

EMPLOYMENT APPEALS BOARD DECISION
2019-EAB-0654

Late Application for Review Allowed
Order No. 19-UI-127696 Reversed ~ Request to Reopen Allowed
Merits Hearing Required

PROCEDURAL HISTORY: On February 8, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 104156). Claimant filed a timely request for hearing. On February 19, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for March 5, 2019 at 9:30 a.m., at which time claimant failed to appear for the hearing. On March 5, 2019, ALJ Frank issued Order No. 19-UI-125737, dismissing claimant's request for hearing for failure to appear. On March 8, 2019, claimant filed a timely request to reopen the hearing. On March 14, 2019, OAH mailed notice of a hearing scheduled for March 28, 2019 at 9:30 a.m. On March 28, 2019, ALJ Snyder conducted the hearing, and on April 5, 2019 issued Order No. 19-UI-127696, denying claimant's request to reopen the March 5th hearing. On April 19, 2019, claimant filed a new request for hearing form with OAH. On April 25, 2019, Order No. 19-UI-127696 became final. On July 15, 2019, claimant filed a late application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT:

- Request to reopen.** (1) Claimant received notice of the March 5, 2019 hearing and planned to attend it.
- (2) Around March 5th, claimant's region of the state was experiencing inclement weather and flooding. Claimant's phone did not work very well at that time. It lost its signal and kept dropping calls because of the weather and storm around that time.
- (3) On the morning of March 5th, claimant was not prepared for the phone to malfunction when claimant tried to call into the hearing. The nearest WorkSource Oregon center, where claimant might have gone to use a different phone, was 15 miles away. Because of the inclement weather, including snow, claimant was not able to travel to the WorkSource Oregon center.
- (4) Claimant began calling to participate in the hearing telephone conference ten minutes before the scheduled time, at approximately 9:20 a.m. Claimant's phone kept dropping the call. Claimant got

through to the hearing line and the call dropped again when claimant tried to enter the conference code. Claimant finally got through to the hearing and remained on hold for quite some time. Claimant disconnected after an unknown period of time, and around 11:23 a.m. called OAH about claimant's inability to participate in the 9:30 a.m. hearing.

(5) Claimant had read the notice of hearing instructions, including the portion regarding calling an alternative phone number if was unable to connect to the hearing. Claimant did not call the alternative number because claimant either did not remember or did not understand that instruction when attempting to connect to the hearing.

Late application for review. (6) Claimant likely received notice of Order No. 19-UI-127696 within a few days after it was mailed on April 5, 2019.

(7) On April 19, 2019, claimant completed and faxed an "Unemployment Insurance Benefits Request for Hearing" form asking to appeal the issue decided in decision # 104156. Claimant listed on the form that claimant needed an accommodation for "limited reading." Claimant included with the request for hearing form information about claimant's inability to participate in the March 5th hearing that answered some of the ALJ's findings and conclusions in Order No. 19-UI-127696. For unknown reasons, OAH filed the April 19th form in its electronic file for claimant's case, and did not identify the document as an application for review or forward the document to EAB.

CONCLUSIONS AND REASONS: Claimant's late application for review is allowed. Claimant's request to reopen the March 5th hearing is allowed, and claimant is entitled to a hearing on the merits of decision # 104156.

Late application for review. An application for review is timely if it is filed within 20 days of the date that OAH mailed the decision for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20 day filing period may be extended a "reasonable time" upon a showing of "good cause." ORS 657.875; OAR 471-041-0070(2). "Good cause" means that factors or circumstances beyond the applicant's reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A "reasonable time" is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The deadline for claimant's application for review was April 25, 2019. Claimant's application for review was not filed until July 15, 2019, making the application for review late. The record shows, however, that claimant made an unsuccessful attempt to file a document that should have been considered an timely application for review. The fact that the document was not treated as an application for review was a circumstance beyond claimant's reasonable control. We infer that claimant followed up with EAB within a reasonable time after realizing that the case had not progressed, and claimant's late application for review is therefore allowed.

Request to reopen. 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).

Order No. 19-UI-127696 concluded that claimant did not have good cause to reopen the hearing because claimant's loss of phone service on March 5th was predictable, and claimant did not promptly call the alternative number when unable to join the hearing. Order No. 19-UI-127696 at 2. The record does not support those conclusions.

OAR 471-040-0040(2)(a)(B) states that, for telephone hearings, "unanticipated, and not reasonably foreseeable, loss of telephone service" is good cause for failing to appear at a hearing. Claimant did not know about the phone issues that prevented participation in the hearing until "just then, in March." Audio recording at ~ 12:00-12:15. Claimant testified about the phone difficulties, "'I didn't know at that time, I – I just wasn't prepared to not have a phone, to have phone problems that morning.'" Audio recording at ~ 12:35-12:50. Claimant could not travel to a WorkSource Oregon location to use a different phone for the hearing because "the weather, so it was hard to get around down here." *See Id.*; Audio recording at ~ 15:00. It is more likely than not on this record that claimant's failure to participate in the hearing was the result of unanticipated, and not reasonable foreseeable, loss of phone service. Claimant therefore had good cause for failing to appear, and is entitled to have the hearing on decision # 104156 reopened.

The order under review also concluded that claimant did not have good cause, because claimant did ultimately connect to the hearing, "suggesting that his phone did have service sufficient to connect to the hearing line." Order No. 19-UI-127696 at 3. The order also stated that claimant did not have good cause because, when claimant's attempts to join the hearing failed, claimant should have called the alternate number listed on the notice of hearing in accordance with the instructions provided on that notice. *Id.* The record does not support those conclusions, either.

Although claimant was ultimately able to use the phone on March 5th to connect to the hearing and later leave a message for OAH, there is no evidence in the record suggesting that claimant's description of the difficulties claimant experienced trying to connect to the hearing, and trying to stay connected, were false. The fact that claimant's phone had sufficient service to connect to the hearing line at some point does not suggest that claimant did not in fact struggle to connect to the hearing line in time to participate in the hearing. Claimant's ability to successfully make some calls and not others only confirms claimant's descriptions of the phone problems that prevented claimant's participation in the hearing.

Although claimant arguably should have tried to call the alternate phone number listed on the notice of hearing in accordance with the instructions on the notice after claimant's initial attempts to reach the hearing failed, on this record there is little to suggest that claimant's attempts to call a different number would have had a different result than the attempts to call into the hearing itself. Nor that claimant would have been able to reach someone via the alternate number in time to join the hearing, must less that claimant's phone would have enabled claimant to stay connected throughout the duration of the hearing had it taken place. Claimant indicated that the phone service was malfunctioning because of inclement weather and signal problems. It therefore would not matter if claimant tried to call the hearing, or OAH's alternative number, claimant still would likely have been unable to complete a call during the period in which claimant needed to connect or stay connected to the hearing. Additionally, claimant established in the April 19th filing and application for review that claimant had difficulty with

reading comprehension, explaining claimant's failure to understand the alternate number instructions on the notice of hearing sufficiently to follow them, and suggesting that claimant was likely unable to comply with those instructions. Given the totality of the circumstances and claimant's extensive efforts to participate in the hearing despite reading and phone difficulties, claimant's failure to call the alternative phone number was at worst an excusable mistake caused by the inability to follow directions despite substantial efforts to comply.

Claimant had good cause for failing to appear at the March 5th hearing. Claimant is entitled to a hearing on the merits of decision # 104156.

DECISION: Order No. 19-UI-127696 is set aside, as outlined above. Claimant is entitled to a hearing on the merits of decision # 104156.

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

DATE of Service: July 19, 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 ໄດ້ໂດຍປະຕິບັດຕາມຄຳແນະນຳທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄຳຕັດສິນນີ້.

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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