

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0612

Reversed
Requests to Reopen Granted

PROCEDURAL HISTORY: On November 29, 2016, the Oregon Employment Department (the Department) served separate notices of four administrative decisions, one concluding that claimant voluntarily left work without good cause (decision # 130151), one concluding claimant was not available for work for the week including June 12 through June 18, 2016 (decision # 135244), one concluding that claimant was not available for work for the week including August 7 through August 13, 2016 (decision # 143625), and one concluding claimant did not actively seek work during the weeks including September 18 through October 8, 2016 and October 16 through October 22, 2016 (decision # 145528). Claimant filed timely requests for hearing regarding each of the administrative decisions.

On February 10, 2017, the Office of Administrative Hearings (OAH) scheduled a hearing regarding decision # 145528 for March 3, 2017 at 2:30 p.m., a consolidated hearing regarding decision #s 135244 and 143625 for March 3, 2017 at 3:30 p.m. and a hearing regarding decision # 130151 for March 3, 2017 at 4:30 p.m. Claimant failed to appear at all three hearings.

On March 3, 2017, ALJ Frank issued Hearing Decision 17-UI-78195, dismissing claimant's hearing request on decision # 145528. On March 6, 2017, ALJ Frank issued three hearing decisions dismissing claimant's other hearing requests, including Hearing Decision 17-UI-78202, dismissing claimant's hearing request on decision # 143625, Hearing Decision 17-UI-78203, dismissing claimant's hearing request on decision # 135244 and Hearing Decision 17-UI-78210, dismissing claimant's hearing request on decision # 130151.

On March 22, 2017, claimant filed timely requests to reopen all four March 3, 2017 hearings. On April 18, 2017, ALJ Frank conducted a consolidated hearing regarding decisions # 135244 and 143625, and on April 26, 2017, issued Hearing Decision 17-UI-81859, dismissing claimant's request to reopen the hearing on decision # 135244 and Hearing Decision 16-UI-81860, dismissing claimant's request to reopen the hearing on decision # 143625. Also on April 18, 2017, ALJ Frank conducted a hearing regarding decision # 145528, and on April 26, 2017, issued Hearing Decision 17-UI-81861, dismissing claimant's request to reopen the hearing on that administrative decision. Also on April 18, 2017, ALJ

Frank conducted a hearing regarding decision # 130151, and on April 26, 2017, issued Hearing Decision 17-UI-81862, dismissing claimant's request to reopen the hearing on that administrative decision.

On May 15, 2016, claimant filed timely applications for review of Hearing Decisions 17-UI-81859, 17-UI-81860, 17-UI-81861 and 17-UI-81862 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-81859, 17-UI-81860, 17-UI-81861 and 17-UI-81862. For case-tracking purposes, this decision is being issued in quadruplicate (EAB Decisions 2017-EAB-0613, 2017-EAB-0612, 2017-EAB-0604 and 2017-EAB-0605, respectively).

EAB considered claimant's written argument when reaching this decision to the extent it was based on the hearing record.

FINDINGS OF FACT: (1) In each of claimant's December 13, 2016 requests for hearing regarding the administrative decisions in these cases, claimant notified OAH in writing that he was "NOT available" for hearing "Any time after 2:30 pm" due to his "work at 4:00 pm." Record Documents.

(2) Nonetheless, on February 10, 2017, the Department sent hearing notices to claimant advising him that hearings regarding the administrative decisions in these cases had been scheduled for March 3, 2017 at 2:30 p.m., 3:30 p.m. or 4:30 p.m. Record Documents.

(3) After receiving the notices of hearing but prior to the hearings in question, claimant contacted OAH and requested postponement of the hearings due to a conflict with his work but was advised that his requests were untimely and would not be granted at that time.

(4) On March 3, 2017, claimant was scheduled to begin work at 3:00 p.m. Claimant left for work at approximately 2:15 p.m. so he could be at his work station at 2:45 p.m., as required by the employer. Claimant did not attempt to cancel his work shift to attend the three unemployment hearings scheduled for that afternoon because he "[didn't] want to get fired." Audio Record Case No. 2016-UI-58945 ~ 19:45 to 20:45.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's requests to reopen should be allowed.

ORS 657.270(5) allows any party who failed to appear at the hearing to request reopening, and provides that the request may be allowed if the party filed the request within 20 days after the hearing decision(s) were issued and showed good cause for failing to appear. "Good cause" exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant's reasonable control. OAR 471-040-0040(2) (February 10, 2012).

In each of these cases, after failing to find that claimant notified OAH in his original requests for hearing that he was not "NOT available" to attend a hearing "Any time after 2:30 pm" due to his "work", but finding that claimant "unsuccessfully requested a postponement of the hearings with the Office of Administrative Hearings (OAH) personnel due to his work shift," and that claimant likely started work at 4:00 p.m. that day, the ALJ denied claimant's requests to reopen, reasoning that the "preponderance of

the evidence...demonstrates it was still within claimant's reasonable control to appear for not just one, but all three hearings that day...[to] participate[] in the hearings or explain[] his circumstances...Because claimant did not demonstrate good cause for failing to appear for the March 3, 2017 hearing[s], he is entitled to neither a reopening of the case[s] or a hearing on its merits." Hearing Decisions 17-UI-81859, 17-UI-81860, 17-UI-81861 and 17-UI-81862 at 2, 4. We disagree.

Claimant chose to work a scheduled work shift rather than appear at the scheduled telephone hearings because he "[didn't] want to get fired." Claimant's choice was that of a person who, consistent with the purpose and policy of Employment Department law, chose not to demonstrate "indifference to the consequences" of his missing a work shift for the employer or engage in an act that "amount[ed] to a willful or wantonly negligent disregard of the employer's interests" in favor of his own, particularly where his previous requests for hearings that would not conflict with his work schedule were essentially ignored by OAH. OAR 471-030-0038(1)(c) and (3)(a). If claimant made a mistake in attending work rather than appearing for his hearings, his mistake was excusable because it resulted from his desire to maintain employment and thereby avoid the need for additional unemployment insurance benefits. Because claimant's failures to appear at the March 3 hearings were caused by an excusable mistake, he has demonstrated good cause for reopening the hearings in question. Hearing Decisions 17-UI-81859, 17-UI-81860, 17-UI-81861 and 17-UI-81862 are reversed, and these matters remanded for hearings and hearing decisions on the merits of claimant's hearing requests.

DECISION: Hearing Decisions 17-UI-81859, 17-UI-81860, 17-UI-81861 and 17-UI-81862 are set aside, as outlined above.

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

DATE of Service: June 14, 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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