

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0153

Affirmed
Late Request for Hearing Dismissed

PROCEDURAL HISTORY: On November 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision (decision # 154658) concluding that claimant was disqualified from the receipt of unemployment benefits from October 30 through November 12, 2016 and until claimant provided the Department with evidence that the disqualifying conditions no longer exist. On December 6, 2016, decision # 154658 became final, without a request for hearing having been filed. On December 19, 2016, claimant filed an untimely request for hearing. On December 27, 2016, ALJ Kangas issued Hearing Decision 16-UI-73656, dismissing claimant's hearing request, subject to claimant's right to renew the request by responding to an appellant questionnaire within 14 days. Claimant did not respond to the questionnaire within the designated 14-day period. On January 17, 2017, Hearing Decision 16-UI-73656 became final, without an application for review having been filed. On January 31, 2017, claimant submitted a late response to the appellant questionnaire to the Office of Administrative Hearings (OAH). OAH forwarded the response to the appellant questionnaire and the materials claimant submitted with it to the Employment Appeals Board (EAB).

CLAIMANT'S JANUARY 31, 2017 SUBMISSION: An application for review may be filed on forms provided by the Department or OAH, but use of a form is not required, provided that "the party requests review of a specific hearing decision, or otherwise expresses intent to appeal a specific hearing decision." Included with claimant's appellant questionnaire was a copy of Hearing Decision 16-UI-73656. We find that these documents indicate claimant's intent to appeal this hearing decision, and construe his January 31, 2017 submission as an application to review Hearing Decision 16-UI-73656.

ORS 657.270(6) required that claimant's application for review of Hearing Decision 16-UI-73656 be filed no later than January 17, 2017. Because claimant filed his application for review on January 31, 2017, it was late. OAR 471-041-0070 (August 30, 2011) provides that the filing period may be extended a reasonable time upon a showing of good cause as provided by ORS 657.875. "Good cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing. OAR 471-041-0070(2)(a). "A reasonable time" is

seven days after the circumstances that prevented timely filing ceased to exist. OAR 471-041-0070(2)(b).

In his response to the appellant questionnaire, claimant explained that the copy of Hearing Decision 16-UI-73656 that OAH mailed to him and that he “just got” a second copy of the decision. Included in the materials claimant submitted on January 31 was a copy of Hearing Decision 16-UI-73656 with the following statement stamped on the page with the certificate of service: “Remailed for your information only [...] Original date of mailing constitutes date of service.” Based on this information, we conclude that the loss in the mail of the hearing decision issued on December 27, 2016 constituted a circumstance beyond claimant’s reasonable control that prevented him from timely filing an application for review. Claimant therefore demonstrated good cause for his untimely filing, and it appears that he filed his application for review within a reasonable time. Claimant’s late application for review is allowed.

EVIDENTIARY MATTER: In his response to the appellant questionnaire, a document which is not part of the record in this case, claimant explained why he filed an untimely hearing request. Under OAR 471-041-0090(2), EAB may consider new information that is not part of the hearing record if the party offering the information demonstrates that circumstances beyond the party’s reasonable control prevented the party from offering the information at a hearing, and the information is relevant and material to EAB’s determination. As discussed above, circumstances beyond claimant’s reasonable control – the loss in the mail of the hearing decision issued on December 27, 2016, which, we note, included the appellant questionnaire form, was lost in the mail – prevented claimant from timely submitting his response to the appellant questionnaire to OAH. Information concerning the reasons for claimant’s late hearing request is relevant and material to EAB’s determination. EAB therefore considered claimant’s appellant questionnaire response, which is marked as EAB Exhibit 3. A copy of EAB Exhibit 3 is included with this decision. Any party that objects to the admission of EAB Exhibit 3 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 3 will remain part of the record.

FINDINGS OF FACT: (1) Claimant received decision # 154658 soon after the Department issued it on November 16, 2016.

(2) Sometime after December 6, 2016, claimant filed his request for hearing on decision # 154658.¹

CONCLUSION AND REASONS: Claimant’s late request for hearing must be dismissed.

ORS 657.269 provides that parties have 20 days to request a hearing after the Department issues an administrative decision. ORS 675.875 allows the 20-day deadline to be extended "a reasonable time"

¹ Claimant filed his hearing request by mail. OAR 471-040-0005(4)(b) provides that the date of filing for a hearing request submitted by mail is the U.S. Postal Service postmarked date on the envelope in which the request was mailed; in the absence of a postmarked date, the filing date is the most probable date of mailing. The envelope in which claimant mailed his hearing to the OAH office in Salem, Oregon request was sent from Bend, Oregon and is postmarked December, but although it appears that the postmark date includes two digits, the date itself is illegible. DR Exhibit 2. The record shows that OAH received claimant’s hearing request on December 22, 2016. *Id.* The ALJ found the hearing request was filed on December 19, 2016. It is unnecessary to determine the exact and most probable date on which claimant mailed his hearing request, since the record establishes that more likely than not, the hearing request was mailed sometime after December 6, 2016.

upon a showing of "good cause." OAR 471-040-0010 (February 10, 2012) defines "good cause" as factors beyond the party's reasonable control or an "excusable mistake." The record shows that claimant filed his hearing request sometime after December 6, 2016 – more than 20 days from the date on which the Department issued the decision. Claimant's request for hearing was therefore late.

In the response to his appellant questionnaire, claimant asserted that he received decision # 154658 on November 16, 2016, and filed his hearing request on that date. EAB Exhibit 3. Claimant's assertion that he filed his hearing request on the same day the decision was issued is implausible given that the decision had to be mailed from Salem to Bend. Claimant provided no explanation why his hearing request was not mailed until after December 6, 2016, as his answers appear to have focused exclusively on the timing of his response to the appellant questionnaire and did not address why he delayed in filing a request for hearing on decision # 154658. Claimant therefore failed to demonstrate that circumstances beyond his reasonable control or an excusable mistake caused his late filing. Because claimant did not show good cause for extending the deadline for filing his hearing request, his hearing request must be dismissed.

DECISION: Hearing Decision 16-UI-73656 is affirmed.

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

DATE of Service: February 9, 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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