

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0067**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On October 17, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115130). On November 7, 2016, decision # 115130 became final without claimant having filed a timely request for hearing. On November 23, 2016, claimant filed a late request for hearing. On November 29, 2016, ALJ Kangas issued Hearing Decision 16-UI-71836, dismissing claimant's late request for hearing subject to his right to renew the request by responding to an appellant questionnaire by December 13, 2016. On December 6, 2016, the Office of Administrative Hearings (OAH) received claimant's response. On December 8, 2016, OAH mailed a letter stating that Hearing Decision 16-UI-71836 was canceled, and a hearing would be scheduled. On December 13, 2016, OAH mailed notice of a hearing scheduled for December 23, 2016. On December 23, 2016, ALJ S. Lee conducted a hearing, at which the employer failed to appear, and on December 30, 2016 issued Hearing Decision 16-UI-73863, allowing claimant's late request for hearing and concluding that claimant's discharge was not for misconduct. On January 14, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-73863 should be reversed and this matter remanded for additional proceedings.

With its application for review, the employer's owner provided new information about claimant's work separation and argued that she was unable to attend the hearing because the notice of hearing came, and the hearing was held, while she was away from the business for a two-week "winter break." The employer's request for relief is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. The employer's statement suggests that factors or circumstances beyond the owner's reasonable control might have prevented her from attending the hearing, but additional facts are necessary before a determination can be reached. Because it appears the record might not be complete, this matter must be reversed and remanded to OAH for collection of additional information.

The threshold issue on remand is whether, having failed to attend the hearing, the employer may still be allowed to present information about claimant's work separation. The employer must establish that factors or circumstances beyond its reasonable control prevented it from appearing at the December 23, 2016 hearing. The ALJ should ask the employer when its two-week winter break was, whether the business was open or closed during that period, and what arrangements, if any, the employer made to handle its time-sensitive mail during the winter break period. The ALJ should ask the employer whether it received a copy of the December 8<sup>th</sup> letter canceling Hearing Decision 16-UI-71836, and if so, on what date. The ALJ should ask if the employer read the portion of that letter indicating that a notice of hearing was going to be mailed, and what, if any, action it took to determine whether the notice would arrive during its winter break or to notify OAH that the employer was not available for a hearing during any specified period of time. The ALJ should follow up with the employer on any other relevant lines of inquiry, and allow claimant the opportunity to respond to the employer's evidence. Only if the ALJ determines that the employer proved that, more likely than not, factors or circumstances beyond its reasonable control prevented the employer from appearing during the December 23<sup>rd</sup> hearing to provide evidence about the work separation would the employer then be allowed another opportunity to do so.

**DECISION:** Hearing Decision 16-UI-73863 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>1</sup>

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

**DATE of Service:** January 20, 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](http://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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<sup>1</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-73863 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.