

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0561

Late Application for Review Dismissed

PROCEDURAL HISTORY: On December 1, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, but not for misconduct (decision # 133443). The employer filed a timely request for hearing. On December 29, 2016, ALJ Vincent conducted a hearing in which claimant did not participate. At the hearing, the ALJ noted that in its request for hearing on decision # 133443, the employer requested that it be relieved of charges for claimant's unemployment benefits. The ALJ explained that the December 16 hearing would only address whether claimant would receive unemployment benefits, and that a request for relief of charges would have to be adjudicated at a separate proceeding. Based on the ALJ's explanation, the employer withdrew its request for hearing on decision # 133443. On December 30, 2016, ALJ Vincent issued Hearing Decision 16-UI-73877, dismissing the employer's hearing request. On January 19, 2017, Hearing Decision 16-UI-73877 became final, without a request for hearing having been filed. On January 24, 2017, the Department issued an "Administrative Charge Relief Decision," concluding that the employer was not entitled to relief of charges to its account for unemployment insurance benefits payable to claimant because the December 1, 2016 decision found that claimant was discharged, but not for misconduct.¹ On May 3, 2017, the employer filed an untimely application for review of decision # 133443 with the Employment Appeals Board (EAB).

CONCLUSION AND REASONS: Although the employer established good cause for extending the period for filing its application for review, it failed to show that it filed the application for review within a reasonable time after the circumstances that prevented a timely filing ceased to exist.

An application for review is timely if it is filed within 20 days of the date that OAH mailed the decision for which review is sought. OAR 471-041-0070(1) (March 20, 2014). The 20 day filing period may be extended a "reasonable time" upon a showing of "good cause." ORS 657.875; OAR 471-041-0070(2). "Good cause" means that factors or circumstances beyond the applicant's reasonable control prevented

¹ We take official notice of the "Administrative Charge Relief Decision," a document contained in Department records. OAR 471-041-0090(3) (October 29, 2006). Any party that objects to our taking notice of this fact 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, the noticed fact will remain part of the record.

timely filing OAR 471-040-0070(2)(a). A “reasonable time” is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0050(2)(b).

In the explanation submitted with its application for review, the employer’s representative explained that she was “misinformed” by the ALJ at the December 29 hearing. She noted that based on the ALJ’s assertion that the December 16 hearing would and could not address the employer’s request that it be relieved of charges for claimant’s unemployment benefits, she withdrew the employer’s hearing request on decision # 133443, the decision concluding that the employer discharged claimant, but not for misconduct. Because the employer subsequently received the January 24, 2017 “Administrative Charge Relief Decision” that denied the employer’s request to be relieved of charges due to the conclusion reached in decision # 133443, the employer’s representative now wished to “reopen the case so I may have an opportunity to negate claimant’s claim that she was fired.”

We agree with the employer’s representative that she may not have been given complete information at the December 29 hearing. Although the ALJ was correct that the purpose of the hearing was not to determine if the employer could be relieved of charges for any unemployment benefits payable to claimant, he neglected to inform the employer that the hearing could affect its request for relief of charges. When an employer is provided an opportunity to contest an employee’s work separation, but does not do so, it cannot seek a second determination by requesting to have its account relieved of charges regarding the employee. *See Delmer L. Johnson v. Employment Div.*, 124 Or App 77, 81, 861 P2d 1032 (1993). The ALJ’s failure to explain the relationship between the request for hearing on decision # 133443 and a request for relief of charges was a circumstance beyond the employer’s reasonable control that constituted good cause for extending the period for filing an application for review.

The employer failed to file its application for review within a reasonable time once the factors that prevented a timely filing ceased to exist, however. On January 24, 2017, the Department issued the “Administrative Relief Charge Decision” which notified the employer that it could not be relieved of charges for unemployment benefits payable to claimant because of the administrative decision concluding that the employer discharged claimant, but not for misconduct. After receiving this decision, the employer knew or should have known that it needed to appeal Hearing Decision 16-UI-68231. The employer waited more than three months to file its application for review, however. The employer therefore failed to demonstrate that it filed the application for review within a “reasonable time,” *i.e.* seven days, after the circumstances that prevented a timely filing ceased to exist.

DECISION: The application for review filed May 3, 2017 is dismissed. Hearing Decision 16-UI-73877 remains undisturbed.

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

DATE of Service: May 12, 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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