

**EMPLOYMENT APPEALS BOARD DECISION**  
**2017-EAB-0900**

*Reversed*  
*Request to Reopen Allowed*

**PROCEDURAL HISTORY:** On February 13, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 73406). On February 28, 2017, claimant filed a timely request for hearing. On March 23, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for March 28, 2017 at 9:30 a.m. OAH canceled that hearing, and on March 28, 2017 mailed notice of a hearing scheduled for April 10, 2017 at 9:30 a.m. On April 10, 2017, ALJ Sgroi conducted a hearing, at which the employer and claimant appeared until claimant was disconnected, at which time the ALJ continued the hearing to another date to be determined later. On April 10, 2017, OAH mailed notice of another hearing scheduled for April 28, 2017 at 9:30 a.m. On April 11, 2017, OAH mailed an amended notice of a hearing scheduled for April 28, 2017 at 9:30 a.m. On April 28, 2017, ALJ Sgroi conducted a hearing at which claimant failed to appear, and on May 5, 2017 issued Hearing Decision 17-UI-82749, concluding that the employer discharged claimant for misconduct. On May 16, 2017, claimant filed a timely request to reopen the April 28<sup>th</sup> hearing that included a written statement explaining why she had missed the hearing. On June 26, 2017, OAH mailed notice of a hearing scheduled for July 14, 2017 at 10:45 a.m. On July 14, 2017, ALJ Sgroi conducted a hearing, and on July 21, 2017 issued Hearing Decision 17-UI-88640, denying claimant's request to reopen. On July 26, 2017, claimant filed an application for review of Hearing Decision 17-UI-88640 with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Claimant received notice of the March 28<sup>th</sup> hearing and planned to attend. Sometime prior to March 28<sup>th</sup> an OAH employee called claimant about rescheduling the hearing to April 10<sup>th</sup>. Claimant planned to fly out of the country on March 28<sup>th</sup> for a five-week business trip and would not be in the United States on April 10<sup>th</sup>. Claimant asked that the hearing be rescheduled to a date on which she would be in the country; the OAH employee refused to change the date. Claimant agreed to try to call in to the hearing on April 10<sup>th</sup> but suggested she might have problems connecting to the hearing and might need the hearing to be rescheduled if she did. On March 28<sup>th</sup>, OAH mailed claimant a notice of hearing for the April 10<sup>th</sup> hearing, which claimant did not receive because she was out of the country.

(2) On April 10<sup>th</sup>, claimant called OAH to participate in the April 10<sup>th</sup> hearing. Claimant had to participate from a public location with Wi-Fi and lost the phone connection mid-way through the employer's testimony. The ALJ continued the hearing to another date.

(3) After losing her phone connection, claimant attempted to reconnect to the hearing but was unable to do so. She then called OAH and left a voicemail stating that she had lost her phone connection to the hearing, was unable to reconnect to the hearing and needed the hearing to be rescheduled. Claimant stated in the voicemail that she was out of the country and was not receiving her mail, and asked that she be notified by email of the rescheduled hearing date.

(4) Claimant did not receive emails from OAH about the rescheduled hearing. On April 26, 2017, claimant traveled back to the United States and went to her home; on April 27, 2017, claimant again traveled from her home to the state of Washington on business. Claimant had asked friends to collect her mail in her absence and they did not return the mail to her during the brief period of time she had been home. Claimant did not receive notice of the April 28<sup>th</sup> hearing prior to the hearing and did not participate in it because she was unaware of it.

(5) Claimant returned home and retrieved her mail during the week of May 1, 2017. Sometime between May 1<sup>st</sup> and May 16<sup>th</sup>, claimant read OAH's notice of the April 28<sup>th</sup> hearing and a copy of the ALJ's May 5<sup>th</sup> hearing decision, and filed a request to reopen before the May 5<sup>th</sup> hearing decision became final.

**CONCLUSIONS AND REASONS:** We disagree with the ALJ and conclude that claimant showed good cause to reopen the April 28<sup>th</sup> hearing.

ORS 657.270(5) provides that any party may request to reopen a hearing, and that the request may be allowed if the party that requested the hearing failed to appear at the hearing, requested reopening within 20 days after the ALJ's decision was issued, and shows good cause for failing to appear. "Good cause" means "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).

There is no dispute that claimant failed to attend the April 28<sup>th</sup> hearing and requested that that hearing be opened within 20 days of the date the ALJ issued a decision in this matter. The only issue is whether claimant showed "good cause" for failing to appear. The ALJ concluded that claimant did not, because "she did not check or open her accumulated mail promptly after retrieving it from the friend who had been collecting for her during her absence" at a time when she "reasonably should have known that she could be receiving a notice of hearing" and "she was still within the timeframe to either participate in the hearing or make a request to postpone the hearing." Hearing Decision 17-UI-88640 at 4. We disagree.

It is undisputed that claimant could not have checked or opened her accumulated mail on April 26<sup>th</sup> or April 27<sup>th</sup> because she had not retrieved it from the friend who had collected it for her and therefore did not have possession of the mail. Nor is there any evidence in this record suggesting that it was possible for claimant to have retrieved the mail during the short window of time she was at her home between arriving home from one business trip and leaving the next day for her next business trip. There is also insufficient evidence that she "reasonably should have known that she could be receiving notice of [another] hearing" between April 10<sup>th</sup> and April 28<sup>th</sup>. She was not on the phone when the ALJ announced that she would reschedule the hearing, OAH staff had told claimant on the phone prior to

March 28<sup>th</sup> that the hearing could not be scheduled for a date after she returned from her out-of-country trip, and it had previously taken up to 23 days for OAH to mail notice of a hearing to her. All of these facts suggest that she did not have reason to know that OAH would mail her notice of a new hearing after she dropped off the April 10<sup>th</sup> hearing conference call, and did not have reason to think that OAH would mail her a notice and hold the hearing within the 18 day period between the April 10<sup>th</sup> and April 28<sup>th</sup> hearings.

Although claimant was home for a portion of April 26<sup>th</sup> and April 27<sup>th</sup>, the ALJ did not ask, and the record does not show, what time claimant arrived home on April 26<sup>th</sup> and what time she had to leave on April 27<sup>th</sup>, and she provided unrefuted testimony that she had business on April 28<sup>th</sup> that prevented her from participating in the hearing even if she had known about it. We therefore disagree with the ALJ that claimant “was still within the timeframe to . . . participate in the hearing” based upon the fact that she was briefly home on April 26<sup>th</sup> and April 27<sup>th</sup>. Nor does the record support the ALJ’s conclusion that making a request to postpone the hearing was feasible, because the record fails to show what times of day she was home prior to the April 28<sup>th</sup> hearing, and because claimant had previously requested when OAH staff rescheduled the March 28<sup>th</sup> hearing that they reschedule the hearing to a date after she returned from her business trip and OAH staff had refused to accommodate her schedule.

Claimant did not receive notice of hearing because, despite having reported to OAH in a voicemail that she was not capable of receiving mail at the time, the only notice sent regarding the April 28<sup>th</sup> hearing was provided by mail and she did not receive her mail prior to the April 28<sup>th</sup> hearing.<sup>1</sup> At worst, claimant’s failure to retrieve her mail on April 26<sup>th</sup> or April 27<sup>th</sup>, to the extent that was even possible, and failure to review it to see if OAH sent her something after she dropped off of the April 10<sup>th</sup> hearing conference call, or failure to call OAH a second time to inquire about the results of the April 10<sup>th</sup> hearing or ask whether the hearing was being continued to a new date was a mistake. Given the inadequate notice and claimant’s substantial efforts to attend the hearings about her work separation despite her repeated difficulties doing so, her mistake was excusable, and she is entitled to have the April 28<sup>th</sup> hearing reopened.

The ALJ’s decision denying claimant’s request to reopen the April 28<sup>th</sup> hearing is therefore reversed, and this matter is returned to OAH for a new hearing on the merits of decision # 73406.

**DECISION:** Hearing Decision 17-UI-88640 is set aside, as outlined above.<sup>2</sup>

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

**DATE of Service:** August 1, 2017

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<sup>1</sup> We note that this record shows OAH had placed a telephone call to claimant about rescheduling the March 28<sup>th</sup> hearing in addition to mailing her notice of hearing, suggesting that claimant reasonably expected that OAH could provide her with notice of any additional proceedings in a call or some other format.

<sup>2</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-88640 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

**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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