

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0964

Application for Review Dismissed

PROCEDURAL HISTORY: On January 30, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct on December 29, 2016 (decision # 85723). Claimant filed a timely request for hearing. On March 7, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for March 21, 2017. On March 21, 2017, ALJ Murdock conducted a hearing, which she continued to April 10, 2017, and OAH mailed notice of the continued hearing, scheduled for April 10, 2017. On April 10, 2017, prior to the continued hearing convening, claimant telephoned OAH and withdrew her request for hearing on decision # 85723. On April 10, 2017, ALJ Murdock issued Hearing Decision 17-UI-80685, dismissing claimant's request for hearing based upon claimant's withdrawal of her request. On May 1, 2017, Hearing Decision 17-UI-80685 became final without claimant having filed a timely application for review with the Employment Appeals Board (EAB). On August 11, 2017, claimant filed a late application for review with EAB.

EAB considered claimant's argument when reaching this decision. The letter attached to the written argument is hereby admitted into evidence as EAB Exhibit 1, pursuant to OAR 471-041-0070(3) and OAR 471-041-0090(1) and (2). A copy of EAB Exhibit 1 has been included with the copy of this decision mailed to the parties. Any party that objects to EAB Exhibit 1 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, EAB Exhibit 1 will remain part of the record.

FINDINGS OF FACT: (1) On December 29, 2016, Department of State Police discharged claimant.¹ Claimant filed an initial claim for unemployment insurance benefits effective the week ending January

¹ See administrative decision # 85723, page 1.

7, 2017 (BYE 52-17).² On January 30, 2017, the Department issued decision # 85723, concluding that claimant was disqualified from receiving unemployment insurance based on the Department's determination that her December 29th work separation from Department of State Police was a disqualifying event under ORS 657.176.

(2) Claimant requested a hearing, and OAH scheduled one for March 21st; because the parties were unable to complete the hearing that day the ALJ continued the hearing to April 10th and OAH mailed notice of the continued hearing to the parties. For unknown reasons, on April 10, 2017, claimant called OAH and requested to withdraw her request for hearing.³ The ALJ issued a hearing decision dismissing claimant's request for hearing pursuant to her withdrawal, and that decision became final on May 1, 2017 when claimant did not file an application for review of that decision with EAB.

(3) At some point after the December 29th discharge, claimant and her union grieved the discharge and appealed the discharge to arbitration.⁴ At some point, likely sometime between March 21st and June 9th, claimant and Department of State Police reached a settlement agreement whereby Department of State Police rescinded claimant's discharge, paid her back wages from December 29, 2016 to March 29, 2017 then placed her on unpaid leave until May 31, 2017, and accepted her resignation, effective May 31st.⁵

(4) On or about June 9, 2017, claimant reported her May 31st resignation to the Department and the Department investigated.⁶ The Department chose not to adjudicate claimant's May 31st resignation as a new potentially disqualifying separation or issue a decision addressing the May 31st resignation, instead concluding that no new separation had occurred and the disqualification had already been adjudicated in decision # 85723.⁷ It does not appear from Department records that the Department notified claimant of

² We take notice of the effective date and benefit year ending date of claimant's claim, which are contained in Employment Department records. 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 facts will remain in the record.

³ OAH's "Memo to File" documenting claimant's April 10th telephone call is hereby admitted into evidence as EAB Exhibit 2 to complete the record, pursuant to OAR 471-041-0090, a copy of which has been mailed to the parties with this decision. 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, EAB Exhibit 2 will remain in the record. *See also* EAB Exhibit 1 at page 1 (claimant's union counsel states, "It is true that . . . [claimant] withdrew her request for hearing).

⁴ EAB Exhibit 1, page 2.

⁵ EAB Exhibit 1, page 1.

⁶ We take notice of the facts in this paragraph, which are contained in Employment Department records, copies of which are hereby admitted into evidence to complete the record as EAB Exhibit 3, a copy of which has been mailed to the parties with this decision. 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 facts will remain in the record at EAB Exhibit 3.

⁷ EAB Exhibit 3.

its decision not to issue a decision about her May 31st resignation. On July 17, 2017, claimant contacted the Department because she had been expecting to receive a decision about the May 31st resignation. Department staff told claimant that she could “file a request for a hearing,” took a telephone hearing request on her behalf, and transmitted the request to OAH.

(5) On July 19, 2017, OAH sent claimant a letter that stated, in pertinent part, “we are unable to schedule another hearing on this matter because a decision was already issued. Your appeal needs to go to the Employment Appeals Board.”⁸ The letter directed claimant to contact EAB if she had further questions and provided her with EAB’s contact information.⁹

(6) On July 26, 2017, claimant called the Department about being denied a hearing.¹⁰ A Department employee told claimant “that even though the employer and her [*sic*] changed their agreement on the separation, it doesn’t change our stance on it.”¹¹ The employee advised claimant “to follow up with letter from OAH and write a letter to request an appeal from the appeals board.”¹² After July 26, 2017, claimant waited 16 days to file an application for review with EAB.

CONCLUSIONS AND REASONS: Claimant’s late application for review must be dismissed.

As a preliminary matter, we address the scope of review in this matter. Claimant argued that OAH erred in concluding that OAH “is unable to schedule a hearing on this matter because a decision was already issued.” She further argued that since Department of State Police rescinded her December 29th discharge the only work separation at issue in this case should be her May 31st resignation. In essence, then, her argument is that decision # 85723, claimant’s withdrawal of her request for hearing on that decision, and Hearing Decision 17-UI-80685 are not at issue because those all pertain to claimant’s December 29th discharge by Department of State Police, and the matter she is disputing is her May 31st resignation from that same employment.

While we understand claimant’s argument, however, EAB has no jurisdiction to address the question of whether the December 29th and May 31st work separations should or should not be adjudicated separately or are, as the Department has thus far determined, both part of the same separation event that has already been adjudicated. We also have no jurisdiction to determine whether the May 31st separation, considered alone, would be disqualifying for purposes of unemployment insurance benefits. ORS 657.270(6) and ORS 657.275(1) clearly establish that EAB’s jurisdiction is confined to review of

⁸ The July 19th letter from OAH to claimant is hereby admitted into evidence as EAB Exhibit 4 to complete the record, a copy of which has been mailed to the parties with this decision. 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, EAB Exhibit 4 will remain in the record.

⁹ EAB Exhibit 4.

¹⁰ EAB Exhibit 3.

¹¹ *Id.*

¹² *Id.*

decisions issued by administrative law judges. Likewise, ORS 657.269 and ORS 657.270(1) establish that OAH's jurisdiction is confined to review of Employment Department decisions. The only administrative decision the Department has issued regarding claimant's separation from Department of State Police is decision # 85723, adjudicating her December 29th work separation, which defines OAH's jurisdiction in this matter and the scope of the ALJ's review. Because OAH scheduled and held hearing(s) and claimant withdrew her request for hearing, claimant does not have any further recourse as far as having OAH review decision # 85723. Likewise, the only hearing decision OAH has issued about claimant's work separation from Department of State Police is Hearing Decision 17-UI-80685, allowing claimant's request to withdraw and dismissing her request for hearing on decision # 85723. EAB's jurisdiction in this matter, and thus the scope of EAB's review, are confined to reviewing the issue presented before EAB based on claimant's application for review of Hearing Decision 17-UI-80685.¹³

With respect to claimant's application for review, ORS 657.270(6) provides in pertinent part that "the decision of the administrative law judge is final unless . . . [a] party to the hearing files an application for review with the Employment Appeals Board within 20 days after the" hearing decision was mailed. The ALJ in this case issued Hearing Decision 17-UI-80685 on April 10, 2017; the 20-day period in which claimant might have timely filed an application for review with EAB expired on May 1, 2017 and claimant did not file an application for review until August 11th, making the application for review late.

ORS 657.875 provides that the 20-day time period "may be extended, upon a showing of good cause therefor, a reasonable time under the circumstances of each particular case." "Good cause" means "factors or circumstances beyond the applicant's reasonable control prevented timely filing." OAR 471-041-0070(2)(a) (March 20, 2012). "A reasonable time" means "seven days after the circumstances that prevented timely filing ceased to exist." OAR 471-041-0070(2)(b).

We first address the "reasonable time" component because it is dispositive. However we characterize the circumstances that were preventing claimant's timely filing in this case, those circumstances had ceased to exist by July 26th at the latest, by which time the Department and OAH had informed claimant that the Department did not consider the May 31st resignation separate from the December 29th discharge it had already adjudicated, the Department would not issue a new decision about the May 31st separation, and her recourse for further appeal would be to "request an appeal from the appeals board" and "go to the Employment Appeals Board." Claimant must therefore have filed her late application for review with EAB within "seven days" of July 26th to satisfy the seven-day "reasonable time" requirement set forth in ORS 657.875. Claimant, however, waited 16 days, until August 11th, to file her late application for review. Because claimant did not file her request for hearing within "a reasonable time," her application for review must be dismissed under ORS 657.875 and OAR 471-041-0070(2)(b). Therefore, both Hearing Decision 17-UI-80685, which dismissed claimant's request for hearing on decision # 85723 upon her request, and decision # 85723, disqualifying claimant from receiving benefits because of her work separation from Department of State Police, remain undisturbed.

Having so concluded, we reiterate that EAB has no jurisdiction over whether or not claimant's December 29th or May 31st work separation(s) from Department of State Police were or should be considered as one or more event, nor over whether or not either or both events should be considered

¹³ For those reasons, and because the only potential recourse claimant has at this point as far as administrative review of her work separation from Department of State Police would be review of Hearing Decision 17-UI-80685 by EAB, we have construed claimant's August 11th submission as an application for review under OAR 471-041-0060(1).

disqualifying. Likewise, given that OAH's jurisdiction over unemployment insurance benefits cases is confined to review of the Department's administrative decisions and OAH has already reviewed the only decision the Department issued about claimant's separation from Department of State Police, OAH has no jurisdiction over this matter. Although claimant has the right to appeal this decision (Appeals Board Decision 2017-EAB-0964) by filing a Petition for Judicial Review with the Oregon Court of Appeals (see "NOTE" section, below for further information), claimant has *no* further right to administrative review over her work separation from Department of State Police unless and until the Department decides to issue a new decision about claimant's May 31st work separation from Department of State Police pursuant to ORS 657.267, and, thereafter, claimant exercises her right to administrative review of such new decision.

DECISION: The application for review filed August 11, 2017 is dismissed. Hearing Decision 17-UI-80685 remains undisturbed.

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

DATE of Service: August 17, 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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