

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-1431

Applications for Review Dismissed

PROCEDURAL HISTORY: On October 5, 2017, the Oregon Employment Department (the Department) served two notices of two administrative decisions concluding the employer suspended claimant for misconduct (decision # 84559) and discharged claimant for misconduct (decision # 82223). Claimant filed timely requests for hearing on both decisions. On October 16, 2017, the Office of Administrative Hearings (OAH) mailed notice of a consolidated hearing scheduled for November 13, 2017 at 1:30 p.m.¹ On November 13, 2017, ALJ Griffin conducted the hearing, and on November 14, 2017 issued Hearing Decision 17-UI-96783, reversing decision # 84559 and concluding claimant's suspension was not for misconduct, and Hearing Decision 17-UI-96782, reversing decision # 82223 and concluding claimant's discharge was not for misconduct. On December 4, 2017, both hearing decisions became final without any party having filed a timely application for review. On December 12, 2017, the employer filed late applications for review of both hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-96782. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2017-EAB-1430 and 2017-EAB-1431).

CONCLUSIONS AND REASONS: The employer's late applications for review are dismissed.

ORS 657.270(6) provides that ALJs' decisions are final "unless the director or any other party to the hearing files an application for review with the Employment Appeals Board within 20 days after the . . . notice was mailed to the party's last-known address." ORS 657.875 allows the 20-day deadline to be extended "a reasonable time" upon a showing of "good cause." OAR 471-041-0070 defines "a reasonable time" as seven days, and "good cause" as factors or circumstances beyond the applicant's reasonable control." OAR 471-041-0070(3) also provides, in pertinent part, that a party filing a late application for review with EAB "shall include with the application for review a written statement

¹ Although the notices mailed to the employer were returned to the Office of Administrative Hearings by the U.S. Postal Service as undeliverable the employer did receive actual notice of the hearing and a representative appeared at the hearing.

describing the circumstances that prevented a timely filing.” In this case, although the employer submitted a written argument alongside its application for review, the employer did not include in its written statement any description of the circumstances that prevented it from filing timely applications for review of Hearing Decisions 17-UI-96782 and 17-UI-96783, much less show “good cause” to extend the filing deadlines “a reasonable time.” The employer’s late applications for review must, therefore, be dismissed.

We note that in the employer’s written argument the employer attacked Oregon’s jurisdiction to decide whether or not claimant should be disqualified from unemployment insurance benefits because she was a federal employee, and, as such, the employer alleged that Oregon’s decisions in this matter amount to a “constitutionally prohibited application of state law to a federal entity.” The employer “hereby asserts the federal Supremacy Clause” and petitioned the state to “immediately reverse, overturn and dismiss with prejudice the determination in the unemployment benefits appeal . . . insofar as it relies upon the misapplication of state law in a federal employee administrative discipline matter.” The employer’s request is denied for the reasons that follow.

As a preliminary matter, the employer’s application of its policies and federal law in deciding to suspend and/or discharge the claimant in this matter is not at issue in this case; rather, the issue is whether claimant should be disqualified from receiving unemployment insurance benefits under Oregon law because of the circumstances of her suspension and/or discharge. In other words, the employer’s concern that Oregon’s decisions to allow benefits in these unemployment insurance case has somehow undermined the agency’s disciplinary or discharge processes is without merit.

Likewise, the employer’s claim that any action by the state of Oregon with respect to claimant’s benefits in these cases is barred by “the federal Supremacy Clause” is without merit. The type of claim category under which claimant’s claim for unemployment benefits falls is “Unemployment Compensation for Federal Employees,” or “UCFE” for short.² The UCFE program, as described by the U.S. Department of Labor:

[P]rovides benefits for eligible unemployed former civilian Federal employees. The program is administered by States as agents of the Federal government. This program is operated under the same terms and conditions that apply to regular State Unemployment Insurance. In general, the law of the State in which your last official duty station in Federal civilian service was located will be the State law that determines eligibility for unemployment insurance benefits.³

Under the United States Code of Federal Regulations provides, in pertinent part:

² 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.

³ <https://workforcsecurity.doleta.gov/unemploy/unemcomp.asp> (internal links omitted)

[T]he terms and conditions of the applicable State law which apply to claims for, and the payment of, State unemployment compensation shall apply to claims for, and the payment of, UCFE and claims for waiting period credit. The provisions of the applicable State law which shall apply include, but are not limited to:

- (1) Claim filing and reporting;
- (2) Information to individuals, as appropriate;
- (3) Notices to individuals and Federal agencies, as appropriate, including notice to each individual of each determination and redetermination of eligibility for or entitlement to UCFE;
- (4) Determinations and redeterminations;
- (5) Ability to work, availability for work, and search for work; and
- (6) Disqualifications.⁴

In sum, provisions within the U.S. Department of Labor's resources and the U.S. Code of Federal Regulations establish that, notwithstanding the Supremacy Clause to which the employer's argument referred, Oregon does, in fact, have the right to adjudicate claimant's claim for and potential disqualification from unemployment insurance despite her status as a former federal employee. The employer's request that EAB reverse, overturn and dismiss with prejudice the ALJ's determination in Hearing Decisions 17-UI-96782 and 17-UI-96783 is therefore denied, and, for the reasons already explained, the employer's late applications for review of those decisions are dismissed.

DECISION: The applications for review filed December 12, 2017 are dismissed. Hearing Decisions 17-UI-96782 and 17-UI-96783 remain undisturbed.

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

DATE of Service: December 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 *See* 20 CFR 609.9(a). Although there are exceptions to and conditions on the applicability of state law to UCFE claims, none of the exceptions or conditions appear to apply to this case, and the employer did not establish that they should.