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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0391

Hearing Decision 17-UI-79612 – Reversed, Late Request for Hearing Allowed
Hearing Decision 17-UI-79633 - Reversed and Remanded

PROCEDURAL HISTORY: On November 9, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 100403). On November 29, 2016, decision # 100403 became final without claimant having filed a timely request for hearing. On December 22, 2016, the Department served notice of an administrative decision assessing a \$2,860 overpayment, based on decision # 100403, which claimant was required to repay (decision # 155820). On December 29, 2016, claimant filed a late request for hearing on decision # 100403 and a timely request for hearing on decision # 155820. On March 24, 2017, ALJ Lohr conducted two hearings and issued Hearing Decision 17-UI-79612, dismissing claimant’s late request for hearing on decision # 100403, and Hearing Decision 17-UI-79633, affirming decision # 155820. On April 1, 2017, claimant filed applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-79612 and 17-UI-79633. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0390 and 2017-EAB-0391).

FINDINGS OF FACT: (1) On November 7, 2016, a Department employee had a conversation with claimant in which the employee indicated she would “hopefully” be mailing something about claimant’s work separation the following week; she did not specify when any decision on that issue would be mailed. Audio recording at ~ 19:25. Claimant thought she might be getting something in the mail “soon after” the conversation, but did not know when to expect it. Audio recording at 10:55.

(2) Claimant did not receive decision # 100403 when the Department mailed it to her. Claimant receives her mail in a locked mailbox at her apartment complex, which she checks three or four times every week. She did not have any known mail delivery problems, and, to her knowledge, had “never” failed to receive mail that was delivered to her mailbox. Audio recording at 13:50.

(3) Claimant first learned of decision # 100403 when she received decision # 155820 sometime shortly after it was mailed on December 22, 2016. She filed a request for hearing on decision # 100403 within seven days of finding out that decision existed.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-79612 should be reversed and the matter scheduled for a hearing on the merits of decision # 100403. Hearing Decision 17-UI-79633, which was based entirely on the determination in decision # 100403 that claimant was not eligible for benefits, should be reversed and remanded pending the outcome of that hearing.

ORS 657.269 provides that the Department's decisions become final unless a party files a request for hearing within 20 days after the date it is mailed. ORS 657.875 provides that the 20-day deadline may be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010 provides that "good cause" includes factors beyond an applicant's reasonable control or an excusable mistake, and defines "reasonable time" as seven days after those factors ceased to exist.

The ALJ concluded that claimant did not have good cause for the late request for hearing, reasoning that she should have followed up with the Department when she did not receive a decision in the mail after her November 7th phone call with the Department, and that her "bare assertion of non-receipt" was an insufficient basis for finding that she had good cause. Hearing Decision 17-UI-79612 at 3. We disagree.

The ALJ stated that because claimant "knew a decision regarding her eligibility for benefits was pending and made no reasonable effort to ensure she received an important document affecting her ability to claim benefits," she did not show good cause for filing a late request for hearing. We believe the ALJ has imposed too high a burden on claimant given the circumstances of this case. The Department's witness testified that she did not tell claimant when a decision about her work separation would be made, or mailed, just that it would "hopefully" be sent the following week. There is no evidence in this case suggesting that claimant knew when it would be mailed or was ever instructed that she should follow up with the Department if she did not receive something in the mail the following week, much less that her "ability to claim benefits" would be affected if she did not. Claimant testified that, although she had a vague belief that she would be getting something from the Department "soon after" her November 7th conversation with the Department employee, she was not actually aware if she was told when a document would arrive. Given those circumstances, expecting claimant to follow up with the Department when she did not receive mail she did know when to expect constituted, at worst, an excusable mistake.

The ALJ also characterized claimant's non-receipt of decision # 100403 as a "bare assertion" that she did not receive it. A "bare assertion" is one in which the individual merely says she did not receive a document, without any supporting or circumstantial evidence tending to support the assertion of non-receipt. Here, however, claimant testified that her mailbox was locked, she accessed it with a key, she checked her mail three or four times each week, she was expecting to receive mail from the Department at some point, and she "never" failed to receive items that were sent to her. Given those factors, it is more likely than not that, had a U.S. Postal Service employee placed an envelope containing decision # 100403 into claimant's mailbox, claimant would have received it. Her failure to receive that decision therefore strongly suggests it was not delivered to her, which amounted to a circumstance beyond her

reasonable control that prevented her from timely requesting a hearing. For those reasons, we conclude that claimant established “good cause” for the late request for hearing.

The evidence suggests that claimant filed her late request for hearing on decision # 100403 within the seven-day reasonable time period. She first learned that decision existed after the Department mailed decision # 155820 to her, which occurred on December 22, 2016. Even if she received decision # 155830 the same day it was mailed, she filed her request for hearing on December 29, 2016, which was seven days from that date, which was a “reasonable time.” Having shown good cause to extend the deadline for requesting a hearing on decision # 100403 a reasonable time, claimant’s request for hearing on that decision is allowed, and she is entitled to a hearing on the merits of that decision.

The ALJ's determination in Hearing Decision 17-UI-79633 that claimant was overpaid benefits for the was based entirely on her determination in Hearing Decision 17-UI-79612 dismissing claimant’s request for hearing on decision # 100403, and finding that decision final as a matter of law. Because we have concluded that claimant is entitled to a hearing about her disqualification from benefits that week and, depending on the outcome of that hearing, may or may not have been overpaid, we also conclude that there is an insufficient basis upon which to conclude that claimant was overpaid benefits. Hearing Decision 17-UI-79633 must therefore be reversed and remanded pending a determination of claimant's disqualification from benefits.

We note that the failure of any party to appear at any subsequent hearings scheduled in these matters will not reinstate Hearing Decisions 17-UI-79612 and 17-UI-79633 or return these matters to EAB. Only timely applications for review of any subsequent hearing decisions will cause these matters to return to EAB.

DECISION: Hearing Decision 17-UI-79612 is set aside, as outlined above. Hearing Decision 17-UI-79633 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: April 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 ‘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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