

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1357-R

*EAB Decision 2017-EAB-1357 Adhered to on Reconsideration
Application for Review Dismissed*

PROCEDURAL HISTORY: On September 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 110832). Claimant filed a timely request for hearing. On October 26, 2017, ALJ Murdock conducted a hearing, and on November 1, 2017 issued Hearing Decision 17-UI-95906, affirming the Department’s decision. On November 21, 2017, Hearing Decision 17-UI-95906 became final without claimant having filed a timely application for review. On November 22, 2017, claimant filed a late application for review with the Employment Appeals Board (EAB). On November 27, 2017, EAB issued EAB Decision 2017-EAB-1357, dismissing claimant’s late application for review. On December 8, 2017, claimant filed a timely request for reconsideration. This decision is issued pursuant to EAB’s authority under ORS 657.290(3).

FINDINGS OF FACT: (1) When the Office of Administrative Hearings mailed Hearing Decision 17-UI-95906 to claimant it included in the envelope a copy of a document called “Rights of Review of a Hearing Decision.”¹ The “Appeal Rights” contained in the hearing decision instructed claimant to call OAH if she did not receive a copy of that document.²

(2) The “Rights of Review of a Hearing Decision” stated on the first side:

How do I file an Application for Review?

An application for review may be filed in person, by mail or by fax to the Employment Appeals Board . . .

An Application for Review must specify:

- a) The hearing decision’s case number

¹ See Hearing Decision 17-UI-95906 at 4.

² *Id.*

- b) The hearing decision's mailing date (upper right hand corner)
- c) The applicant's or representative's name
- d) The applicant's or representative's postal or email address
- e) The claimant's name

What is the deadline for an "Application for Review"

You must file your application for review within 20 days . . . The application for review must be . . . faxed . . . by 5:00 PM . . .³

(3) The reverse side of the "Rights of Review of a Hearing Decision" document, titled "Excerpts from Administrative Rules Governing Review of a Hearing Decision," stated:

OAR 471-041-0065 Filing Dates

(1)(c) If faxed, the filing date is the receipt date stamped or written on the fax transmission by the public employee who received the document . . . if EAB receives a faxed document after 5:00 PM . . . it will be marked as received the following business day.

OAR 471-041-0070 Late Application for Review

(1) An application for review is timely if it is filed within 20 days of the date that OAH mailed the hearing decision sought to be reviewed. EAB shall dismiss a late application for review, unless the filing period is extended in accordance with this rule.

* * *

(3) The applicant shall include with the application for review a written statement describing the circumstances that prevented a timely filing.⁴

(4) On November 21, 2017 at 11:37 p.m., claimant faxed an application for review form, an 8-page letter and a 3-page letter to EAB. The application for review and accompanying documents were stamped as "received" by EAB staff on November 22, 2017. Claimant's November 21, 2017 submission did not include a written statement describing the circumstances that had prevented a timely filing.

CONCLUSIONS AND REASONS: On reconsideration, we adhere to EAB Decision 2017-EAB-1357 and conclude that claimant's late application for review was properly dismissed.

ORS 657.290(3) and OAR 471-041-0145(1) allow parties to request that EAB reconsider its previous decisions, in pertinent part, "to correct an error of material fact or law."⁵

³ The "Rights of Review of a Hearing Decision" document is hereby admitted into evidence as EAB Exhibit 1 to complete the record, and a copy of that document 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 at EAB Exhibit 1.

⁴ EAB Exhibit 1 (emphasis in original).

⁵ OAR 471-041-0145(2) provides that the request is subject to dismissal unless it includes a statement that a copy of the request was provided to the other parties and is filed on or before the 20th day after the decision sought to be reconsidered is

In her request for reconsideration, claimant acknowledged that she understood the 20-day deadline for filing her application for review but “found myself on the afternoon of the deadline making changes and rewording sections to better clarify my circumstances thus having a better chance for approval.” She further stated, “I wanted to double check that I had until midnight to fax my application to you and I tried to contact you by phone, using the number provided at the bottom of my paperwork” three times but “kept getting a recording that the number was no longer in service.” Claimant then stated that she called OAH and was told by an employee that “he didn’t see anything about a 5:00 pm deadline and said as long as I had it in before midnight, I should be fine.” Claimant then stated that she faxed her application for review to EAB around 11:30 p.m. and received notice of EAB’s dismissal decision the following day. In summation, claimant stated, “I hope that Members of the Board will consider the facts that the contact phone number issued by EAB was not in working order” and she “was given incorrect advice from” OAH, and allow an extension of the deadline to file her application for review and request for reconsideration.

There can be no dispute that the deadline for a timely application for review of Hearing Decision 17-UI-95906 filed by fax was 5:00 p.m. on November 21, 2017. Likewise, there can be no reasonable dispute, given that faxed documents are “filed” when received, that claimant “filed” her application for review by fax on November 22, 2017, making claimant’s application for review one day late.

ORS 657.875 and OAR 471-041-0070 allow the deadline to be extended “a reasonable time” upon a showing of “good cause.” OAR 471-041-0070(2)(a) defines “good cause” as “when the applicant provides satisfactory evidence that factors or circumstances beyond the applicant’s reasonable control prevented a timely filing.” OAR 471-041-0070(3) provides that the applicant must explain the circumstances causing the late filing in a written statement included with the application for review.

As found in the above-stated facts, the written information provided to claimant with Hearing Decision 17-UI-95906 stated in two places that faxed applications for review had to be received by 5:00 p.m. to be considered filed on the day they were sent. To any extent claimant could not meet the deadline because she was revising her written statement, we note that written statements are not required to be faxed with the application for review, as indicated on the Rights of Review document, which also included the “Written Argument” rule explaining the separate deadline for submission of argument for EAB’s consideration. Given the circumstances, claimant did not show that factors or circumstances beyond her reasonable control prevented a timely filing in this case. Nor did claimant explain any of the circumstances in a written statement included with her application for review as required under EAB’s administrative rule. For those reasons, claimant’s deadline may not be extended under ORS 657.875 and OAR 471-041-0070.

Claimant also argued, however, that EAB should not be allowed to dismiss her application for review because she was provided inaccurate information by OAH staff that caused her to file her application for review late. Claimant’s argument is, in essence, that equitable estoppel should apply. The doctrine of equitable estoppel “requires proof of a false representation, (1) of which the other party was ignorant, (2) made with the knowledge of the facts, (3) made with the intention that it would induce action by the

mailed. Because claimant’s request was both timely and stated that a copy was mailed to the employer, no further discussion is required.

other party, and (4) that induced the other party to act upon it.” *Keppinger v. Hanson Crushing, Inc.*, 161 Or App 424, 428, 983 P2d 1084 (1999) (citation omitted). In addition, to establish estoppel against a state agency, a party “must have relied on the agency’s representations and the party’s reliance must have been reasonable.” *State ex rel SOSOC v. Dennis*, 173 Or App 604, 611, 25 P3d 341, *rev den*, 332 Or 448 (2001) (citing *Dept. of Transportation v. Hewett Professional Group*, 321 Or 118, 126, 895 P2d 755 (1995)).

Claimant alleged that an OAH employee specifically said “he didn’t see anything about a 5:00 pm deadline and said as long as I had it in before midnight, I should be fine.” That employee’s contemporaneously made notes of the conversation stated, however, that claimant called at 4:52 p.m.:

To request information about faxing information to EAB. Explained the ALJ’s order lists today as the due date for a timely appeal. She wanted an extension on the deadline and I told her the ALJ’s order specifies today. She also thought it is due by 5 pm today, and I read her the ALJ’s order that does not mention a time. She called OAH because she can’t reach anyone on the EAB line. Wanted me to commit to an extension or a time of day to allow her to get all of her researched and prepared info in to EAB. Told her I could not do that, but that the AFR should be faxed to EAB today.⁶

Although the OAH employee appears to have told claimant he did not see anything about the deadline on the decision, the employee’s notes specifically state that although claimant wanted assurances that she could send her application for review by “a time of day” the employee said he could not do so. The notes and claimant’s request for reconsideration also strongly imply that claimant was, at all relevant times, aware of the 5:00 p.m. deadline for faxed documents and seeking an extension or confirmation of that deadline, and, notably, the 5:00 p.m. deadline was prominently mentioned in the documents provided to claimant about how to file an application for review. Given those factors, the record fails to show proof of a false representation, of which claimant was ignorant, made with the intention of inducing claimant to act on the false representation, nor does it show, given the circumstances, that reliance on any such representation was reasonable under the circumstances. For those reasons, EAB should not be estopped from dismissing claimant’s late application for review in this case.

We acknowledge claimant’s assertion that EAB’s phone line had a “no longer in service” message at the time claimant tried to call it three times on November 21st. Although we are not aware of any interruption in EAB’s phone service and have received no other such complaints, and the OAH employee’s notes indicate that claimant said she could not “reach anyone on the EAB line” rather than saying that EAB’s phone was disconnected, we do regret that claimant was unable to reach EAB when she tried to do so. It remains, however, that the preponderance of the record shows that claimant was advised of, and understood, that the deadline for submitting her application for review by fax was 5:00 p.m. on November 21, 2017, she did not meet that deadline, and for the reasons explained herein, the deadline may not be extended. On reconsideration, we affirm our decision dismissing claimant’s late application for review. Hearing Decision 17-UI-95906 remains undisturbed.

⁶ A copy of the OAH case note memorializing the phone call is hereby admitted into evidence as EAB Exhibit 2, and a copy of the note 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 at EAB Exhibit 2.

DECISION: On reconsideration, claimant's application for review of Hearing Decision 17-UI-95906 is dismissed. EAB Decision 2017-EAB-1357 is adhered to on reconsideration.

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

DATE of Service: December 19, 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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.