

EMPLOYMENT APPEALS BOARD DECISION
2018-EAB-0787-R

Request for Reconsideration Dismissed

PROCEDURAL HISTORY: On March 5, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant, not for misconduct (decision # 131346). The employer filed a timely request for hearing. On April 20, 2018, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for May 4, 2018. On May 4, 2018, ALJ Janzen conducted a hearing at which claimant failed to appear, and on May 8, 2018, issued Order No. 18-UI-108859, concluding that claimant's discharge was for misconduct. On May 11, 2018, claimant filed an application for review with the Employment Appeals Board (EAB). On May 17, 2018, EAB issued EAB Decision 2018-EAB-0501, reversing Order No. 18-UI-108859 and remanding this matter to OAH for another hearing.

On July 12, 2018, ALJ Janzen conducted another hearing, and on July 16, 2018 issued Order No. 18-UI-113153, again concluding that the employer discharged claimant for misconduct. On August 8, 2018, claimant filed an application for review of Order No. 18-UI-113153 with EAB. On August 16, 2018, EAB issued EAB Decision 2018-EAB-0787, dismissing claimant's application for review as untimely with no written statement describing the circumstances that prevented a timely filing, as required under OAR 471041-0070(3). On August 23, 2018, claimant filed a request for reconsideration of EAB Decision 2018-EAB-0787.

CONCLUSIONS AND REASONS: Claimant's request for reconsideration of EAB Decision 2018-EAB-0787 is dismissed.

ORS 657.290(3) provides that EAB, upon application of any party in interest, may reconsider any previous EAB Decision for the correction of previous error of fact or law. Thus, any party may request reconsideration to correct an error of material fact or law, or to explain any unexplained inconsistency with Department rule, or officially stated Department position, or prior Department practice. OAR 471-041-0145(1) (October 29, 2006). However, a request for reconsideration is subject to dismissal unless it includes a statement that a copy has been provided to the other parties. OAR 471-041-0145(2)(a). Here, claimant's request for reconsideration does not include such a statement, and the request therefore is dismissed.

Even if claimant's for reconsideration was allowed, however, EAB Decision 2018-EAB-0787 would be adhered to on reconsideration. In his request, claimant argued that EAB erred in determining that his application for review was late. In support of that argument, claimant asserted he did not receive the initial mailing of Order No. 18-UI-113153, contacted OAH on August 1, 2018, and received a copy of the order in the mail on August 3, 2018. According to claimant, that document stated that he had 10 days to file an application for review, and his August 8, 2018 application for review therefore was timely.

To be timely, an application for review typically must be filed within 20 days of the date that OAH mailed the decision for which review is sought. OAR 471-041-0070(1) (March 20, 2014). The 20 day filing period may be extended a "reasonable time" upon a showing of "good cause." OAR 471-041-0070(2). "Good cause" means that factors or circumstances beyond the applicant's reasonable control prevented timely filing OAR 471-040-0070(2)(a). A "reasonable time" is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0050(2)(b).

Here, Order No. 18-UI-113153 was first mailed on July 16, 2018. Because August 5, 2018 was a Sunday, claimant was required to file his application for review by the following business day, August 6, 2018. Order No. 18-UI-113153 specifically states that any appeal of the order had to be filed on or before that date to be timely. The copy of Order No. 18-UI-113153 that OAH re-mailed to claimant, which he included with his application for review and request for reconsideration, states that the order was re-mailed for claimant's information only and that the original date of mailing constituted the date of service. Claimant did not submit any evidence to support his assertion that the document stated he had 10 days to file an application for review. EAB therefore did not err in determining that claimant's application for review of Order No. 18-UI-113153 was late, and dismissing it because it did not include a written statement describing the circumstances that prevented a timely filing, as required under OAR 471041-0070(3).

Even if claimant's application for review had contained a written statement explaining why it was late, however, it would have been dismissed. Absent evidence supporting his assertion that the re-mailed copy of Order No. 18-UI-113153 he received on August 3, 2018 stated he had 10 days to file an application for review, claimant did not assert or show that it was beyond his reasonable control to file it by the August 6, 2018 deadline stated in the order. Claimant's application for review therefore would have been dismissed as untimely without a showing of good cause.

DECISION: Claimant's request for reconsideration is dismissed. EAB Decision 2018-EAB-0787 and Order No. 18-UI-113153 remain undisturbed.

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

DATE of Service: August 31, 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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