

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0228

Affirmed
Request to Reopen Denied

PROCEDURAL HISTORY: On December 13, 2018, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 162348). Claimant filed a timely request for hearing. On January 15, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for January 23, 2019, at which time claimant did not appear at the hearing. On January 23, 2019, ALJ S. Hall issued Order No. 19-UI-123257, dismissing claimant's hearing request for failure to appear. On January 26, 2019, claimant filed a timely request to reopen the hearing. On February 6, 2019, OAH mailed notice of a hearing scheduled for February 20, 2019. On February 20, 2019, ALJ R. Frank conducted a hearing, and on February 22, 2019 issued Order No. 19-UI-125173, denying claimant's reopen request. On March 4, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

With her application for review, claimant requested another hearing with a different ALJ, alleging, "The judge at the hearing was confusing me with his questions and he was getting irritated with me for no good reason." We have reviewed the entire hearing record, including the audio recording of the hearing. Although we did not identify questions asked by the ALJ that were patently confusing, the record shows that claimant and/or her representative stated at times during the hearing that the ALJ's questions were confusing to claimant. The ALJ then asked questions again, rephrased questions, invited claimant to tell him if any of his questions were confusing to her, and invited her to state that she did not know the answer to questions. When claimant or her representative claimed that questions were confusing thereafter, the ALJ asked questions or conversed with them about why the question was confusing. It does appear that much of claimant's confusion was based upon the ALJ's attempts to reconcile claimant's inconsistent answers to the ALJ's questions. Clarifying and reconciling inconsistencies in a party's testimony is one of the ALJ's rights and obligations when conducting a hearing, however, and did not cause or result in claimant receiving an unfair hearing.

We note that it did sound on the audio recording as though the ALJ became irritated during the hearing. The question on review is whether the ALJ's apparent irritation affected claimant's right to a full, fair, and unbiased hearing in this case. We conclude that it does not. First, it does not appear on the record that the ALJ acted irritated with claimant, nor did the ALJ refuse clarify his questions or explain process

to claimant or her representative. Second, it does not appear that the ALJ cut short his questioning or claimant, cut off claimant's testimony, or failed to offer claimant's representative a chance to question her. Third, it appears that the majority of the ALJ's irritation was with the claimant's representative, who had repeatedly interrupted the proceedings, was heard on the recorded hearing to have coached claimant's answers to questions on several occasions, and attempted to mislead the ALJ when the ALJ admonished him not to coach claimant by denying that he had done so when it was apparent on the recording that he had in fact coached claimant's answers to some questions. Although the ALJ's apparent irritation with the representative during the hearing was unfortunate, it does not appear that the ALJ's irritation impaired the proceedings such that a new hearing is required. Claimant's request for a new hearing with a different ALJ is, therefore, denied.

FINDINGS OF FACT: Claimant received the notice of hearing OAH mailed to her on January 15, 2019. Audio recording at ~ 12:25-12:30. She did not understand the notice, and misplaced it. *Id.* at ~ 12:40-12:55.

CONCLUSIONS AND REASONS: We agree with the ALJ that claimant did not show good cause to reopen the hearing.

ORS 657.270(5) provides that parties who fail to appear at a hearing may request that the hearing be reopened, and that the ALJ may allow the request if, among other things, the party shows good cause for failing to appear. Good cause is defined as an excusable mistake or factors beyond an applicant's reasonable control, and does not include "[n]ot understanding the implications of a decision or notice when it is received." OAR 471-040-0040(2).

Claimant has not shown good cause to reopen the hearing. Claimant claimed at times that she did not attend the hearing because she did not receive notice of the hearing, because she received notice of the hearing and misplaced it, because she received notice of the hearing and did not understand it, and because OAH did not change her mailing address even though she provided a new one. Claimant's testimony was highly inconsistent, making it difficult to discern what, exactly, happened, and why she missed the January 2019 hearing. The preponderance of the evidence, however, is that claimant did in fact receive and misplace the January 15th notice of hearing.

Notice of the January 15th hearing at issue in this case was mailed to claimant at the same address she had at the time of the reopen hearing and at the time of this review. It appears that notice of the hearing therefore was mailed to claimant's correct address. Moreover, it appears more likely than not that claimant actually received the January 15th notice of hearing. The ALJ initially asked claimant, "Did you receive Exhibit 1, the notice of hearing sent to you on January 15th?" Claimant replied, "Yeah." The ALJ asked, "And did you understand that your hearing was scheduled for January 23rd?" Claimant replied, "No." The ALJ asked, "Do you know why if you read it?" Claimant replied, "I didn't understand it. It got misplaced, too."¹

Claimant later denied having received the January 15th notice of hearing, or misplaced it, and claimed that when she initially answered that question she did not hear the ALJ say the date.² The ALJ clarified,

¹ Audio recording ~ 12:20-13:00.

² Audio recording at 17:25-17-35.

“I’m asking about the missed hearing? Do you understand?” Claimant replied that she went through all her mail and could not find anything related to the first hearing. The ALJ asked, “Okay, well what was the paperwork you misplaced?” Claimant replied, “The hearing notice.” The ALJ asked, “Which hearing notice?” Claimant replied, “The first one.”³ The ALJ then asked, “If you received the hearing notice, and then misplaced it, then why have you written [in the request to reopen] that you didn’t receive it.”⁴ Claimant replied, “The truth is I didn’t find it in my paperwork.”⁵ Claimant then said that she did not get the notice of hearing in her P.O. Box. The ALJ asked, “Okay, then what did you misplace after receiving it?” Claimant replied, “I got the final notice that my hearing had been decided ‘cause I didn’t show up for the hearing.” The ALJ asked, “And then what happened.” Claimant said, “That’s when I contacted you immediately.” The ALJ asked, “What did you misplace?” Claimant answered, “I didn’t misplace anything.”⁶

As shown, claimant’s testimony alternated between claiming to have received and misplaced the notice of the January 15th hearing and then not to have received or misplaced it, then to have misplaced it, and then, again, not to have misplaced anything, including the January 15th notice of hearing. However, due to the specificity with which claimant asserted she had received and misplaced the notice of hearing in her initial testimony (Audio recording at ~12:20-13:00) and in the middle of the hearing when she again testified she had misplaced “[t]he first” notice of hearing (Audio recording at ~17:35-18:05), and the vagueness and coached nature of her denials that she received it, we find it more likely than not that she received and misplaced the January 15th notice of hearing. It is generally considered to be within an individual’s reasonable control to keep track of documents pertaining to important personal business. And although it was likely a mistake to misplace the January 15th notice of hearing, it was not an excusable mistake because it did not, for example, raise a due process issue, and was not the result of inadequate notice, reasonable reliance on another, or the inability to follow directions despite substantial efforts to comply.

Claimant also initially testified that she did not appear at the January 2019 hearing, in part, because she did not understand the January 15th notice of hearing. To any extent claimant not understanding the January 15th notice of hearing caused or contributed to her failure to appear at the January 2019 hearing, claimant did not show good cause to reopen the hearing because OAR 471-040-0040(2)(b)(B) specifically states that “[n]ot understanding the implications of a decision or notice when it is received” is not good cause.

Claimant did not establish good cause to reopen the January 2019 hearing on decision # 162348, and her request to reopen the hearing is therefore denied. Decision # 162348 remains undisturbed.

DECISION: Order No. 19-UI-125173 is affirmed.

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

DATE of Service: March 11, 2019

³ Audio recording at 17:35-18:05.

⁴ Audio recording at 18:00-18:12.

⁵ Audio recording at 18:10-18:25.

⁶ Audio recording at 18:40-19:40.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.



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

هذا القرار قد يؤثر على منحة البطالة الخاصة بك، إذا لم تفهم هذا القرار، إتصل بمجلس منازعات العمل فوراً، و إذا كنت لا توافق على هذا القرار، يمكنك رفع شكوى للمراجعة القانونية بمحكمة الاستئناف بأوريغون و ذلك بإتباع الإرشادات المدرجة أسفل القرار.

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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

The Oregon Employment Department is an equal opportunity employer/program. Auxiliary aids and services are available upon request to individuals with disabilities. Language assistance is available to persons with limited English proficiency at no cost.

El Departamento de Empleo de Oregon es un programa que respeta la igualdad de oportunidades. Disponemos de servicios o ayudas auxiliares, formatos alternos y asistencia de idiomas para personas con discapacidades o conocimiento limitado del inglés, a pedido y sin costo.