

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0102

Application for Review Allowed
Hearing Decision 16-UI-73899 Reversed
Late Request to Reopen Allowed and Granted

PROCEDURAL HISTORY: On February 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 113840). Claimant filed a timely request for hearing. On February 16, 2016, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for February 24, 2016. On February 24, 2016, ALJ Menegat conducted a hearing at which the employer failed to appear, and on February 25, 2016 issued Hearing Decision 16-UI-53796, concluding the employer discharged claimant, but not for misconduct. On March 16, 2016, Hearing Decision 16-UI-53796 became final without the employer having filed a request for the hearing to be reopened. On December 16, 2016, the employer mailed a letter to the Department, which the Department forwarded to OAH, and which OAH construed as a late request to reopen the hearing. On December 30, 2016, ALJ Kangas issued Hearing Decision 16-UI-73899, dismissing the employer's request as untimely without a showing of good cause. On January 12, 2017, the employer faxed a letter to OAH asking the ALJ to withdraw or reconsider Hearing Decision 16-UI-73899, or treat the letter as an application for review of Hearing Decision 16-UI-73899 with the Employment Appeals Board (EAB). The ALJ did not withdraw or reconsider Hearing Decision 16-UI-73899. OAH did not treat the letter as an application for review of Hearing Decision 16-UI-73899 or forward the letter to EAB. The employer contacted the Department, which instructed the employer to file an application for review with EAB. On January 30, 2017, the employer filed an application for review with EAB.

EAB considered the entire hearing record and, under ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006), the employer's written argument. We also took official notice of facts contained in Department records. 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 facts will remain in the record.

FINDINGS OF FACT: (1) The Department mailed decision # 113840 to the employer at its address of record with the Department in Denver, Colorado.

(2) OAH mailed notice of the February 24, 2016 hearing to the employer at an address in Auburn, Washington, and not to its address of record with the Department. The employer therefore did not receive notice of the hearing.

(3) OAH mailed notice of Hearing Decision 16-UI-53796 to the employer at the address in Auburn, Washington, and not to its address of record with the Department. The employer therefore did not receive notice of Hearing Decision 16-UI-53796.

(4) The employer's December 16, 2016 letter to the Department stated that the employer wanted to contest charges to the employer's account for claimant, based on decision # 113840. The employer still had no notice of Hearing Decision 16-UI-53796.

CONCLUSIONS AND REASONS: The employer's application for review of Hearing Decision 16-UI-73899 is allowed. The employer's late request to reopen the February 24, 2016 hearing is allowed and granted. Hearing Decision 16-UI-73899 therefore is reversed, and this case remanded to OAH for a reopened hearing on decision # 113840.

The first issue in this case is whether the employer filed a timely application for review of Hearing Decision 16-UI-73899. ORS 657.270(6) required the employer's application for review to be filed no later than January 19, 2017. To file an application for review a party must request review of a specific hearing decision, in person, by mail or by fax to EAB, or any office of the Department, including OAH. OAR 471-041-0060 (January 8, 2008). Here, the employer requested review of Hearing Decision 16-UI-73899 by fax to OAH on January 12, 2017. The employer's application for review therefore was timely, and is allowed.

The next issue is whether the December 16, 2016 letter the employer mailed to the Department, which OAH construed, and we accept, as a late request to reopen the February 24, 2016 hearing on decision # 113840, should be allowed. ORS 657.270(5) required the employer's request to reopen to be filed no later than March 16, 2016. It was filed on December 16, 2016 and therefore was late. However, OAR 471-040-0041(1) (February 10, 2012) states that the period within which a party may request reopening may be extended if the party requesting reopening has good cause for failing to request reopening within the time allowed, and acts within a reasonable time. "Good cause" exists when an action, delay, or failure to act arises from factors beyond an applicant's reasonable control, including the failure to receive a document because OAH mailed it to an incorrect address despite having the correct address. OAR 471-040-0041(2). "A reasonable time," is seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-040-0041(3). Here, the employer filed a late request for reopening because OAH mailed notice of Hearing Decision 16-UI-53796 to the employer at the address in Auburn, Washington, and not to its address of record with the Department, and therefore OAH. The employer had no notice of Hearing Decision 16-UI-53796 prior to filing its request to reopen on December 16, 2016. The employer therefore had good cause for filing a late request for a reopening, and acted within a reasonable time.

The final issue is whether the employer's request to reopen the February 24, 2016 hearing on decision # 113840 should be granted. ORS 657.270(5) and OAR 471-040-0040(1) (February 10, 2012) provide, in relevant parts, that a party's request to reopen a hearing may be granted if the party shows good cause for failing to appear at the hearing. "Good cause" exists when an action, delay, or failure to act arises from factors beyond an applicant's reasonable control, including the failure to receive a document because OAH mailed it to an incorrect address despite having the correct address. OAR 471-040-0040(2)(a). Here, the employer failed to appear at the February 24, 2016 hearing because OAH mailed notice of the hearing to the employer at an address in Auburn, Washington, and not to its address of record with the Department, and therefore OAH. The employer therefore had good cause for failing to appear at the hearing, and its request to reopen the hearing is granted.

In sum, the employer's application for review of Hearing Decision 16-UI-73899 is allowed. The employer's late request to reopen the February 24, 2016 hearing is allowed and granted. Hearing Decision 16-UI-73899 therefore is reversed, and this case remanded to OAH for a reopened hearing on decision # 113840.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-53796 or 16-UI-73899, 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.

DECISION: Hearing Decision 16-UI-73899 is set aside, as outlined above.

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

DATE of Service: February 8, 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 '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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