

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0288

Reversed
Request for Hearing Allowed
Merits Hearing Required

PROCEDURAL HISTORY: On January 10, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 124842). Claimant filed a request for hearing. On February 19, 2020, ALJ Kangas issued Order No. 20-UI-144748, dismissing claimant's request for hearing as late without a showing of good cause subject to his right to renew the request by responding to an appellate questionnaire by March 4, 2020. On February 25, 2020, claimant responded to the questionnaire. On March 4, 2020, the Office of Administrative hearings (OAH) mailed a letter stating that Order No. 20-UI-144748 was cancelled, and on March 17, 2020 OAH mailed notice of a hearing scheduled for March 31, 2020. On March 31, 2020, ALJ Janzen conducted a hearing, and on April 1, 2020 issued Order No. 20-UI-147274, re-dismissing claimant's request for hearing as late without good cause. On April 8, 2020, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB did not consider claimant's written argument when reaching this decision because they did not include a statement declaring that they provided a copy of their argument to the opposing party or parties as required by OAR 471-041-0080(2)(a) (May 13, 2019).

FINDINGS OF FACT: (1) On January 10, 2020, the Department mailed notice of decision # 124842 to claimant's mailing address in Lake Oswego, Oregon. Decision # 124842 found that claimant was discharged from work for misconduct based, in part, on "Findings of Fact" number 2, which stated: "Claimant was discharged after the employer discovered that tax documents and payroll reports were unfiled, which resulted in the accrual of governmental penalties and fines." Exhibit 1.

(2) On January 13 or 14, 2020, claimant received notice of decision # 124842 in the mail. Claimant recognized from the decision that his deadline for filing a timely request for hearing was on or before January 30, 2020. Claimant read the decision and did not agree with it.

(3) On January 14, 2020, claimant faxed a request for hearing.

(4) On January 15, 2020, claimant received a phone call from a Department employee. The employee left claimant a voicemail indicating the employee had encountered some difficulty receiving claimant's fax in its entirety. The employee instructed the claimant to resubmit the fax. Transcript at 67. The employee provided claimant a specific telephone number to reach the employee if claimant had any questions.

(5) On January 15 or 16, 2020, claimant re-faxed the documents and, because he was not receiving a fax confirmation from his fax machine, called the employee to confirm receipt. The employee confirmed receipt of the faxed documents.

(6) On February 11, 2020, claimant filed a second request for hearing asserting that he had timely faxed a request for hearing on January 14, 2020. Claimant's second request for hearing included, at "Exhibit A", a copy of the four-page document claimant claimed to have faxed on January 14, 2020 (the "Exhibit A" document). Page four of the "Exhibit A" document included the following argument by claimant:

Evidence as presented in denial by OED, to accept Employer's claim of 'Findings of Fact 2.' Claimant was fired for Employers refusal for filing IRS tax forms. Claimant was never an officer, director, corporate officer of any of the companies owned by any of the companies or principals of the companies listed herein. Claimant had no access nor was a signor on any bank accounts related to the Employers principals or officers.

Exhibit 2 at 4. The "Exhibit A" document was undated and contained no encoded fax date, nor a fax receipt date stamp.

(7) The Department had no record of the receipt of any faxes from claimant from January 14, 2020, through January 16, 2020.

CONCLUSIONS AND REASONS: Claimant's request for hearing is allowed, and a hearing on the merits of decision # 124842 required.

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 the decision is mailed. OAR 471-040-0005(1)(July 15, 2018) instructs that although a claimant may file a request for hearing using a form provided by the Department, use of a Department form is not required as long as "the party requests a hearing or otherwise expresses a present intent to appeal and it can be determined what issue or decision is being appealed."

OAR 471-040-0005(2)(a) provides that a request for hearing of an administrative decision may be filed by fax. When a request for hearing is filed by fax, "the date of filing shall be the encoded date on the fax document unless such date is absent, illegible, or improbable, in which case the fax receipt date stamped or written by the agency employee, if available, shall be the date of filing. If a filing date cannot otherwise be determined, the most probable date of faxing shall be the date of filing." OAR 471-040-0005(4)(c).

In "Findings of Fact" number 2, of decision # 124842, the Department found that "Claimant was discharged after the employer discovered that tax documents and payroll reports Claimant were unfiled,

which resulted in the accrual of governmental penalties and fines.” In page four of the “Exhibit A” document, claimant made a direct reference to, and a detailed disagreement with, “Findings of Fact 2.” This evidence, coupled with claimant’s testimony that he had disagreed with decision # 124842, were sufficient to demonstrate a specific issue(s) that claimant disagreed with, and a present intent to appeal. The “Exhibit A” document was sufficient in form to constitute a request for hearing.

However, the order under review concluded that claimant failed to demonstrate that he had timely requested a hearing because the Department had no record of claimant having filed a timely request for hearing from January 14, 2020, through January 16, 2020. In addition, the order under review concluded that claimant had failed to demonstrate that he had timely requested a hearing because the “Exhibit A” document he claimed to have sent between January 14 and January 16, 2020, was not dated, and because “[c]laimant was not able to provide any fax confirmation that he sent documents any of those days or what documents were sent.” Order No. 20-UI-147274 at 4-5.

While the record supports those factual findings, that does not end the analysis. As noted above, OAR 471-040-0005(4)(c) provides that where a request for hearing is faxed, and where the faxed document does not contain an “encoded date” or a “fax receipt date” (stamped or written), “the most probable date of faxing shall be the date of filing.” Here, claimant timely faxed a request for hearing on January 14, 2020 to a fax number that the Department confirmed belonged to OAH. Transcript at 70. Claimant received a telephone call later that day from an employee of the Department, who left a voicemail indicating that there were issues with the receipt of the fax and that claimant needed to send the fax again. The Department employee left claimant a telephone number to reach the employee if claimant had any questions. Claimant maintained a copy of the voicemail and read its substance into the record. Transcript at 67-68. On January 15 or 16, 2020, claimant re-faxed his request for hearing and, after having difficulty obtaining a fax confirmation, called the Department’s employee at the employee’s number, who then confirmed receipt. The Department confirmed that the telephone number belonged to an employee with the same first name who worked at the WorkSource office in Tualatin. Transcript at 70. The Department also confirmed that the Tualatin WorkSource office is in the same building as a part of the OAH. Transcript at 70.

While the record supports the order under review’s conclusion that the Department had no record of claimant’s January 14-16, 2020 request, and that the request itself failed to include a date or fax confirmation, claimant’s first-hand testimony that he did fax the request between January 14 and 16, 2020, is credible and has greater weight than the circumstantial evidence that he did not file on time. The preponderance of the evidence shows that claimant timely faxed a request for hearing at some point between January 14 and 16, 2020, and that, under the circumstances, this was the most probable date of filing. Claimant’s request for hearing therefore was timely, and he is entitled to a hearing on the merits of decision # 124842.

DECISION: Order No. 20-UI-147274 is set aside, as outlined above. A hearing on the merits of decision # 124842 is required.

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

DATE of Service: April 29, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-124842 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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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 desisyong ito.

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 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.

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