

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0163

Reversed
Late Request for Hearing Allowed

PROCEDURAL HISTORY: On November 20, 2018, the Oregon Employment Department (the Department) served, by mail, notice of an administrative decision concluding that claimant was disqualified from receiving benefits based on her discharge by the employer (decision # 111732). On December 10, 2018, decision # 111732 became final without claimant having filed a request for hearing. On December 13, 2018, claimant filed a late request for hearing. On December 17, 2018, ALJ Kangas issued Order No. 18-UI-121390, dismissing claimant's request for hearing as late without a showing of good cause, subject to claimant's right to renew her request by responding to an appellant questionnaire by December 31, 2018. On December 28, 2018, claimant filed a timely response to the appellant questionnaire. On January 7, 2019, the Office of Administrative Hearings (OAH) cancelled Order No. 18-UI-121390, and on January 10, 2019 served notice of a hearing scheduled for January 24, 2019. On January 24, 2019, ALJ Griffin conducted a hearing on claimant's late request for hearing, and on January 25, 2019 issued Order No. 19-UI-123435, re-dismissing the request as late without good cause. On February 14, 2019, claimant filed a timely application for review of Order No. 19-UI-123435 with the Employment Appeals Board (EAB).

EAB considered the entire hearing record. Claimant submitted written argument with her application for review but failed to certify that she provided a copy of her argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). EAB therefore did not consider claimant's written argument when reaching this decision.

FINDINGS OF FACT: (1) Claimant and her husband were discharged by the employer on the same day in early October 2018. In late October 2018, claimant restarted her initial claim for benefits, her husband filed an initial claim for benefits, and both reported their discharge by the employer to the Department. Claimant and her husband began filing weekly claims for benefits and receiving weekly letters from the Department stating that the benefits were not being paid until it decided whether they were entitled to receive benefits. Claimant and her husband saved the letters they received from the Department.

(2) On November 19, 2018, a Department adjudicator called claimant for information regarding her discharge by the employer. During their conversation, the adjudicator asked claimant if she preferred to receive the administrative decision on whether she was disqualified from receiving benefits based on her discharge by the employer by mail or email. Claimant stated that she preferred to receive the administrative decision by mail.

(3) On November 20, 2018, claimant faxed the adjudicator more information regarding her discharge by the employer, expecting the adjudicator to consider the information before issuing the administrative decision. Unknown to claimant, however, the adjudicator already had written decision # 111732, and the Department mailed notice of the decision to claimant on November 20th before the adjudicator received and considered claimant's additional information. Claimant did not receive notice of decision # 111732 in the mail.

(4) On November 26, 2018, claimant called the adjudicator to follow up on the information she had faxed, believing that the adjudicator had not yet issued the administrative decision. Claimant learned that the adjudicator had been on vacation since November 22, 2018 (Thanksgiving) and would not return to work until November 29, 2018. Claimant left the adjudicator a voice message, and expected the adjudicator to review the information she had faxed and return her call before he issued the administrative decision. When the adjudicator did not return claimant's call on November 29th, claimant called him again on November 30, 2018, still believing the adjudicator had not yet issued the administrative decision. Claimant left the adjudicator another voice message, and expected the adjudicator to review the information she had faxed and return her call before issuing the administrative decision. The adjudicator never returned claimant's calls.

(5) On November 29, 2018, the Department had mailed claimant's husband notice of an administrative decision concluding that he was not disqualified from receiving benefits based on his work separation from the employer. That same day, the Department also had mailed claimant a letter stating that it could not pay her the benefits she claimed for the previous week, that an administrative decision found that she was discharged for misconduct, that if she had requested a hearing she should continue to report until a decision had been made, and that her disqualification lasted until she worked after the week she was discharged and earned at least four times her weekly benefit amount. Claimant and her husband received the documents in the mail on December 1, 2018 and saved them with the other documents they had received from the Department.

(6) Claimant understood from the letter and viewing the status of her and her husband's claims online a few day later that the Department had decided she was disqualified from receiving benefits based on her discharge by the employer. However, claimant believed that the adjudicator would be mailing her a formal notice of the decision like the one her husband had received. Claimant therefore waited to receive formal notice of the decision in the mail, intending to file a request for hearing after receiving the notice. Claimant waited until December 12, 2018, then contacted the Department and learned that decision # 111732 had been issued on November 20, 2018. Claimant filed a request for hearing on decision # 111732 the following day.

CONCLUSIONS AND REASONS: We disagree with the ALJ and conclude that claimant's late request for hearing on Order No. 19-UI-123435 should be 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. ORS 657.875 provides that the 20-day deadline may be extended a "reasonable time" upon a showing of "good cause." OAR 471-040-0010 (February 10, 2012) provides that "good cause" includes factors or circumstances beyond an applicant's reasonable control or an excusable mistake. Good cause does not include not understanding the implications of a decision or notice when it is received. OAR 471-040-0010(1)(b)(B). OAR 471-040-0010 defines a "reasonable time" as seven days after the factors or circumstances that prevented timely filing ceased to exist.

In Order No. 19-UI-123435, the ALJ dismissed claimant's late request for hearing on decision # 111732 as without good cause, first asserting that claimant failed to rebut the presumption she received the November 20, 2018 notice of the decision in the mail, given that the notice was addressed correctly, claimant had no problems receiving correspondence from the Department, and had experienced no issues with missing other mail or having mail addressed to her being misdirected.¹ The ALJ further determined that even if claimant did not receive the November 20th notice, her lack of knowledge that decision # 111732 had been issued was remedied when she received the November 29, 2018 letter stating that an adverse decision had been issued regarding her claim, and it was within her reasonable control to file a request for hearing by the December 10, 2018 deadline.² The ALJ did not address whether claimant's failure to do so was an excusable mistake.

We first disagree with the ALJ's assertion that claimant failed to rebut the presumption she received the November 20, 2018 notice of decision # 111732 in the mail. At hearing, claimant categorically denied receiving the notice, asserting that she saved all the documents she received from the Department and OAH, and did not have the notice. Transcript at 24-26. Claimant knew an administrative decision on whether she was disqualified from receiving benefits based on her discharge by the employer was going to be mailed to her, and her repeated attempts to have the adjudicator consider additional information before issuing the decision suggest that if claimant had received the decision, she would have filed a timely request for hearing. Claimant's testimony and corroborating circumstantial evidence are sufficient to overcome the presumption that she received notice of decision # 111732 in the mail, and establish that she did not.

We also disagree with the ALJ that claimant did not have good cause for failing to file a timely request for hearing after she received the November 29th letter from the Department. Although it may have been within claimant's reasonable control to file a timely request for hearing after receiving the letter, several factors and circumstances beyond her reasonable control contributed to her failure to do so, including the adjudicator issuing decision # 111732 one day after talking to claimant and two days after going on vacation, claimant's failure to receive notice of decision # 111732 in the mail, the adjudicator being on vacation when she called him on November 26th and his failure to return that call when he returned to work on November 29th, and the adjudicator's failure to return claimant's call to him on November 30th. Although the Department's letter stated that an administrative decision found that claimant was discharged for misconduct, it did not state or imply that the decision had been issued and mailed on November 20th or that claimant only had until December 10th to request a hearing on the decision. It was reasonable for claimant to believe that the adjudicator made his decision after he returned to work on

¹ Order No. 19-UI-123435 at 3 (citing OAR 137-003-0520(1) and ORS 40.120).

² *Id.*

November 29th, that the Department would be mailing a formal notice of the decision in the mail like the one her husband had received, and that she would have ample time to request a hearing after receiving the formal notice. Thus, although claimant's decision to wait until December 12th before contacting the Department was a mistake, we conclude that, under the circumstances, it was an excusable one. Claimant therefore established good cause for failing to file a timely request for hearing on decision # 111732.

The remaining issue is whether claimant filed her late request for hearing on decision # 111732 within a reasonable time. The factors and circumstances that prevented a timely filing ceased to exist on December 12, 2018, when claimant contacted the Department and learned that decision # 111732 had been issued on November 20, 2018. Claimant filed her request for hearing on December 13, 2018, one day after the factors and circumstances that prevented timely filing ceased to exist. Claimant therefore filed her late request for hearing on decision # 111732 within a reasonable time.

Claimant's late request for hearing therefore is allowed, and claimant is entitled to a hearing on the merits of decision # 111732.

DECISION: Order No. 19-UI-123435 is set aside, as outlined above.

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

DATE of Service: March 15, 2019

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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Understanding Your Employment Appeals Board Decision

English

Attention – This decision affects your unemployment benefits. If you do not understand this decision, contact the Employment Appeals Board immediately. If you do not agree with this decision, you may file a Petition for Judicial Review with the Oregon Court of Appeals following the instructions written at the end of the decision.

Simplified Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Traditional Chinese

注意 – 本判決會影響您的失業救濟金。如果您不明白本判決，請立即聯繫就業上訴委員會。如果您不同意此判決，您可以按照該判決結尾所寫的說明，向俄勒岡州上訴法院提出司法複審申請。

Tagalog

Paalala – Nakakaapekto ang desisyong ito sa iyong mga benepisyo sa pagkawala ng trabaho. Kung hindi mo naiintindihan ang desisyong ito, makipag-ugnayan kaagad sa Lupon ng mga Apela sa Trabaho (Employment Appeals Board). Kung hindi ka sumasang-ayon sa desisyong ito, maaari kang maghain ng isang Petisyon sa Pagsusuri ng Hukuman (Petition for Judicial Review) sa Hukuman sa Paghahabol (Court of Appeals) ng Oregon na sinusunod ang mga tagubilin na nakasulat sa dulo ng desisyon.

Vietnamese

Chú ý - Quyết định này ảnh hưởng đến trợ cấp thất nghiệp của quý vị. Nếu quý vị không hiểu quyết định này, hãy liên lạc với Ban Kháng Cáo Việc Làm ngay lập tức. Nếu quý vị không đồng ý với quyết định này, quý vị có thể nộp Đơn Xin Tái Xét Tư Pháp với Tòa Kháng Cáo Oregon theo các hướng dẫn được viết ra ở cuối quyết định này.

Spanish

Atención – Esta decisión afecta sus beneficios de desempleo. Si no entiende esta decisión, comuníquese inmediatamente con la Junta de Apelaciones de Asuntos Laborales. Si no está de acuerdo con esta decisión, puede presentar una Petición de Revisión Judicial ante el Tribunal de Apelaciones de Oregon siguiendo las instrucciones escritas al final de la decisión.

Russian

Внимание – Данное решение влияет на ваше пособие по безработице. Если решение Вам непонятно – немедленно обратитесь в Апелляционный Комитет по Трудоустройству. Если Вы не согласны с принятым решением, вы можете подать Ходатайство о Пересмотре Судебного Решения в Апелляционный Суд штата Орегон, следуя инструкциям, описанным в конце решения.

Khmer

ចំណុចសំខាន់ – សេចក្តីសម្រេចនេះមានផលប៉ះពាល់ដល់អត្ថប្រយោជន៍គ្មានការងារធ្វើរបស់លោកអ្នក។ ប្រសិនបើលោកអ្នកមិនយល់អំពីសេចក្តីសម្រេចនេះ សូមទាក់ទងគណៈកម្មការឧទ្ធរណ៍ការងារភ្លាមៗ។ ប្រសិនបើលោកអ្នកមិនយល់ស្របចំពោះសេចក្តីសម្រេចនេះទេ លោកអ្នកអាចដាក់ពាក្យប្តឹងសុំឲ្យមានការពិនិត្យរឿងក្តីឡើងវិញជាមួយតុលាការឧទ្ធរណ៍រដ្ឋ Oregon ដោយអនុវត្តតាមសេចក្តីណែនាំដែលសរសេរនៅខាងចុងបញ្ចប់នៃសេចក្តីសម្រេចនេះ។

Laotian

ເອົາໃຈໃສ່ – ຄຳຕັດສິນນີ້ມີຜົນກະທົບຕໍ່ກັບເງິນຊ່ວຍເຫຼືອການຫວ່າງງານຂອງທ່ານ. ຖ້າທ່ານບໍ່ເຂົ້າໃຈຄຳຕັດສິນນີ້, ກະລຸນາຕິດຕໍ່ຫາຄະນະກຳມະການອຸທອນການຈ້າງງານໃນທັນທີ. ຖ້າທ່ານບໍ່ເຫັນດີນຳຄຳຕັດສິນນີ້, ທ່ານສາມາດຍື່ນຄຳຮ້ອງຂໍການທົບທວນຄຳຕັດສິນນຳສານອຸທອນລັດ Oregon ໄດ້ ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

Arabic

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Farsi

توجه - این حکم بر مزایای بیکاری شما تاثیر می گذارد. اگر با این تصمیم موافق نیستید، بلافاصله با هیأت فرجام خواهی استخدام تماس بگیرید. اگر از این حکم رضایت ندارید، می‌توانید با استفاده از دستور العمل موجود در پایان آن، از دادگاه تجدید نظر اورگان درخواست تجدید نظر کنید.

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