

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0311

Reversed
Request for Hearing Allowed

PROCEDURAL HISTORY: On January 29, 2018, the Oregon Employment Department (the Department) mailed notice of an administrative decision concluding that claimant quit working for the employer with good cause (decision # 91251). The employer filed a request for hearing. On March 20, 2018, ALJ Amesbury conducted a hearing, and on March 23, 2018 issued Hearing Decision 18-UI-105854, dismissing the employer's request for hearing on decision # 91251 as untimely without good cause to extend the filing period. On March 29, 2018, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDING OF FACT: The employer's executive director received decision # 91251 in the mail on January 31 or February 1, 2018. On February 1 or 2, 2018, the executive director telephoned the Department adjudicator who had written decision # 91251 and requested a hearing on the decision. The adjudicator told the executive director he could not accept a request for hearing, and gave her instructions on how to file a request with the Office of Administrative Hearings (OAH).

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude the employer filed a timely request for hearing on decision # 91251, which therefore is allowed.

ORS 657.269 provides that the Department's decisions become final unless a party files a request for hearing within 20 days after the date it is mailed. A request for hearing may be filed on forms provided by the Department or similar offices in other states. OAR 471-040-0005(1) (July 14, 2011). Use of the form is not required provided the party specifically requests a hearing or otherwise expresses a present intent to appeal. *Id.* A request for hearing on an administrative decision related to the payment or amount of unemployment insurance benefits may be filed by telephone with any Department Unemployment Insurance (UI) Center or UI Section in Oregon. OAR 471-040-0005(2).

In this case, the deadline for the employer to request a hearing on decision # 91251 was February 20, 2018. In Hearing Decision 18-UI-105854, the ALJ found that on February 1 or 2, 2018, after reviewing decision # 91251, the employer's executive director telephoned the Department adjudicator who wrote the decision because she was concerned that the employer's version of claimant's work separation from

the employer might not have been considered by the adjudicator.¹ The ALJ found that the executive director and the adjudicator conversed for approximately 20 minutes, and that the adjudicator provided the executive director with information on how to file a request for hearing with OAH, “which is the standard practice when an adjudicator receives a request for information on how to file an appeal.”² Elaborating on that statement, the ALJ found as follows: Department adjudicators frequently answer questions about the process for requesting a hearing on an administrative decision, and also accept requests for hearings. In response to a request for information on how to request a hearing, the standard practice is for an adjudicator to provide the requestor with information on how to request a hearing with OAH. If the adjudicator is presented with a request that indicates a present intent to appeal, then the practice is for the adjudicator to treat the communication as a request for hearing, make a record of the request in Department records, and forward the request to OAH.³

Based on those findings, the ALJ concluded that the employer did not request a hearing on decision # 91251 on February 1 or 2, 2018.⁴ In support of that conclusion, the ALJ asserted that the employer’s executive director initially testified that the employer filed a request for hearing by fax on February 5, 2018.⁵ According to the ALJ, it was only after further testimony established that the fax did not include a request for hearing that the executive director asserted that that she had requested a hearing when speaking with the adjudicator on February 1 or 2, 2018, and that the adjudicator refused to accept the request.⁶ The ALJ further asserted that the executive director was unable to provide significant details about that portion of their conversation, and that the information the executive director did recall—information provided to her by the adjudicator about how and where to file a request for hearing—is the information an adjudicator would ordinarily provide in response to a request for information, rather than a request for hearing.⁷ The ALJ therefore determined that the executive director likely asked the adjudicator about the process for requesting a hearing rather than actually requesting a hearing.⁸

We first disagree with the ALJ’s assertion that it was only after testimony established that the February 5th fax did not include a request for hearing that the executive director asserted that that she requested a hearing when speaking with the adjudicator on February 1 or 2, 2018. The executive director first testified that she requested a hearing when speaking with the adjudicator on February 1 or 2 before the employer’s office manager testified that the documents she faxed on February 5 did not include a request for hearing. *See* Audio Record at 39:55-40:30, 44:50-47:10. Moreover, the record shows that the executive director initially testified that the employer filed its request for hearing by fax on February 5 because she understood from her conversation with the adjudicator that she could not request a hearing

¹ Hearing Decision 18-UI-105854 at 2.

² *Id.*

³ *Id.*

⁴ *Id.* at 4-5.

⁵ *Id.* at 4.

⁶ *Id.*

⁷ *Id.* at 4-5.

⁸ *Id.* at 5.

with him, and she mistakenly believed that the officer manager's fax included a request for hearing. *See* Audio Record at 39:55-40:30, 59:45-1:06:15.

We also disagree with the ALJ's assertion that the executive director was unable to provide significant details about the portion of her conversation with the adjudicator during which she allegedly requested a hearing on decision # 91251. The executive director testified in detail regarding that portion of their conversation. *See* Audio Record 39:45-42:15, 59:45-1:04:00. When the ALJ asked the executive director if she asked the adjudicator if she could request a hearing with him, she stated that she did, and that the adjudicator told her he she needed to call a different department. Audio Record at 39:45-40:05. When asked to clarify exactly what she said to the adjudicator that prompted him to say that, the executive director testified, "I said, specifically, Rick, I want to appeal this," because she disagreed with claimant's version of events, "and I definitely want to appeal this." Audio Record at 40:05-40:30. When asked how the adjudicator responded, the executive director testified that he told her she needed to call OAH, and then gave her OAH's telephone number. Audio Record at 40:30-40:42.

After the Department's witness testified that the adjudicator would have followed the Department's standard procedure and accepted a request for hearing from the executive director if she had asked, the executive director again asserted that she did request a hearing when she spoke to the adjudicator, and that the adjudicator told her he could not accept a request for hearing. Audio Record at 59:45-1:00:30. When the Department's witness repeated her testimony, the executive director replied, "I understand what you're saying . . . but . . . I did tell him I wanted to have a hearing, and that's when he proceeded to tell me how to go about doing it." Audio Record 1:00:30-1:01:32. When the ALJ again asked the executive director if she requested a hearing when she spoke to the adjudicator, the executive director testified, "I did, your honor," "I told him, of course I want a hearing. I want to be able to tell what happened." Audio Record at 1:02:40-1:03:29.

The executive director's testimony that she requested a hearing on decision # 91251 when she spoke to the adjudicator on February 1 or 2, 2018 was sufficiently detailed and materially consistent. The adjudicator did not testify at the hearing, and the Department had no record of his conversation with the executive director. Absent a basis for concluding that the executive director was not a credible witness, her testimony that she requested a hearing on decision # 91251 on February 1 or 2 outweighs the Department's speculation that the adjudicator would have accepted a request for hearing from the executive director if she had asked. The employer therefore established that it filed a timely request for hearing on decision # 91251. The employer's request for hearing therefore is allowed.

DECISION: Hearing Decision 18-UI-105854 is set aside, as outlined above.

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

DATE of Service: April 13, 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. 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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