

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0365**

*Reversed and Remanded*

**PROCEDURAL HISTORY AND FINDINGS OF FACT:** On May 16, 2017, the Oregon Employment Department (the Department) served, by mail, notice of an administrative decision concluding that claimant willfully underreported earning from the employer, and therefore was overpaid \$3840 in benefits that he must repay the Department, was disqualified for 26 weeks of future benefits, and assessed a \$1152 monetary penalty (decision # 194933). On June 5, 2017, decision # 194933 became final without claimant having filed a request for hearing. On March 17, 2019, claimant filed a late request for hearing. On March 20, 2019, ALJ Kangas issued Order No. 19-UI-126698, dismissing claimant's request for hearing as late without a showing of good cause, subject to claimant's right to renew his request by filing a response to an appellant questionnaire by April 3, 2019. On March 25, 2019, claimant filed a timely response to the appellant questionnaire. ALJ Kangas reviewed claimant's response, and on March 28, 2019 issued Order No. 19-UI-127206, re-dismissing claimant's late request for hearing as late without good cause to extend the filing deadline to March 17, 2019. On April 12, 2019, claimant filed a timely application for review with the Employment Appeals Board (EAB).

Claimant submitted written argument with his application for review. However, claimant failed to certify that he provided a copy of his argument to the other parties as required by OAR 471-041-0080(2)(a) (October 29, 2006). The argument also contained information that was not part of the hearing record, and claimant failed to show that factors or circumstances beyond his reasonable control prevented him from offering the information in his request for hearing or response to the appellant questionnaire, as required under OAR 471-041-0090 (October 29, 2006). EAB therefore did not consider claimant's written argument, and only considered information received into the hearing record. *See* ORS 657.275(2).

**CONCLUSIONS AND REASONS:** Order No. 19-UI-127206 is reversed, and this matter remanded for a hearing on whether claimant's late request for hearing on decision # 194933 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(1)(a) (February 10, 2012) provides that "good cause" includes factors beyond an applicant's reasonable control or an

excusable mistake, including the failure to receive a document because the Department mailed it to an incorrect address despite having the correct address. Good cause does not include the failure to receive a document due to not notifying the Department of an updated address while the person is claiming benefits, or not understanding the implications of a decision or notice when it is received. OAR 471-040-0010(1)(b). OAR 471-040-0010(3) defines “a reasonable time” as seven days after the circumstances that prevented a timely filing ceased to exist.

Order No. 19-UI-127206 found that claimant filed a late request for hearing on decision # 194933 because, when the decision was issued, he was dealing with his mother who had been in a severe car accident, he did not take into consideration what was claimed against him, and he thought unemployment insurance benefits were his to use as much, or as little, as he deemed necessary.<sup>1</sup> The Order noted that although claimant asserted in his response to the appellant questionnaire that he did not remember receiving decision # 194933 in the mail, that did not mean it was not delivered to him since the decision was not returned to the Department by the United States Postal Service (USPS), and that unreturned mail is presumed to have been delivered.<sup>2</sup>

Order No. 19-UI-127206 also found even if claimant failed to receive the decision, he contacted the Department on November 17, 2017 “about his overpayment,” and contacted the Department again on November 27, 2017 and was informed that he “had 26 penalty weeks that he had to satisfy.”<sup>3</sup> Based on that finding, the Order determined that claimant would have “certainly known” whether he disagreed with those assessments, and that the circumstances that may have prevented claimant from filing a timely request for hearing therefore had ended.<sup>4</sup> Order No. 19-UI-127206 further determined that to the extent claimant’s “misunderstanding” of his entitlement to unemployment insurance benefits “may have” contributed to his filing his request for hearing late, his mistake was not “excusable,” and that claimant therefore failed to establish good cause to extend the deadline for filing his request for hearing to March 17, 2019.<sup>5</sup>

Order No. 19-UI-127206 therefore dismissed claimant’s late request for hearing based primarily on findings that claimant contacted the Department on November 17, 2017 about his overpayment and was informed on November 27, 2017 that he had 26 penalty weeks to satisfy, after which claimant would have certainly known whether he disagreed with decision # 194933. However, the Order must be set aside because there is absolutely no evidence in the hearing record to support those findings.

According to Order No. 19-UI-127206, the ALJ took notice of those facts, as “contained in Employment Department records,” under OAR 471-040-0025(7) (August 1, 2004).<sup>6</sup> However, OAR 471-040-0025(7) states that an ALJ may take notice of “judicially cognizable facts” and “general, technical, or scientific facts within the administrative law judge’s specialized knowledge.” Although OAR 471-040-0025(7) states that an ALJ may take notice of “documents, records and forms retained within the Employment Department’s files,” it does not state that, based on the information contained therein, an ALJ may make dispositive findings of disputable facts on material issues.

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<sup>1</sup> Order No. 19-UI-127206 at 2.

<sup>2</sup> *Id.* at 2-3.

<sup>3</sup> *Id.* at 2.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at 3.

<sup>6</sup> *Id.* at 2, fns 1-2.

OAR 471-040-0025(7) authorized the ALJ to take notice of Department records indicating that claimant contacted the Department on certain dates and that certain matters were discussed. However, it did not authorize the ALJ to find, as fact, that claimant actually discussed those matters with the Department on those dates, much less of what claimant would have “certainly known” based on those discussions. The use of unspecified Department records as dispositive evidence on those issues, without requiring that the evidence be substantiated and allowing claimant a meaningful opportunity to respond, amounts to a denial of due process. This matter therefore is remanded for further development of the record.

The hearing on remand should include further inquiry into whether claimant ever received decision # 194933 from the Department in the mail. Contrary to ALJ’s finding that decision was not returned to the Department by the United States Postal Service (USPS), Department records available to EAB appear to indicate that the decision mailed on May 16, 2017 was returned because it was mailed to the wrong address,<sup>7</sup> and do not appear to indicate whether the decision was later mailed to claimant at the correct address. Those records are, for reasons previously explained, not dispositive of whether or not claimant received the decision. If the records are correct, however, and claimant never received decision # 194933 in the mail, further inquiry is needed to determine whether the Department mailed the decision to an incorrect address despite having the correct address, or whether claimant failed to notify the Department of an updated address while he was claiming benefits or otherwise knew or should have known that he needed to update his address.

With respect to claimant’s apparent contact with the Department on November 17, 2017, further inquiry is needed into the substance of any conversation he had with a Department employee, and what he understood from that conversation. Although Order No. 19-UI-127206 found that claimant contacted the Department “about his overpayment,” Department records available to EAB only appear to indicate that claimant called to obtain the telephone number for the Department’s overpayment division, and was given the number.<sup>8</sup> Further inquiry is necessary to determine whether claimant contacted the overpayment division, and if so, when, what prompted him to call, what he called about, what was he told, and what he understood from that conversation.

With respect to claimant allegedly contacting the Department on November 27, 2017 and being told he “had 26 penalty weeks that he had to satisfy,” further inquiry is needed into the date of that contact, the substance of any conversation claimant had with a Department employee, and what he understood from that conversation. Contrary to the ALJ’s finding that claimant contacted the Department on November 27, 2017, Department records available to EAB appear to indicate that he contacted the Department November 27, 2018.<sup>9</sup> In general, given that claimant appears to have disagreed with decision # 194933

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<sup>7</sup> We take notice of this information, which is contained in Department records, under OAR 471-041-0090(3) (October 29, 2006). A copy of the record containing the information (May 30, 2017 Claim Comment), is attached to this decision and admitted into evidence as EAB Exhibit 1. Any party that objects to the admission of EAB Exhibit 1 may do so at the hearing on remand. Unless the ALJ sustains the objection, EAB Exhibit 1 will remain in the record.

<sup>8</sup> We take notice of this information, which is contained in Department records, under OAR 471-041-0090(3) (October 29, 2006). A copy of the record containing the information (November 17, 2017 Claim Comment), is attached to this decision and admitted into evidence as EAB Exhibit 2. Any party that objects to the admission of EAB Exhibit 2 may do so at the hearing on remand. Unless the ALJ sustains the objection, EAB Exhibit 2 will remain in the record.

<sup>9</sup> We take notice of this information, which is contained in Department records, under OAR 471-041-0090(3) (October 29, 2006). A copy of the record containing the information (November 27, 2018 Claim Comment), is attached to this decision

only to the extent it disqualified him for 26 weeks of future benefits and assessed a \$1152 monetary penalty,<sup>10</sup> the hearing on remand should include an inquiry sufficient to determine when claimant first became aware of those penalties.

Finally, assuming claimant delayed filing his request for hearing after becoming aware of the penalties, further inquiry is needed to determine the reason(s) for the delay, including whether claimant failed to understand the implications of the penalties after becoming aware of them. The ALJ's finding that claimant's misunderstanding of his entitlement to unemployment insurance benefits may have contributed to his filing his request for hearing late apparently was based on claimant's request for hearing.<sup>11</sup> However, it is unclear whether that portion of claimant's request for hearing was explaining why his request for hearing was late, or addressing the merits of decision # 194933. Further inquiry is needed to make that determination.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record, Order No. 19-UI-127206 is reversed, and this matter is remanded for development of the record.

**DECISION:** Order No. 19-UI-127206 is set aside, and this matter remanded for further proceedings consistent with this order.

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

**DATE of Service:** May 10, 2019

**NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Order No. 19-UI-127206 or return this matter to EAB. Only a timely application for review of the subsequent Order will cause this matter to return to EAB.

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and admitted into evidence as EAB Exhibit 3. Any party that objects to the admission of EAB Exhibit 3 may do so at the hearing on remand. Unless the ALJ sustains the objection, EAB Exhibit 3 will remain in the record.

<sup>10</sup> See Exhibit 2, Exhibit 3 at 2.

<sup>11</sup> See Exhibit 2.



# 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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