

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0615

Affirmed
Request to Reopen Denied

PROCEDURAL HISTORY: On May 9, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 115502). Claimant filed a timely request for hearing. On May 28, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for June 10, 2019 at 10:45 a.m. On June 10, 2019 at 10:23 a.m., the employer's representative faxed a request for postponement to OAH. On June 10, 2019, ALJ Snyder conducted the hearing, at which the employer failed to appear, and on June 18, 2019 issued Order No. 19-IU-131870, concluding that claimant's discharge was not for misconduct. On June 25, 2019, the employer filed a request to reopen with OAH. On July 2, 2019, ALJ Kangas reviewed the employer's request and issued Order No. 19-UI-132645, denying the employer's request to reopen. On July 3, 2019, the employer filed an application for review of Order No. 19-UI-132645 with the Employment Appeals Board (EAB).

EAB considered the employer's argument when reaching this decision.

FINDINGS OF FACT: (1) On an unknown date prior to June 10th, the employer's representative received notice of the June 10th hearing. On an unknown date thereafter, the employer's representative communicated with the employer's witness and learned that the witness would not be available at the time of the hearing.

(2) On June 10th, 22 minutes prior to the beginning of the hearing, the employer's representative filed with OAH a request to postpone the hearing. The request stated:

The employer received the hearing [*sic*] with short notice. The witness for the employer, [] will not be able to participate in the hearing as scheduled as he has other commitments at that time. [] was a direct witness to the altercation for which the claimant was terminated and the employer feels he will have needed first hand testimony.

See record document, June 10th request for postponement. Neither OAH's office staff nor an ALJ formally responded to or allowed the employer's representative's postponement request. Neither the employer's representative or an employer witness called into the June 10th 10:45 a.m. hearing.

(3) The employer requested reopening because "[t]he witness for the employer was not able to participate in the hearing as scheduled. A request to postpone was made but that request was denied." *See* record document, June 25th request to reopen.

CONCLUSIONS AND REASONS: The employer's request to reopen is denied.

ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. "Good cause" exists when the requesting party's failure to appear at the hearing arose from an excusable mistake or from factors beyond the party's reasonable control. OAR 471-040-0040(2) (February 10, 2012).

The employer failed to appear at the hearing in this case because its witness was unavailable and its postponement request was denied. The employer's request for relief is therefore, in essence, that OAH erred in denying the postponement request, which we review for abuse of discretion.

OAR 471-041-0021 (August 4, 2004) states, in pertinent part:

(2) A postponement may be granted by Office of Administrative Hearings staff at the request of a party if:

(a) The request is promptly made after the party becomes aware of the need for postponement; and

(b) The party has good cause, as stated in the request, for not attending the hearing at the time and date set.

(3) For the purpose of subsection (2)(b) of this rule, good cause exists when:

(a) The circumstances causing the request are beyond the reasonable control of the requesting party; and

(b) Failure to grant the postponement would result in undue hardship to the requesting party.

The employer's representative requested postponement only 22 minutes prior to the beginning of the June 10th hearing. Although the employer has not established the actual date upon which it received notice of the June 10th hearing, and alleged in its postponement request that it had "short notice," we infer that it is unlikely that the employer's representative did not receive a notice of hearing mailed 13 days prior to the date of the hearing only minutes before the hearing began. Generally speaking, first

class mail sent through the U.S. Postal Service takes one to three days to arrive at its destination.¹ Absent a showing that the notice of hearing took significantly longer than one to three days to arrive at the employer's representative's address, for example, that it was not received until 12 or 13 days after it was mailed, the record fails to show that the employer's request for postponement was "promptly made." Any delays in communication between the employer's representative and the employer's witnesses about the witness's availability, likewise, were not placed in evidence by the employer and therefore fail to suggest that the postponement request was "promptly made after the party becomes aware of the need for postponement." The first element is not met.

The record also fails to show that the employer had "good cause" for requesting postponement in this case. The record fails to show what other commitments the employer's witness had that prevented the witness from appearing at the June 10th hearing, so the record does not show that the other commitments were "beyond the reasonable control" of the employer. Likewise, to any extent delays in communication about the date and time set for the hearing between the employer's representative and employer's witness might have contributed to the witness's inability to appear at the hearing, the record does not establish or suggest that the delays were "beyond the reasonable control" of the employer. Finally, although the employer might have preferred to present evidence from a firsthand witness, the record does not suggest or show that no one else was available to participate in the hearing on the employer's behalf when the firsthand witness was unable to do so. Nor does the record suggest or show that the employer's representative was unable to make an appearance on the employer's behalf. The second element is, therefore, not met.

Because the employer has not established that it promptly requested postponement after becoming aware that postponement was needed, or that the reason for postponement was beyond the reasonable control of the employer, the employer has not shown that it was entitled to a postponement of the June 10th hearing. Nor has the employer shown that OAH's denial of the postponement request was an abuse of discretion such that the employer had good cause for failing to appear at that hearing and is entitled to reopening.

The employer has not otherwise asserted or established that its failure to appear at the June 10th hearing was due to circumstances beyond its control or an excusable mistake. The employer's request to reopen the June 10th hearing is, therefore, denied.

DECISION: Order No. 19-UI-132645 is affirmed.

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

DATE of Service: July 19, 2019

¹ EAB has taken notice of this fact, which is a generally cognizable fact. OAR 471-041-0090(1) (May 13, 2019). A copy of the information is available to the parties at <https://www.usps.com/ship/mail-shipping-services.htm>. Any party that objects to our taking notice of this information 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(2). Unless such objection is received and sustained, the noticed fact will remain in the record.

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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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 الإستئناف 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.

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