

**EMPLOYMENT APPEALS BOARD DECISION**  
**2019-EAB-0727**

*Modified*  
*Request to Reopen May 10 Hearing Allowed*  
*Request to Reopen April 10 Hearing Allowed*  
*Merits Hearing Required*

**PROCEDURAL HISTORY:** On March 18, 2019, the Oregon Employment Department (the Department) served notice of an administrative decision assessing a \$6,841 overpayment, \$2,052.30 monetary penalty, and 52 penalty weeks (decision # 194361). Claimant filed a timely request for hearing. On March 27, 2019, the Office of Administrative Hearings (OAH) mailed notice of a hearing scheduled for April 10, 2019 at 10:45 a.m., at which time claimant failed to appear for the hearing. On April 10, 2019, ALJ Frank issued Order No. 19-UI-127920, dismissing claimant's request for hearing for failure to appear.

On April 17, 2019, claimant filed a request to reopen the April 10<sup>th</sup> hearing. On April 25, 2019, OAH mailed notice of the reopen hearing scheduled for May 10, 2019 at 10:45 a.m., at which time claimant failed to appear for the hearing. On May 10, 2019, ALJ Meerdink issued Order No. 19-UI-129718, dismissing claimant's request to reopen for failure to appear.

On May 29, 2019, claimant filed a request to reopen the May 10<sup>th</sup> hearing. On June 4, 2019, ALJ Kangas reviewed claimant's request and issued Order No. 19-UI-131031, denying the request. On June 14, 2019, claimant filed an application for review with the Employment Appeals Board (EAB).

On June 21, 2019, EAB issued Appeals Board Decision 2019-EAB-0546, reversing Order No. 19-UI-131031 and remanding the case for a hearing on claimant's request to reopen the May 10<sup>th</sup> hearing and, if warranted, possibly on the April 10<sup>th</sup> request to reopen and the merits of decision # 194361. On June 25, 2019, OAH mailed notice of a hearing scheduled for July 10, 2019. On July 10, 2019, ALJ Frank conducted a hearing, and on July 18, 2019 issued Order No. 19-UI-133608, allowing claimant's request to reopen the May 10<sup>th</sup> hearing, but denying the request to reopen the April 10<sup>th</sup> hearing. On August 6, 2019, claimant filed a timely application for review of Order No. 19-UI-133608 with EAB.

Based on a *de novo* review of the entire record in this case, and pursuant to ORS 657.275(2), the portion of the order under review concluding that allowed claimant's request to reopen the May 10<sup>th</sup> hearing is **adopted**.

**FINDINGS OF FACT:** (1) Claimant received notice of the April 10<sup>th</sup> hearing and planned to attend.

(2) Claimant was scheduled to work on April 10<sup>th</sup> at the time set for the hearing. She did not request time off work because she could not afford to take time off. She did not request that the hearing be postponed because although she did not get scheduled break periods at her job, her working conditions were such that her coworker could usually cover things alone if claimant needed to step away to take a call or attend to a personal matter. Claimant thought she would be able to have her coworker cover for her while she participated in the April 10<sup>th</sup> hearing.

(3) On April 10<sup>th</sup> at the time scheduled for hearing, an unexpected emergency arose at her job. Claimant was unable to step away for the hearing because two families were getting into a physical altercation. Claimant and her coworker were both required to intervene. It was unusual for such incidents to occur.

(4) Claimant participated in the July 10<sup>th</sup> hearing during her work hours by stepping away from her duties and asking her coworker to cover things. She did not request a postponement or take time off work to participate in the July 10<sup>th</sup> hearing.

**CONCLUSIONS AND REASONS:** Claimant's request to reopen the April 10<sup>th</sup> hearing is allowed. Claimant is entitled to a hearing on the merits of decision # 194361.

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 order under review concluded that claimant did not have good cause to reopen the April 10<sup>th</sup> hearing because rather than working on April 10<sup>th</sup> and planning to step away from her duties to participate, it was within her reasonable control to "attempt to call and reschedule the hearing, take time off work or, failing either, simply to call into work absent on the day of the hearing in order to participate." Order No. 19-UI-133608 at 4. The record does not support that conclusion.

Although under certain circumstances it might be within an individual's reasonable control to take time off work or call into work absent in order to participate in an unemployment insurance hearing, it was not in this case for two reasons. First, the claimant in this case could not financially afford to take time off work. Nor is there evidence that she had paid time off available to her, or would not face adverse consequences at her job if she took time off work. Second, the purpose of the unemployment insurance program is to provide financial support to unemployed and underemployed individuals, and as a condition of eligibility and qualification for the program individuals cannot fail or refuse to work. Requiring individuals to choose between foregoing work – and as a consequence forfeiting their ability to earn wages and their eligibility for unemployment insurance benefits for a whole week, and possibly facing a lengthier disqualification from benefits – or forfeiting their right to contest adverse unemployment insurance benefits decisions is anathema to the purposes of the unemployment insurance program.<sup>1</sup> Under the circumstances of this case, it was not within claimant's reasonable control to take time off for the hearing.

Claimant expected that her work schedule would allow her to participate in the April 10<sup>th</sup> hearing without taking time off work. That expectation was reasonable, as demonstrated by the fact that she participated in the July 10<sup>th</sup> hearing under circumstances identical to those under which claimant planned to participate in the April 10<sup>th</sup> hearing. Claimant had no reason to think that she needed to request that the April 10<sup>th</sup> hearing be postponed, as she rarely experienced work emergencies that would prevent her from having a coworker cover her duties while she stepped away for a call. The altercation that prevented her from participating in the April 10<sup>th</sup> hearing was neither foreseeable nor within claimant's reasonable control. Likewise, given the nature of that emergency, the record fails to show that it was within claimant's reasonable control to step away from the emergency on April 10<sup>th</sup> to request that the hearing be postponed once the emergency arose.

To any extent it might nevertheless be considered within claimant's reasonable control to have requested postponement, even though she did not think she needed to do so, her failure to do so was at worst an excusable mistake because the unforeseeable work emergency rendered her unable to participate in the hearing despite her plans to do so and substantial efforts to comply.

It is also worth noting that, on this record, it was not reasonable to expect claimant to request the hearing be rescheduled to another date because there is no evidence that she would be available to participate in a hearing on a different date. Specifically, the record fails show what claimant's usual work hours were, much less that she had time off work that coincided with the hours during which OAH customarily scheduled unemployment insurance hearings. Absent evidence that there was another time to which the hearing could be scheduled, without requiring claimant to take time off work and forfeit pay or render herself ineligible for unemployment benefits, the conclusion that claimant could have requested postponement to avoid failing to appear at a hearing is without support.

Claimant showed good cause to reopen the April 10<sup>th</sup> hearing. She is entitled to a hearing on the merits of decision # 194361.

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<sup>1</sup> ORS 657.155(1)(c) and OAR 471-030-0036(3) provide that individuals who miss opportunities to work while claiming benefits are not eligible for benefits during the week in which they miss work. ORS 657.176(2) and OAR 471-030-0038(6) provide that individuals who refuse offers of work without good cause are disqualified from receiving benefits until they earn four times their weekly benefit amount from work in subject employment.

**DECISION:** Order No. 19-UI-133608 is modified, as outlined above. A hearing on the merits of decision # 194361 is required.

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

**DATE of Service: August 22, 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](http://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 Empleo. Si no está de acuerdo con esta decisión, puede presentar una Aplicación 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 ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນຫ້າຍຂອງຄໍາຕັດສິນນີ້.

**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.

**Employment Appeals Board - 875 Union Street NE | Salem, OR 97311**  
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