

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0003

Reversed & Remanded

PROCEDURAL HISTORY: On October 21, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct (decision # 121406). Claimant filed a timely request for hearing. On December 5, 2016, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for December 16, 2016. On December 16, 2016, ALJ Wyatt conducted a hearing in which the employer did not participate, and on December 22, 2016, issued Hearing Decision 16-UI-73508, concluding that the employer discharged claimant, but not for misconduct. Hearing Decision 16-UI-73508, n 1. On December 30, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

In its written argument, the employer's human resources (HR) director asked for a new hearing. In support of its request, the HR director explained that when the employer received notice of the hearing on December 7, the HR director immediately called OAH and requested a postponement because the HR director and the manager who had been claimant's direct supervisor would be out of town on December 16. The HR director further explained that the OAH representative with whom she spoke told her to send a written postponement request with a copy of the HR director's travel itinerary to OAH; the HR director faxed these materials to OAH on December 8.¹ On December 16, the HR director received an email from an OAH representative, stating that the employer's postponement request was denied because the request could not be made on the day of the hearing. The HR manager noted that she was

¹ The employer submitted as evidence for the hearing proof that on December 8, it faxed its request for a postponement and a copy of the HR director's travel itinerary to OAH. The ALJ refused to consider these documents because these materials "had not reached the ALJ prior to the hearing." The ALJ also noted that "documents for a hearing must also be submitted to the other parties in advance of the hearing." Hearing Decision 16-UI-73508, n 2. Under OAR 471-041-0090(1), EAB may consider exhibits that were offered but not received into evidence at the hearing "as necessary to complete the record." We find the employer's December 8 fax transmission, which the request for a postponement a copy of the HR director's travel itinerary are necessary to complete our record, and have marked these documents as EAB Exhibit 1. A copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission of EAB Exhibit 1 must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, EAB Exhibit 1 will remain part of the record.

“puzzled by this [statement] because the request was sent eight days prior to the hearing, not the day of the hearing...” Written Argument p. 1 (emphasis in the original).

The employer’s request for a new hearing 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. In this case, the employer was unable to participate in the hearing because its OAH denied its request for a postponement was denied. Under OAR 471-040-0021, an ALJ or OAH representative may grant a party’s request for a postponement if the request is promptly made after the party determines the need for a postponement and the party shows “good cause” for the postponement. In Hearing Decision 16-UI-73508, the ALJ noted that the employer had requested a postponement of the hearing “due to the travel schedule of the Director of Human Resources [HR],” but the request “was denied by the OAH without a showing that it was necessary for the hearing for the Director of HR to participate herself.” Hearing Decision 16-UI-73508, n 1. Nothing in the record supports the ALJ’s finding, however. The record contains no document showing that an OAH representative denied the employer’s postponement request and provided the reasons for the denial to the employer. The only information regarding the postponement is contained in EAB Exhibit 1; that document indicates that OAH failed to promptly consider the employer’s request, and also indicates that contradictory reasons were given for the denial of the postponement. According to EAB Exhibit 1, an OAH representative told the employer’s HR director that the request for a postponement was denied because it was untimely (an assertion that was incorrect), while the ALJ stated that the request had been denied due to the employer’s failure to demonstrate the necessity of a particular witness’ testimony at the hearing.

Based on this record, we find that the employer’s inability to present evidence at the hearing resulted from a circumstance beyond its reasonable control – OAH’s denial of its postponement request which is unsupported by any evidence in the record. The employer’s request to present new information is therefore allowed. Hearing Decision 16-UI-73508 is reversed, and this matter remanded under ORS 657.275(1) for a new hearing and hearing decision.

DECISION: Hearing Decision 16-UI-73508 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: January 6, 2017

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

² **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-73508 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.

'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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