

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0453**

*Reversed*  
*Late Request for Hearing Allowed*  
*Hearing Required*

**PROCEDURAL HISTORY:** On December 23, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 94828). On January 12, 2017, decision # 94828 became final without claimant having filed a timely request for hearing. On January 30, 2017, claimant filed a late request for hearing. On February 1, 2017, ALJ Kangas issued Hearing Decision 17-UI-75908, dismissing claimant's late request for hearing subject to claimant's right to renew the request by responding to an appellant questionnaire by February 15, 2017. On February 14, 2017, claimant responded to the questionnaire. On February 15, 2017, the Office of Administrative Hearings (OAH) mailed a letter canceling Hearing Decision 17-UI-75908. On March 20, 2017, OAH mailed notice of a hearing scheduled for April 4, 2017. On April 4, 2017, ALJ Murdock conducted a hearing, and on April 12, 2017 issued Hearing Decision 17-UI-80830, re-dismissing claimant's late request for hearing. On April 17, 2017, claimant filed an application for review of Hearing Decision 17-UI-80830 with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Claimant received notice of decision # 94828 shortly after it was mailed, disagreed with the Department's decision, and planned to request a hearing. On December 28, 2016, claimant contacted her attorney to request that he represent her in the matter. Claimant notified the attorney that the deadline to request a hearing was January 12, 2017.

(2) On January 4, 2017, claimant's attorney agreed to represent her in this matter. Claimant understood that her attorney would request a hearing on her behalf. Claimant had previously retained the same

attorney to represent her in another matter and, based on her experiences working with him, trusted that he would submit timely filings on her behalf and competently represent her in this matter.

(3) At the time claimant's attorney agreed to represent claimant in this matter he was also representing other clients in "several high profile and labor intensive cases." Exhibit 4. During the days after January 4<sup>th</sup> several developments in the other cases occurred that required the attorney to exclusively work on the other cases. One case was complex, involved three different defendants, required "two days of intense mediation," and required the attorney to travel to another county; another case involved defending an individual charged with attempted murder and involved potential mandatory minimum sentencing and plea negotiations, and regularly required the attorney to travel 294 miles round trip, at least three hours in each direction;<sup>1</sup> two other cases involved jury trials, one of which lasted three days. The attorney was also involved with an attempt to intervene with a close friend and colleague suffering from a substance abuse problem.

(4) On January 12, 2017, the deadline for requesting a hearing on decision # 94828 lapsed without claimant or her attorney having filed a timely request for hearing. Claimant knew at the time what the deadline was and that it was lapsing; she was, however, unaware that her attorney had not filed a request for hearing on or before that date.

(5) By January 29, 2017, claimant's attorney's other, more pressing cases had either been resolved or the developments requiring his exclusive attention had abated. He began to process non-emergency items in his inbox, including claimant's case, and realized for the first time that he had missed the deadline for filing a request for hearing. He filed a late request for hearing on claimant's behalf one day later.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant has shown good cause to extend the filing deadline in this matter a reasonable time.

The ALJ wrote that for purposes of determining whether good cause exists claimant's attorney's actions were attributable to claimant. Hearing Decision 17-UI-80830 at 5. We agree that the attorney's actions in failing to file a timely request for hearing are the proper focus of the good cause analysis. The Court of Appeals has consistently held that "an attorney's negligent failure to file a timely request for hearing . . . does not constitute good cause . . . unless the attorney's reason for failing to file would be good cause if attributed to the claimant." *McComas v. Employment Department*, 133 Or. App. 577, 891 P.2d 1351 (1995) (internal citations omitted).

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.

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<sup>1</sup> Claimant's attorney traveled between Madras and John Day. Exhibit 4. We take notice of the generally cognizable fact that Madras and John Day are separated by a distance of 147 miles in each direction. <https://www.mapquest.com/directions/from/us/or/madras-282038360/to/us/or/john-day-282035301>. 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 fact will remain in the record.

Although the ALJ indicated that claimant reasonably relied upon her attorney's representations that he would represent her in this matter, the ALJ ultimately concluded that she did not show good cause to extend the filing deadline because the attorney's failure to "notate it [the deadline] in his calendar or use other means for organizing and prioritizing his caseload" and "monitor his emails in a timely manner" were not the result of an excusable mistake or a circumstance beyond his reasonable control. Hearing Decision 17-UI-80830 at 5. We agree with the ALJ that claimant reasonably relied upon her attorney in this matter to represent her, given her previous experiences suggesting that the attorney would competently represent her. We agree with the ALJ that a lapse in an attorney's competence can, under many circumstances, result in the unfortunate forfeit of a claimant's right to an administrative review. We also agree that simply mis-calendaring or forgetting about an event such as a deadline or hearing date, generally speaking, is not beyond the reasonable control of the appellant and does not support a finding of good cause. Our disagreement with the ALJ is as to the facts in this case, and, ultimately, the conclusion drawn therefrom.

Although the record in this matter does not include an exhaustive list accounting for all of the attorney's time between the point at which he agreed on January 4<sup>th</sup> to represent claimant in this matter and the point at which he realized on January 29<sup>th</sup> that he had failed to meet the filing deadline to request a hearing, the record was sufficiently developed to show that the attorney's failure to meet the deadline was not simply caused by a negligent failure to "notate" the deadline, prioritize his caseload or monitor his emails. The personal and professional circumstances described at the hearing and in Exhibit 4 suggest that although the attorney might customarily have maintained a manageable workload, exigent circumstances unique to the period of January 4<sup>th</sup> through January 29<sup>th</sup> caused his workload to temporarily increase beyond his capacity, creating circumstances beyond his ability to control that resulted in an inability to manage his workload, and, consequently, an inability to meet the deadline for filing claimant's request for hearing. Those circumstances ceased to exist on January 29<sup>th</sup>, and the attorney filed claimant's request for hearing on January 30<sup>th</sup>, one day later.

Because the circumstances that prevented a timely filing were beyond the reasonable control of claimant and her attorney, and because claimant's request for hearing was filed within one day of the date those circumstances ceased, we conclude that claimant has shown good cause to extend the deadline for filing her request a reasonable time. Her late request for hearing is, therefore, allowed, and she is entitled to a hearing on the merits of decision # 94828.

**DECISION:** Hearing Decision 17-UI-80830 is set aside, as outlined above.

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

**DATE of Service:** April 24, 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](http://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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