

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0103**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 7, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct (decision # 143503). The employer filed a timely request for hearing. On December 21, 2017, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for January 4, 2018. On January 4, 2018, ALJ Logan conducted a hearing at which claimant failed to appear, and on January 5, 2018 issued Hearing Decision 18-UI-100357 concluding claimant's discharge was for misconduct. On January 25, 2018, Hearing Decision 18-UI-100357 became final without claimant having filed a timely application for review with the Employment Appeals Board (EAB). On January 31, 2018 and February 8, 2018, claimant filed with EAB and OAH a late application for review of Hearing Decision 18-UI-100357 and late request to reopen the January 4, 2018 hearing.

**CONCLUSIONS AND REASONS:** This matter should be set aside and remanded to OAH for additional proceedings.

ORS 657.270(5) provides that any party who failed to appear at a hearing may request that the hearing be reopened by filing a request to reopen within 20 days after the issuance of the hearing decision. ORS 657.270(6) provides that hearing decisions are final unless a party to the case files an application for review of such a decision within 20 days after the decision was mailed to the parties. ORS 657.875 provides that both of those 20-day deadlines may be extended a "reasonable time" upon a showing of "good cause."

In this case, claimant filed both a late application for review of Hearing Decision 18-UI-100357 with EAB and a late request to reopen the January 4<sup>th</sup> hearing underlying Hearing Decision 18-UI-100357 with OAH. Claimant complied with the requirements in OAR 471-040-0041(4) (late requests to reopen) and OAR 471-041-0070(3) (late applications for review) to include with his request and application a

written statement. Regardless whether claimant's filings with OAH and EAB are considered a late request to reopen or a late application for review, however, the outcome of this matter remains the same.

For example, if we considered claimant's filings a late application for review, the record suggests a possibility that claimant might have had good cause to extend the filing period a reasonable time and would therefore be entitled to present new information about his failure to appear at the hearing and, should he establish good cause by a preponderance of the evidence, about his work separation, which would necessitate remand by EAB to OAH for additional proceedings. *See* ORS 657.275(1); OAR 471-041-0070(3). Likewise, if we considered claimant's filings a late request to reopen the January 4<sup>th</sup> hearing, the filings suggest that claimant might have had good cause for the late request to reopen and due process would require that he be given meaningful opportunity for a fair hearing on that issue, and, should he establish good cause for his late request to reopen, about his work separation, which would again necessitate remand, since cases involving whether an individual has good cause in a late request to reopen or should be disqualified based on a work separation belong at OAH, not EAB, as a matter of first impression.<sup>1</sup> *See generally* ORS 657.270; OAR 471-040-0041.

Considering the totality of the circumstances involved in this matter, there is insufficient evidence to reach any conclusion on the issues potentially before us in this case. We therefore conclude that this matter requires remand to OAH to schedule a hearing on claimant's late request to reopen.<sup>2</sup> Should claimant establish good cause for failing to request reopening within the time allowed, and establish that his late request to reopen occurred within a "reasonable time," the ALJ shall develop a record as to whether claimant had good cause to reopen the January 4<sup>th</sup> hearing. Finally, should claimant establish good cause to reopen the January 4<sup>th</sup> hearing, the ALJ must then develop a record sufficient to establish whether or not claimant's work separation should be considered disqualifying under ORS 657.176 and OAR 471-030-0038.

**DECISION:** Hearing Decision 18-UI-100357 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>3</sup>

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

**DATE of Service:** February 9, 2018

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<sup>1</sup> Any party that failed to appear at a hearing may request that the hearing be reopened; additionally, however, any party to a hearing decision may also file an application for review of that hearing decision. *See* ORS 657.270. Although OAR 471-041-0060(4) provides that "EAB *will* treat an application for review by a party whose request for hearing was *dismissed* because that party failed to appear as a request to reopen the hearing" (emphasis in original), EAB is not required to treat an application for review by the non-requesting party the same way, but, rather, has the discretion to review any such application for review under ORS 657.275. In a case such as this one, however, where a party has filed for proceedings before the lower and higher authorities in an administrative review process, it is appropriate for the lower authority to hear the case as a matter of first impression.

<sup>2</sup> Such proceedings obviate the need for separate proceedings or a determination on the late application for review issue.

<sup>3</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 18-UI-100357 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 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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