

**EMPLOYMENT APPEALS BOARD DECISION**  
**2018-EAB-0783-R**

*Request for Reconsideration Dismissed*  
*Peticion de Reconsideración es Rechazada*

**PROCEDURAL HISTORY:** On June 27, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 101321). Claimant filed a timely request for hearing. On July 12, 2018, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for July 25, 2018 to the parties at their addresses of record. On July 25, 2018, ALJ Scott conducted a hearing, at which the employer failed to appear, and on July 31, 2018 issued Order No. 18-UI-114058, concluding that claimant's discharge was not for misconduct. On August 8, 2018, the employer filed an application for review with the Employment Appeals Board (EAB). On August 29, 2018, EAB issued Appeals Board Decision 2018-EAB-0783, affirming Order No. 18-UI-114058. On September 13, 2018, the employer filed a timely request to reconsider with EAB. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

**CONCLUSIONS AND REASONS:** The employer's request for reconsideration is dismissed.

OAR 471-041-0145(1) provides that any party may request reconsideration to correct an error of material fact or law, or to explain any unemployed inconsistency with Employment Department rule, or officially stated Employment Department position, or prior Employment Department practice. A request is subject to dismissal if the request does not include a statement that a copy was provided to the other parties, or is filed after the 20<sup>th</sup> day after the decision sought to be reconsidered is mailed. OAR 471-041-0145(2).

The employer's request for reconsideration in this case was filed within the time period allowed, but it did not include a statement that a copy of the request was provided to the other parties. The employer's request for reconsideration is therefore dismissed for failure to comply with the procedural requirements, and Appeals Board Decision 2018-EAB-0783-R remains undisturbed.

Even if the employer had satisfied the procedural requirements for filing a request for reconsideration, the outcome of Appeals Board Decision 2018-EAB-0783-R would have remained the same. The

employer's complaint was that EAB "takes the Employer [*sic*] rights away again by not giving them a *de novo* [*sic*] hearing notice with a new date and time" based upon the employer's claim that they did not receive notice of the July 25<sup>th</sup> hearing in this matter.

The employer's argument is, at its essence, that the employer had some sort of right to a *de novo* hearing on the merits of decision # 101321, and EAB's disposition of this matter deprived the employer of that right. The employer did not cite to a legal source of such a right, however, nor is there such a right under the circumstances of this case.

Although Oregon law allows any party who misses a hearing to file a request to reopen the hearing with the Office of Administrative Hearings, Oregon law also allows parties who missed the hearing, but whose requests for hearing were not dismissed for failure to appear, to file an application for review of the ALJ's decision with the Employment Appeals Board instead. *Compare* ORS 657.270(5)(a), ORS 657.270(6). Thus, parties have a choice about whether to request reopening with OAH or file an application for review with EAB. In this case, the employer mailed its request to the attention of "Office of Employment Appeals Board Office," directed the letter to "Board of Review Representative," and offered a "written argument for review" to the Board. In so doing, the employer filed an application for review with the Employment Appeals Board, and review of this case was subject to EAB rules.

OAR 471-041-0060 establishes what an application for review at EAB is, and how EAB must treat said application. Specifically, that rule provides that some applications for review must be treated as requests to reopen a hearing, but only those applications for review that were filed "by a party whose request for hearing was dismissed because that party failed to appear." The employer in this case did not file the request for hearing, and the request for hearing was not dismissed, because of the employer's failure to appear. Therefore, EAB's rules do not allow or require EAB to treat the employer's request as a request to reopen, much less order a *de novo* hearing.

EAB's rules do, however, allow parties the opportunity to submit additional evidence to EAB for review. For example, EAB may consider exhibits that were offered, but not received into evidence. OAR 471-041-0090(2). EAB may also consider new information that is relevant and material to EAB's determination, providing that the party offering the information proves that "[f]actors or circumstances beyond the party's reasonable control prevented the party from offering the information into evidence at the hearing." OAR 471-041-0090(2).<sup>1</sup>

In this case, EAB based its decision about whether to allow the employer to submit additional evidence or new information on the application of that rule to the facts presented by the employer. As we explained in Appeals Board Decision 2018-EAB-0783, generally speaking Oregon law presumes that documents sent through the U.S. Postal Service are received in due course by the addressee subject to evidence to the contrary. The employer, as the proponent of the position that they are entitled to a new hearing, has the burden of producing enough evidence to prove its non-receipt by a preponderance of the evidence. Without at least minimal circumstantial evidence to support its claim, the employer's bare assertion of non-receipt of the notice of hearing was insufficient evidence that the document mailed to

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<sup>1</sup> EAB's new information "[f]actors or circumstances beyond the party's reasonable control" standard is comparable to the portion of OAH's reopening rules defining "good cause" to include "factors beyond an applicant's reasonable control." *Compare* OAR 471-041-0090(2)(b); OAR 471-040-0040(2) and OAR 471-040-0041(2).

the employer through the U.S. Postal Service was, more likely than not, not delivered. EAB's decision was based upon the facts the employer provided about its non-receipt; had the employer provided additional facts in support of its claim, EAB would have applied the law to those facts, as well, and reached an appropriate outcome.

Notably, even if the employer's request had been construed as a request to reopen the hearing and sent to the Office of Administrative Hearings, there is no guarantee under Oregon law that a party requesting reopening will receive or is entitled to a *de novo* hearing about that request or the merits of the administrative decision. OAR 471-040-0040 and OAR 471-040-0041, the rules governing requests to reopen and late requests to reopen at OAH, require parties to submit their requests to reopen in writing and "show good cause for failing to appear at the hearing." *See* Order No. 18-UI-114058 at 3. Parties are also advised to "[i]nclude all information regarding your reopen request that you want the Administrative Law Judge to consider when deciding whether to grant your reopen request." *Id.* OAH provides notice of those requirements to parties because it is the regular practice of OAH to review such statements, without a hearing, to determine whether or not the party requesting reopening has good cause, and to deny such requests without allowing a hearing if "good cause" has not been shown.<sup>2</sup> It is well-settled in the area of unemployment insurance benefits law that a party's bare assertion of non-receipt does not amount to "good cause" under either OAH's reopening rules or EAB's additional evidence rule.

In sum, although the employer claimed that EAB erred with respect to its treatment of the employer's request for review, and EAB's disposition of this matter without allowing the employer a hearing, the record in this case shows that EAB adhered to Oregon laws and rules governing its treatment of applications for review and did not err. Therefore, even if EAB had not been required to dismiss the employer's request for reconsideration based on the employer's failure to comply with the procedural requirements set forth for such requests, we would still have concluded that the employer was not entitled to a hearing on either its request to submit additional information or on the merits of the case before EAB. For those reasons, and the reasons set forth in Appeals Board Decision 2018-EAB-0783-R, that decision remains undisturbed.

**DECISION:** The employer's request for reconsideration is dismissed. Appeals Board Decision 2018-EAB-0783-R remains undisturbed. *La petición de reconsideración del empleador es rechazada. La Decisión 2018-EAB-0783-R del Appeal Board sigue sin perturbarse.*

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

**DATE of Service: October 3, 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

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<sup>2</sup> We take notice of this fact, which is within our specialized knowledge of OAH procedures. 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.

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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*NOTA: Usted puede apelar esta decisión presentando una solicitud de revisión judicial ante la Corte de Apelaciones de Oregon (Oregon Court of Appeals) dentro de los 30 días siguientes a la fecha de notificación indicada arriba. Ver ORS 657.282. Para obtener formularios e información, puede escribir a la Corte de Apelaciones de Oregon, Sección de Registros (Oregon Court of Appeals/Records Section), 1163 State Street, Salem, Oregon 97310 o visite el sitio web en [courts.oregon.gov](http://courts.oregon.gov). En este sitio web, hay información disponible en español.*

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