

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0450

Reversed & Remanded

PROCEDURAL HISTORY: On February 1, 2017, the Oregon Employment Department (the Department) served two notices of two administrative decisions, both concluding claimant did not actively seek work; decision # 73831 concluded claimant did not actively seek work from November 27, 2016 to December 24, 2016, and decision # 73937 concluded claimant did not actively seek work from January 1, 2017 to January 7, 2017. On February 21, 2017, decisions # 73831 and # 73937 became final without claimant having filed a timely request for hearing on either decision. On March 20, 2017, claimant filed late requests for hearing on both decisions. On March 23, 2017, ALJ Kangas issued Hearing Decisions 17-UI-79493 and 17-UI-79494 dismissing claimant's late requests for hearing subject to his right to renew the requests by responding to an appellant questionnaire no later than April 6, 2017. On approximately April 10, 2017 claimant filed timely applications for review of Hearing Decisions 17-UI-79493 and 17-UI-79494 with the Employment Appeals Board (EAB) and responded to the appellant questionnaire. On April 17, 2017, ALJ Kangas mailed letters to claimant declining to consider his response to the appellant questionnaire on the grounds that the response was submitted late.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-79493 and 17-UI-79494. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-0450 and 2017-EAB-0451).

Claimant's filing of his response to the appellant questionnaire with his application for review is construed as a request for EAB to consider information not received into the hearing record. Under OAR 471-041-0090(1) (October 29, 2016), information offered, but not received into the hearing record, may be received into evidence as necessary to complete the record. Claimant's response to the appellant questionnaire is necessary to complete the record, and EAB therefore considered his response when reaching this decision. Claimant's response to the appellant questionnaire has been marked as EAB Exhibit 1, and a copy of EAB Exhibit 1 is included with this decision. Any party that objects to the admission of EAB Exhibit 1 must submit its objection in writing to EAB within 10 days of the date on which this decision was mailed. If no objection is received, or an objection is received and overruled, EAB Exhibit 1 will remain part of the record.

CONCLUSIONS AND REASONS: These matters are reversed, and remanded to OAH for further proceedings.

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 (February 10, 2012) 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.

In EAB Exhibit 1, claimant explained that he did not find out about decisions # 73831 and 73937 until March 17th and filed his requests for hearing on March 20, 2017. If correct, the explanation suggests that his filing occurred within the requisite seven-day "reasonable time" period. Claimant also explained that he did not file timely requests for hearing in either matter because he did not receive the administrative decisions. Although claimant's bare assertion of non-receipt of the administrative decisions is insufficient to establish either that the decisions were not mailed to him or that he did not receive them, his non-receipt suggests the possibility that facts sufficient to show that factors beyond his reasonable control or an excusable mistake prevented him from filing timely requests exist, and due process of law requires that claimant be allowed the opportunity to present them for consideration. *See also* ORS 657.270(3) (requiring that all parties be given a reasonable opportunity for a full and fair inquiry); *Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986).

Please note that the primary purpose of any hearing(s) on remand is to develop a record about the reasons for claimant's late requests for hearing on decisions # 73831 and 73937, and why he filed his late requests for hearing when he did. Claimant will not be entitled to a hearing about the work seeking activities at issue in decisions # 73831 and 73937 unless and until claimant first proves by a preponderance of the evidence that he had good cause for the late filings and filed within a reasonable time; if he does not make those showings, decisions # 73831 and 73937 will remain undisturbed.

NOTE: The failure of any party to appear at the hearing(s) on remand will not reinstate Hearing Decisions 17-UI-79493 and 17-UI-79494 or return these matters to EAB. Only timely applications for review of the subsequent hearing decisions will cause these matters to return to EAB.

DECISION: Hearing Decisions 17-UI-79493 and 17-UI-79494 are set aside, and these matters remanded for further proceedings consistent with this order.

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

DATE of Service: April 21, 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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