per week each week he claimed benefits. Between August 23, 2015 and February 27, 2016, the Department paid claimant \$13,041 in regular benefits based on his weekly claims.

(3) In early March 2016, claimant received a "notice of termination" from Unified Grocers stating that he had been "on a leave of absence for almost eleven months," that the employer had concluded claimant was "not qualified for [his] position," that his "employment is ending effective today," and describing the reason for the end of his employment as a "termination." Exhibit 2. When claimant next claimed benefits, he reported to the Department that he had been discharged.

(4) The information about claimant's work separation prompted the Department to undertake an additional investigation into whether claimant should be disqualified from receiving unemployment insurance benefits based on a work separation from Unified Grocers. As a result, the Department reversed its initial decision and concluded that claimant should be disqualified from benefits on the basis of a voluntary leaving, and that the disqualification was retroactively effective to April 2015.

(5) On April 22, 2016, the Department mailed notice that claimant was disqualified from receipt of benefits, decision # 134551, to claimant at his address of record. Claimant received the notice within a couple of days after it was mailed. Claimant disagreed with the decision.

(6) When the Department issues administrative decisions that cancel prior payment determinations or might result in an overpayment of benefits, the Department customarily includes overpayment advisories.¹ The notices the Department issues typically include a statement at the top of the first page that prominently states "THIS DECISION CANCELS A PRIOR PAYMENT DETERMINATION." On the second page of administrative decisions that cancel prior payment determinations the Department typically includes a statement that states:

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.

(7) Although decision # 134551 stated in two places that "Benefits are Denied," decision # 134551 did not include the Department's typical overpayment advisories. Claimant concluded based on the notices he received and information he had at the time that the decision affected only about five weeks of his claim for benefits, and, although claimant disagreed with decision # 134551, he decided not to request a hearing.

¹ We take notice of the facts in this paragraph, specifically, the overpayment advisories the Department customarily includes in its notices when making decisions that cancel prior payment determinations. The information is within EAB's specialized knowledge. 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: We disagree with the ALJ, and conclude that claimant's late request for hearing should be allowed, and this matter returned to the Office of Administrative Hearings (OAH) for a hearing on the merits of decision # 134551. We also disagree with the ALJ that claimant is liable to repay the Department for the overpaid benefits, and conclude that claimant is liable only to have the overpayment deducted from future benefits otherwise payable.

Late request for hearing. 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 on decision # 134551 had to be filed by May 12, 2016. Claimant filed it on June 14, 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. "A reasonable time" means seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-040-0010(3) (February 10, 2012). "Good cause" is defined as "when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control." OAR 471-040-0010(1).

In Hearing Decision 16-UI-64446, the ALJ concluded that claimant did not establish good cause to extend the time for filing a request for hearing on decision # 134551. The ALJ reasoned that, "[w]hile claimant may have been confused about how the [] decision would affect the weeks he already claimed, he failed to establish that an excusable mistake or factors or circumstances beyond his reasonable control caused the late filing."² We disagree.

Claimant understood the conclusion reached in decision # 134551, and concluded, based on the notices he received and information he had, that the decision would only affect five weeks of benefits. The record does not indicate confusion on claimant's part, but rather that he was wrong or mistaken about the effect the decision would have on benefits he had already received. The question is, then, whether claimant's mistake was excusable under OAR 471-040-0010. OAR 471-040-0010(1)(b)(B) specifically excludes "[n]ot understanding the implications of a decision or notice when it is received" from the definition of "good cause" or "excusable mistake," and we have routinely affirmed the dismissal of late requests for hearing in cases where the sole reason for the late request is that the individual did not understand that the decision would result in an overpayment, which falls squarely within that exclusion.

This case, however, is distinguishable, and not subject to the exclusion set forth in OAR 471-040-0010(1)(b)(B). Unlike the other cases we have decided, the notice the Department provided to claimant in this case was a departure from its customary practices. Specifically, when the Department reverses a decision allowing benefits to a claimant, it customarily includes prominent advisories notifying the claimant that the decision cancels a prior payment determination and may result in an overpayment if the claimant had previously been allowed benefits. The Department's notice to claimant did not include those customary advisories, and the lack of notice of that circumstance was directly connected to claimant's decision-making with respect to whether or not to request a hearing. In other words, it appears that claimant did not file a late request for hearing in this case merely because he did not understand the implications of a decision, but because he was not notified of them in accordance with

² Hearing Decision 16-UI-64446 at 3.

the Department's customary practices. Because the Department's departure from its customary practices with respect to notices in cases like this likely contributed to, if not caused claimant to make the mistake that caused his late filing, we conclude that claimant's mistake was excusable, and claimant established good cause for the late filing.

The circumstances that prevented claimant from filing a timely request for hearing ceased to exist on approximately June 7, 2016, when he received notice of decision # 93921. He filed his late request for hearing on decision # 134551 seven days later. Because he filed his late request within seven days after the circumstances that had prevented a timely filing ceased to exist, he filed within "a reasonable time."

In sum, we conclude that claimant established good cause to extend the filing period, and filed his request for hearing within a reasonable time. His late request for hearing is, therefore, allowed, and he is entitled to a hearing on the merits of decision # 134551.

Overpayment. ORS 657.310(1) states that an individual who is overpaid benefits "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, or failed to disclose a material fact" is liable to either repay the benefits or have the overpayment deducted from any future benefits otherwise payable. ORS 657.315(1) states that if the overpayment occurred "because of an error not due to the individual providing a false statement or misrepresentation of a material fact or not disclosing a material fact, or because an initial decision to pay benefits is subsequently reversed by a decision finding the individual is not eligible for the benefits, the individual is liable to have the amount deducted from any future benefits otherwise payable to the individual under this chapter or the equivalent law of another state for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final." Where, as here, the Department initially paid benefits to claimant and now seeks to recoup them, the Department has the burden to prove that benefits should not have been paid and that a false statement or misrepresentation occurred.

There is no dispute in this case that the Department paid claimant \$13,041 in unemployment insurance benefits, nor is there any dispute that decision # 134551, as it currently stands, holds that claimant was not entitled to receive any of those benefits. Thus, unless decision # 134551 is reversed or modified in any proceedings that follow this decision, claimant was overpaid \$13,041. The only remaining dispute at this time is whether claimant should be liable to repay the amount of the overpayment to the Department under ORS 657.310, or if he is instead liable to have the overpayment deducted from future benefits otherwise payable under ORS 657.315.

In Hearing Decision 16-UI-64445, the ALJ found as fact that claimant "did not report a work separation when he claimed benefits" and was subsequently denied benefits based on the Department's conclusion that he voluntarily left work.³ The ALJ concluded that claimant was liable to repay the overpayment to the Department under ORS 657.310 because, "irrespective of claimant's knowledge or intent" he made "incorrect representations" about "the nature of claimant's work separation," which was "material to claimant's eligibility for benefits."⁴ We disagree.

³ Hearing Decision 16-UI-64445 at 1.

⁴ Hearing Decision 16-UI-64445 at 2.

Establishing the nature of a work separation is, at best, a mixed question of law and fact, and the conclusions the Department drew after its investigation are, at this time, undisturbed and cannot be collaterally challenged in these proceedings. The issue for this case, however, is whether the material facts claimant reported to the Department were false or constituted a misrepresentation. To support a conclusion that claimant made false statements or misrepresentations of material fact, it is not enough to show that claimant's reports to the Department were inconsistent with the legal conclusions the Department ultimately drew therefrom. "False" means "not real or genuine."⁵ "Misrepresentation" means "to give someone a false idea about (something or someone)."⁶ There is simply no evidence in this record to support the conclusion that the material facts claimant supplied to the Department, either at the time of his initial claim filing or in March 2016, were false, or that they constituted a misrepresentation. To the contrary, in this rare case, the accuracy of the material facts claimant reported to the Department was conclusively established by evidence in this record.

Irrespective of the Department's legal conclusions in decision # 134551 – that claimant was initially deemed qualified for benefits based on his employment status at the time of his initial claim filing and, later, retroactively disqualified for benefits based on the Department's conclusion that he quit work – claimant accurately reported the underlying material facts – that he was not working because of a medical leave when he filed his initial claim for benefits and that he was terminated after receiving a termination letter from his employer. If, for example, claimant had withheld information about his employment status or affirmatively misled the Department by reporting that he had not had a work separation, our conclusion would, likely, differ. But where the evidence substantiates that claimant accurately and promptly supplied the Department with the facts as he knew them, the record cannot support a conclusion that claimant caused his overpayment by making false statements or misrepresentations of material fact, even if inconsistent with the Department's ultimate conclusions.

Claimant was overpaid because the Department's initial decision to pay benefits was subsequently reversed by a decision finding him ineligible for benefits, and, in this case, the reversal was not caused by claimant's failure to accurately report material facts. Therefore, ORS 657.315 applies, and claimant is not liable to repay the overpayment. Instead, claimant is liable to have the overpayment deducted from future benefits otherwise payable under ORS chapter 657 or the equivalent law of another state for any week or weeks within five years following the week in which the decision establishing the erroneous payment became final.

We note that the existence and amount of any overpayment in this matter depends entirely on the outcome of the hearing OAH is directed to hold regarding decision # 134551, and/or any subsequent proceedings on that matter. Should decision # 134551 be reversed, or the effective dates of claimant's disqualification modified, the amount of the overpayment is subject to change or reduction. Our conclusion regarding claimant's liability as far as repayment of the overpayment, however, is not.

⁵ <http://www.merriam-webster.com/dictionary/false>

⁶ <http://www.merriam-webster.com/dictionary/misrepresentation>

DECISION: Hearing Decision 16-UI-64445 is modified, as outlined above. Hearing Decision 16-UI-64446 is set aside, as outlined above.

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

DATE of Service: September 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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