

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1023

Reversed & Remanded

PROCEDURAL HISTORY: On March 14, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, not for misconduct (decision # 140738). On April 3, 2017, decision # 140738 became final without the employer having filed a timely request for hearing. On June 26, 2017, the employer filed a late request for hearing. On July 11, 2017, the Office of Administrative Hearings (OAH) scheduled a hearing for July 31, 2017 at 9:30 a.m. to address the timeliness of the employer's hearing request and, if appropriate, the merits of the underlying decision on appeal. On July 31, 2017, ALJ Shoemake conducted the scheduled hearing, at which claimant failed to appear, and on August 3, 2017 issued Hearing Decision 17-UI-89566, concluding the employer had shown good cause for its late hearing request, and that the employer discharged claimant for misconduct. On August 23, 2017, claimant filed a timely application for review of Hearing Decision 17-UI-89566 with the Employment Appeals Board (EAB).

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the ALJ's findings and analysis with respect to the conclusion that the employer demonstrated good cause for its late request for hearing filed June 26, 2017 are **adopted**.

FINDINGS OF FACT¹: (1) Claimant received notice that the hearing in this matter was scheduled for July 31, 2017 and planned to participate in it. However, after receiving the notice, claimant prepared for a move to Alaska for a new job, and during his moving efforts he lost some of his mail, including the hearing notice. On July 27, 2017, claimant contacted a WorkSource Oregon office to obtain information regarding the date and time of his hearing. During that contact, claimant spoke to a Department employee and "was told [he] would receive a phone call on July 31st to connect to the hearing." EAB Exhibit 1.

¹ The findings of fact in this decision are based upon claimant's written argument, which is hereby marked as EAB Exhibit 1 and admitted into evidence. A copy of EAB Exhibit 1 has been mailed to the parties along 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. Unless such objection is received and sustained, the noticed fact will remain in the record as EAB Exhibit 1.

(2) On July 31, 2017, claimant was packing a U-Haul truck for his move to Alaska and waited to receive the phone call in question. However, the call never came and the hearing was conducted without his participation.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-89566 is reversed and this matter remanded for additional proceedings.

Claimant's written argument and explanation, submitted with his application for review, contained relevant information regarding his work history and the incident on which the employer based its discharge decision. Claimant's written argument is construed as a request to have EAB consider new information under OAR 471-041-0090 (October 29, 2006), which allows EAB to consider information not presented at the hearing if the party offering the information shows the information is relevant and material and the party was prevented by circumstances beyond its reasonable control from presenting the information at the hearing.

Claimant's circumstances, as described in the findings of fact, were sufficient to establish that it was more likely than not beyond his reasonable control to attend the hearing at its scheduled time. Although the hearing notice notified claimant that he had to call in at the scheduled time,² claimant misplaced that notice during his moving preparations, and explained that he was told by an employee at his local Work Source office that he would receive a call at the scheduled time in order to connect to the hearing. Claimant's explanation is not implausible given that OAH holds both scheduled hearings where parties are to call in and block hearings in which the assigned ALJ calls the participating parties.³ Because circumstances beyond claimant's reasonable control prevented him appearing at the hearing and offering his information into evidence at that time, his request for EAB to consider new information about his work separation is, therefore, allowed. Due process requires that the employer have an opportunity to respond. Hearing Decision 17-UI-89566 therefore is reversed and this remanded for another hearing on whether claimant should be denied benefits based on a work separation from the employer.

As an ancillary matter, in Hearing Decision 17-UI-89566, the ALJ concluded that based on the incident which occurred on January 12, 2017, the employer discharged claimant for misconduct under ORS 657.176(2)(a). Hearing Decision 17-UI-89566 at 4. However, the record fails to show that at hearing the ALJ sufficiently inquired about other possible types of wantonly negligent behavior claimant may have committed during his employment or why the incident in question may have exceeded mere poor judgment under OAR 471-030-0038(1)(d)(August 3, 2011). On remand, the ALJ should sufficiently inquire regarding those issues.

² Record Document – Notice of Hearing.

³ We take notice of this fact, which is 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 fact will remain in the record.

DECISION: Hearing Decision 17-UI-89566 is set aside, and this matter remanded for further proceedings consistent with this order.⁴

J. S. Cromwell and D. P. Hettle.

DATE of Service: September 20, 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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⁴ **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-89566 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.