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State of Oregon
Employment Appeals Board
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Salem, OR 97311

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<p>EMPLOYMENT APPEALS BOARD DECISION 2017-EAB-0376</p>
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Hearing Decisions 16-UI-60678 and 16-UI-63805 Undisturbed – Late Applications for Review Dismissed
Hearing Decision 17-UI-79519 Affirmed – Request for Hearing Withdrawn

PROCEDURAL HISTORY: On January 22, 2013, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit a job with Brandefined on December 11, 2012 without good cause (decision # 112054). On February 11, 2013, decision # 112054 became final without claimant having filed a timely request for hearing.

On February 25, 2016, the Department served notice of an administrative decision concluding claimant quit a job with Express Employment Professionals on January 31, 2016 without good cause (decision # 121146). On February 26, 2016, the Department served notice of another administrative decision, based in part on decision # 121146, assessing a \$465 overpayment, \$116.25 monetary penalty and 52 penalty weeks (decision # 192863). On March 16, 2016, decision # 121146 became final without claimant having filed a timely request for hearing. On March 17, 2016, decision # 192863 became final without claimant having filed a timely request for hearing.

On April 20, 2016, claimant filed late requests for hearing by telephone on decisions # 121146 and #192863. On April 25, 2016, ALJ S. Lee issued Hearing Decisions 16-UI-58058 and 16-UI-58060, dismissing claimant's requests for hearing as untimely subject to his right to renew the requests by responding to an appellant questionnaire by May 9, 2016. On May 6, 2016, the Office of Administrative Hearings (OAH) received claimant's responses. On May 12, 2016, OAH mailed letters to claimant canceling Hearing Decisions 16-UI-58058 and 16-UI-58060; OAH also mailed notice of two hearings scheduled for May 27, 2016 at 9:30 a.m. and 10:45 a.m.

On May 27, 2016, claimant failed to appear at the 9:30 a.m. hearing; ALJ Holmes-Swanson issued Hearing Decision 16-UI-60679, dismissing claimant's request for hearing on decision # 121146 for failure to appear. On May 27, 2016, claimant initially appeared for the 10:45 a.m. hearing;¹ ALJ Holmes-Swanson conducted the hearing and issued Hearing Decision 16-UI-60678, concluding claimant

¹ During the May 27, 2016 hearing on decision # 192863, claimant lost phone service and disconnected from the hearing at 11:07 a.m. He did not rejoin the hearing by the time the ALJ ended the hearing at 11:12 a.m.

did not show good cause for filing a late request for hearing on decision # 192863 and dismissing claimant's late request for hearing. On June 16, 2016, Hearing Decisions 16-UI-60678 and 16-UI-60679 became final without claimant having filed timely applications for review with the Employment Appeals Board (EAB).

On July 12, 2016, claimant filed a late request to reopen the May 27, 2016 hearing on decision # 121146. Claimant's request included a written statement; however, the statement did not explain why claimant's request to reopen was filed almost a month late. On July 14, 2016, ALJ Kangas reviewed claimant's late request to reopen and issued Hearing Decision 16-UI-63805, denying claimant's request. On August 3, 2016, Hearing Decision 16-UI-63805 became final without claimant having filed a timely application for review.

On January 10, 2017, claimant filed a late request for hearing on decision # 112054 by telephone. On January 12, 2017, ALJ Kangas issued Hearing Decision 17-UI-74615, dismissing claimant's request for hearing as untimely subject to his right to renew the request by responding to an appellant questionnaire by January 26, 2017. On January 19, 2017, OAH received claimant's response. On January 26, 2017, OAH mailed a letter to claimant canceling Hearing Decision 17-UI-74615. On March 10, 2017, OAH mailed notice of a hearing on decision # 112054 scheduled for March 23, 2017 at 1:30 p.m. On March 23, 2017, ALJ Murdock conducted a hearing, at which claimant suggested he had appealed the wrong decision and consented to withdraw his request for hearing; ALJ Murdock issued Hearing Decision 17-UI-79519 dismissing claimant's late request for hearing on decision # 112054.

On March 29, 2017, claimant filed applications for review of Hearing Decision 16-UI-63805, and, by extension, 16-UI-60678; he also filed an application for review of Hearing Decision 17-UI-79519.² Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 16-UI-60678, 16-UI-63805 and 17-UI-79519. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2017-EAB-0375, 2017-EAB-0376 and 2017-EAB-0378).

CONCLUSIONS AND REASONS: Claimant's late applications for review of Hearing Decisions 16-UI-60678 and 16-UI-63805 are dismissed; Hearing Decision 17-UI-79519 is affirmed.

Hearing Decisions 16-UI-60678 and 16-UI-63805, Late Applications for Review. ORS 657.270(6) required claimant's application for review of Hearing Decision 16-UI-60678 to be filed no later than June 16, 2016, and his application for review of Hearing Decision 16-UI-63805 to be filed no later than August 3, 2016. Claimant filed both on March 29, 2017.

OAR 471-041-0070 (October 29, 2006) provides that the deadline for filing an application for review may be "extended a reasonable time upon a showing of good cause." *See also* ORS 657.875. "Good

² In his application for review, claimant stated that he was "appealing the matter involving Express Services from 2016." Claimant's testimony in the March 23, 2016 hearing made it clear that he considered "the matter involving Express Services from 2016" to include both the work separation decision (decision # 121146) and the fraud decision (decision # 192863). We therefore considered claimant's application for review to apply to both of those matters. Furthermore, despite claimant's statement that he was only "appealing the matter involving Express Services," he completed a form application for review of Hearing Decision 17-UI-79519, which pertains to the work separation and procedural issues associated with Brandefined; we therefore review that matter pursuant to claimant's specific request for review of that matter. *See* OAR 471-041-0060(1) (January 8, 2008).

cause" exists when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant's reasonable control prevented timely filing; "[a] reasonable time" is seven days after the circumstances that prevented timely filing ceased to exist. OAR 471-040-0070(2).

In both of these matters, claimant explained that there was confusion between his various cases and, with respect to the timing of his filings, "I offer that I am making every effort to meet and comply with your requests in a timely manner." Claimant's explanation did not provide any reason – other than confusion – why he filed his application for review on Hearing Decision 16-UI-63805 eight months after it became final, nor why he filed his application for review on Hearing Decision 16-UI-16-UI-60678 approximately ten months after it became final, much less that either delay was the result of factors or circumstances beyond his reasonable control. Nor did claimant's explanation establish that his March 29, 2017 filings occurred within seven days of the date the circumstances that prevented his timely filings ceased to exist.

The record in these matters, considered as a whole, demonstrates that claimant has experienced a significant amount of confusion related to the decisions in these three cases, the consequences of the decisions, and the procedural hurdles he was required to meet in order to have these matters reviewed. It is, however, within a confused individual's reasonable control to contact the Department, OAH or EAB or otherwise take steps to resolve his confusion, particularly where, as here, each mailing claimant failed to file on time included a deadline and instructions about how to appeal and which office to contact if he had questions. Claimant therefore has not established good cause for either late application for review, and Hearing Decisions 16-UI-60678 and 16-UI-63805 must remain undisturbed.

It is clear that notwithstanding the difficulties claimant has experienced filing timely requests for hearing, requests to reopen and applications for review, he would still like a review of the work separation decision involving Express Employment Professionals that was issued on February 25, 2016 and the related fraud decision issued February 26, 2016 that assessed claimant 52 penalty weeks. Because claimant has missed the majority of the procedural deadlines in these matters, though, claimant is not entitled to have those matters reviewed. For example, in order to have a review of the work separation decision, claimant must first have proven that he had good cause for filing a late application for review of Hearing Decision 16-UI-63805. If he had met that hurdle, he would then have to prove good cause to file a late request to reopen the May 27, 2016 hearing, then prove good cause for missing that hearing, and then prove good cause for filing a late request for hearing on decision # 121146. Only if claimant met all those burdens would he then be entitled to dispute the denial of benefits based on his work separation from Express Employment Professionals.

In order to have a review of the fraud decision that assessed penalty weeks, claimant must, again, have proven that he had good cause for filing a late application for review of Hearing Decision 16-UI-60678. If he had met that hurdle, he would then have to prove that, contrary to the ALJ's decision in that case, he actually had good cause for filing a late request for hearing on decision # 192863. Only if he met those burdens would he then be entitled to dispute the assessment of fraud-based penalties in decision # 192863. As explained above, however, claimant did not prove good cause for the late application for review in either of those matters and is not entitled to any further proceedings on them.

Hearing Decision 17-UI-79519, Withdrawal. During the March 23, 2017 hearing on decision # 112054, claimant agreed with the ALJ that he had not actually intended to request a hearing on decision

112054 and consented to withdrawing his request for hearing on that decision. ORS 657.270(7)(a) and OAR 471-040-0035(1) (August 1, 2004) permit an ALJ to dismiss a request for hearing if the person who requested the hearing withdrew the request. The ALJ therefore did not err in dismissing claimant's request for hearing on decision # 112054, and the ALJ's decision must be affirmed.

DECISION: The applications for review of Hearing Decisions 16-UI-60678 and 16-UI-63805 filed March 28, 2017 are dismissed; Hearing Decisions 16-UI-60678 and 16-UI-63805 therefore remain undisturbed. Hearing Decision 17-UI-79519 is affirmed.

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

DATE of Service: March 30, 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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