

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0024**

*Affirmed*  
*Late Request for Hearing Dismissed*

**PROCEDURAL HISTORY:** On October 27, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$3936.00 overpayment, and a \$590.40 monetary penalty and 27 penalty weeks for willfully misrepresenting facts to obtain benefits (decision # 195260). On November 16, 2017, decision # 195260 became final without claimant having filed a request for hearing. On December 13, 2017, claimant filed a late request for hearing. On December 18, 2017, ALJ Kangas reviewed claimant's request and issued Hearing Decision 17-UI-99212, dismissing claimant's late request for hearing subject to her right to renew the request by responding to an appellant questionnaire by January 2, 2018. On January 3, 2018, the Office of Administrative Hearings (OAH) received claimant's response. On January 4, 2018, OAH sent a letter to claimant stating that her response was late and would not be considered. On January 8, 2018, claimant filed a timely application for review of Hearing Decision 17-UI-99212 with the Employment Appeals Board (EAB).

With claimant's application for review, she submitted 32 pages of new information including her appellant questionnaire and records related to her attempts to file her request for hearing on decision # 195260. Under OAR 471-041-0090(1) (October 29, 2016), information offered, but not received into the hearing record, may be received into evidence as necessary to complete the record. OAH's refusal to consider claimant's information amounted to a circumstance beyond her control; claimant's 32 pages of new information is therefore admitted into evidence as EAB Exhibit 1, and a copy of EAB Exhibit 1 has been mailed to the parties with this decision. Any party that objects to the admission of EAB Exhibit 1 into the record 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 exhibit will remain in the record.

**FINDINGS OF FACT:** (1) On October 13, 2017, the Department mailed a letter to claimant stating that "[a]dditional information is needed to process your claim for unemployment insurance benefits" and

that “[f]ailure to respond within five days will result in a decision based on the information available.”<sup>1</sup> The letter included nine questions for claimant to describe the reasons she quit a job with the employer. Claimant did not respond to the letter within five days; when she did respond, her answers described the terms of her employment and explained why she left her job and what she did to try to remain employed despite her difficulties at work.

(2) Sometime prior to October 27, 2017, the Department mailed another letter to claimant stating, “[a]n administrative decision has already been issued regarding the voluntary quit” from the employer and “[a]dditional information is needed to determine whether or not you willfully misrepresented information to obtain benefits.” The letter included three questions for claimant to describe the reasons she provided the information she had provided to the Department when claiming benefits. Claimant’s answers explained the circumstances under which she had left her job with the employer, and that she had not claimed benefits while working for the employer.

(3) On October 27, 2017, claimant faxed her responses to both letters back to the Department. Claimant received a “communication result report” that her fax had been successfully transmitted to the Department. Also on October 27, 2017, the Department mailed notice of decision # 195260 to claimant at her address of record.

(4) On November 1, 2017, claimant re-faxed her responses to both letters to the Department. Claimant received a “communication result report” that her fax had been successfully transmitted to the Department.

(5) Between November 1, 2017 and December 13, 2017, claimant learned that her first two faxes had been sent to the “wrong dept in Salem.”

(6) On December 5, 2017, the Department sent a letter to claimant stating that although she had claimed benefits for the week ending December 2, 2017, the Department would not pay benefits to her because of “[a]n administrative decision [that] was issued on a prior claim” and “imposed a penalty for misrepresentation.” On December 13, 2017, claimant again re-faxed her responses to both letters, but included a fax transmittal form that addressed the responses to the “appeals division” and included a letter in which she referred to the responses as an “appeal.”

**CONCLUSIONS AND REASONS:** We agree with the ALJ that claimant’s late request for hearing should be dismissed.

Claimant asserted that she filed her request for hearing in this matter, which she referred to as her “appeal,” three times; once on October 27, 2017, once on November 1, 2017, and the third time on December 13, 2017. If claimant requested a hearing on decision # 195260 on October 27<sup>th</sup> or November 1<sup>st</sup>, such requests would have been timely. The first question is, therefore, whether claimant’s October 27<sup>th</sup> and November 1<sup>st</sup> faxes were valid requests for hearing.

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<sup>1</sup> Unless otherwise noted in text, EAB Exhibit 1 is the sources of all quoted material in these findings of fact.

OAR 471-040-0005(1) (July 14, 2011) defines a “request for hearing” as something that “may be filed on forms provided by the Employment Department or similar offices in other states. Use of the form is not required provided the party specifically requests a hearing or otherwise expresses a present intent to appeal.” Claimant did not use a “request for hearing” form provided by the Department to request a hearing in this matter. She did not “specifically request[] a hearing” on decision # 195260 or specifically ask for a hearing about an overpayment or misrepresentation. The question is therefore whether claimant’s October 27<sup>th</sup> and November 1<sup>st</sup> submissions expressed “a present intent to appeal” decision # 195260.

*Kroetch v. Employment Dept.*, 289 Or. App. 291, \_\_\_ P.3d \_\_\_ (December 13, 2017), is instructive. In *Kroetch*, the Oregon Court of Appeals examined the concept of a “present intent to appeal” and determined that it requires “more than just a statement of facts that are inconsistent with the facts found in the eligibility determination.” Before an “appeal” can exist, there must be an underlying decision capable of being appealed; therefore, to express a “present intent to appeal,” the party “must at least implicitly acknowledge that a decision has been made,” and, where the facts show that the Department sent a form to a party prior to issuing a decision, the return of the form, without any “indication whatsoever that any decision has been made,” cannot be read as an expression of intent to appeal the subsequent determination.

Turning to the facts of this case, there is no dispute that claimant twice returned questionnaires to the Department answering questions about her work separation and about whether she willfully misrepresented facts to obtain benefits. Both of those forms pre-dated the Department’s issuance of decision # 195260, however, and claimant’s responses to the questions therein neither explicitly nor implicitly referred to an overpayment, monetary penalty, penalty weeks, or knowledge of a Department-issued decision regarding a willful misrepresentation. In the absence of evidence that could implicitly or explicitly connect claimant’s return of the forms on October 27<sup>th</sup> and November 1<sup>st</sup> to her disagreement with or intent to appeal decision # 195260, we cannot conclude that claimant’s return of those forms amounted to an expression of a present intent to appeal that decision. Claimant’s October 27<sup>th</sup> and November 1<sup>st</sup> submission of the two forms therefore were not valid requests for hearing on decision # 195260.

On December 13, 2017, claimant again re-submitted the two forms that were not, in and of themselves, valid requests for hearing; however, on December 13<sup>th</sup> claimant accompanied the forms with a fax cover sheet addressing the forms to the “appeals” department, a December 5<sup>th</sup> letter from the Department that referenced a “decision” about “misrepresentation,” and called her submission an “appeal.” Claimant’s use of the term “appeal” on December 13<sup>th</sup> and inclusion of the Department’s December 5<sup>th</sup> letter implicitly suggests that claimant was aware that a decision existed to appeal, and amounted to an unambiguous expression of an intent to appeal a decision related to the subject matter of the forms she re-submitted. We therefore conclude that it was a valid request for hearing on decision # 195260.

After the Department issues a decision, claimant has the right to request a hearing; the request “must be filed within 20 days after delivery of” the administrative decision was mailed. *See generally* ORS 657.269. Claimant’s December 13<sup>th</sup> submission was filed after the 20-day filing period expired. The 20-day filing period may be extended a “reasonable time” upon a showing of “good cause.” ORS 657.875. “Good cause” is defined to include an excusable mistake or factors or circumstances beyond her reasonable control. OAR 471-040-0010.

Claimant did not suggest that she did not receive notice of decision # 195260 or did not receive that notice timely, and the record establishes that notice of the decision was mailed to her by the Department at her address of record. Page one of decision # 195260 referred to an enclosed form explaining claimant's "appeal rights" and informed her of the deadline to "appeal" the decision; it also instructed claimant that if she did not understand the decision to contact the Department's investigations unit and provided the phone number for that Department. The applicable administrative rules also allow parties to request a hearing on an administrative decision over the telephone. *See generally* OAR 471-040-0005. It is unclear from claimant's materials why she chose to repeatedly fax the same form documents to the Department, one of them well after the Department's five-day deadline expired, or why she believed doing so would affect decision # 195260, when a phone call requesting a hearing would have sufficed. Regardless, given the circumstances described, we cannot conclude that it was beyond claimant's reasonable control to file a timely request for hearing in this matter. Although it is likely that claimant's decision to re-submit documents to the Department rather than filing a request for hearing form, orally requesting a hearing by phone, or otherwise writing to the Department that she wanted to appeal decision # 195260 was likely the result of a mistake on claimant's part, we cannot conclude that her mistake was excusable because it does not, for example, raise a due process issue, result from inadequate notice or reasonable reliance on another, or the inability to follow direction despite substantial efforts to comply. For those reasons, we conclude that claimant did not establish good cause for filing a late request for hearing on decision # 195260, and her request is therefore dismissed.

**DECISION:** Hearing Decision 17-UI-99212 is affirmed.

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

**DATE of Service:** January 18, 2018

**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](http://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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