

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1236

Reversed & Remanded

PROCEDURAL HISTORY: On August 22, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 145054). Claimant filed a timely request for hearing. On October 5, 2017, the Office of Administrative Hearings (OAH) mailed a notice to the parties scheduling a hearing for October 11, 2017. On October 11, 2017, ALJ S. Lee conducted a hearing at which the employer did not appear, and on October 13, 2017 issued Hearing Decision 17-UI-94586, reversing the Department's decision. On October 27, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

EAB considered the letter the employer submitted explaining its failure to appear at the October 11, 2017 hearing.

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-94586 is reversed and this matter is remanded for further development of the record.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct connected with work. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

In Hearing Decision 17-UI-94586, the ALJ concluded there was insufficient evidence in the record to establish that the employer discharged claimant for misconduct, specifically noting that this insufficiency might have been caused by the employer's failure to appear at the hearing and, presumably, to offer evidence on its own behalf that might have rebutted claimant's evidence. Hearing Decision 17-UI-94586 at 3. In the letter it submitted to EAB, the employer explained that its failure to appear was caused by its failure to receive the October 5th notice scheduling the hearing for October 11th

until October 12th, after the hearing had already taken place. Along with its letter, the employer submitted various documents to EAB that it requested EAB to consider since it contended they were “very important in determining this case.”

OAR 471-041-0090(2) (October 29, 2006) sets forth the circumstances under which EAB may consider information that was not offered into evidence during the hearing if it is relevant and material to the issues before EAB and the party offering the information shows that it was prevented by factors or circumstances beyond its reasonable control from offering it at the hearing. In the current case, that would require a showing that the employer’s failure to appear and offer information during the hearing was caused by factors or circumstances beyond its reasonable control. The notice of hearing that the employer contended it did not receive until October 12th was mailed on Thursday, October 5th, or only 6 days before the October 11th date on which the hearing was scheduled. While the date the notice of hearing was mailed technically complied with the due process requirement set out in OAR 471-040-0015(1) (August 1, 2004) that it must have been mailed at least five days in advance of the hearing, it is plausible that the employer did not receive the notice of hearing until after the October 11th hearing had taken place because a weekend and the October 9th federal holiday of Columbus Day intervened during the 6 days between when the notice was mailed and the hearing date.¹ Given those circumstances, the short notice of the hearing more likely than not caused the employer’s failure to receive the notice scheduling the hearing until after the hearing had already occurred, and constituted a factor or circumstance beyond the employer’s reasonable control that prevented it from appearing and offering information on its own behalf. As a result, this case is remanded for a new hearing and hearing decision to afford the employer a reasonable opportunity to present witnesses and documentary evidence on its own behalf as well as to examine claimant on the issue of claimant’s discharge, and for claimant to respond to the employer’s evidence.

At the hearing on remand, the employer should offer whatever documents it wants to have admitted into evidence as exhibits and the ALJ should, as appropriate, admit those documents. The employer should comply with all necessary requirements for the admission of those documents as specified on the notice scheduling the remand hearing, including that copies of such documents must be provided to all parties and the ALJ in advance of the hearing at the addresses listed on the notice of hearing.

DECISION: Hearing Decision 17-UI-94586 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: November 30, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-94586 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

¹ *See* <https://www.federalpay.org/holidays/columbus-day>.

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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