

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0398

Late Application for Review Allowed
Reversed & Remanded

PROCEDURAL HISTORY: On January 28, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant quit work without good cause on January 3, 2020 and was disqualified from receiving benefits effective December 29, 2019 (decision # 75040). Claimant filed a timely request for hearing. On March 20, 2020, ALJ Frank conducted a hearing, and on March 23, 2020, issued Order No. 20-UI-146723, modifying the Department's decision and concluding claimant quit work without good cause on December 23, 2019 and was disqualified from receiving benefits effective December 22, 2019. On April 13, 2020, Order No. 20-UI-146723 became final without an application for review with the Employment Appeals Board (EAB) having been filed. On May 19, 2020 claimant filed a late application for review with EAB.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence is contained on three pages of the written argument claimant submitted with the application for review, and consists of claimant's statement that claimant mailed the application for review on April 13, 2020 via the United States Postal Service (USPS), supported by a copy of a USPS receipt dated April 13, 2020. The additional evidence has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to the admission of EAB Exhibit 1 into the record 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, EAB Exhibit 1 will remain in the record.

WRITTEN ARGUMENT: The remainder of claimant's argument contained information about the work separation that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented them from offering the information during the hearing. Under ORS 657.275(2) and OAR 471-041-0090 (May 13, 2019), EAB considered only information received into evidence at the hearing when reaching this decision. However, because this case is being remanded to the Office of Administrative Hearings (OAH) for further proceedings, each party may offer new documentation into evidence at the remand hearing by following the instructions OAH will send the parties in the notice scheduling the remand hearing.

FINDINGS OF FACT: (1) Fred Bell Studios Inc. employed claimant as its director of finance from March 15, 2010 to January 3, 2020.

(2) In August of 2019, the employer sustained some cash losses after which claimant recommended that the employer install stricter financial controls to prevent such losses in the future.

(3) In December 2019, claimant was on vacation when the employer installed new security cameras and revised its cash handling policies. One security camera was angled at the employer's safe, which was located outside of claimant's office, and another camera was angled at claimant's desk within her office. Claimant was expected to open payment envelopes outside of her office and in front of the safe within view of the security camera. Claimant was advised of the new policy upon her return from vacation on December 20, 2019.

(4) On December 23, 2019, claimant opened payment envelopes inside of her office as she prepared to make a bank deposit of checks that had been written weeks prior. That evening, the employer's president called claimant and told her he had observed her opening the envelopes in her office in violation of the new protocol and asked her if she had done so. Claimant admitted that she had, that she had also deposited the checks and explained that she believed that following the policy would result in a delayed deposit and delayed customer service. A heated discussion ensued after the president remarked that he did not care about the customers. The president told claimant that he would meet with her after the holidays rather than immediately deal with the matter.

(5) On January 1, 2020, the employer texted claimant and requested a morning meeting on January 3, 2020. Claimant agreed to the meeting.

(6) On January 3, claimant and the president met at the employer's office. They discussed what had transpired on December 23, after which the president requested claimant's keys, passwords and logon information for the employer's accounts. Claimant complied.

(7) Claimant received her copy of Order No. 20-UI-146723 within a few days of after it was mailed on March 23, 2020.

(8) On April 13, 2020, at 4:21 p.m., claimant mailed, via the United States Postal Service (USPS), an application for review of Order No. 20-UI-146273. EAB did not receive claimant's application.

(9) On May 15, 2020, claimant contacted EAB, inquired about the status of her application for review, was told that it had not been received and was asked to re-send it, which she did that same day along with a copy of the USPS postal receipt dated April 13, 2020. With the re-mailing of her application for application for review, claimant included a written explanation concerning her previous but unsuccessful attempt to file it. EAB Exhibit 1.

CONCLUSION AND REASONS: Claimant's late application for review is allowed. Order No. 20-UI-146723 is reversed and this matter remanded for further development of the record.

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 to be timely filed was April 13, 2020. Claimant successfully filed an application for review on May 15, 2020, making the application for review late. The record shows, however, that claimant likely mailed the application for review on April 13, 2020, which would have made the application for review timely had it been delivered through the regular course of the mail. The fact that the application for review was not delivered by USPS after it was deposited in the mail on April 13, 2020 was a circumstance beyond claimant’s reasonable control. Claimant therefore had good cause for the late filing. Claimant discovered that she had not successfully filed a timely application for review on May 15, 2020, and filed a valid application for review that day. Claimant’s filing was within the seven-day “reasonable time” period. Because claimant had good cause to extend the filing period a reasonable time, claimant’s late application for review is allowed.

Work Separation. If the employee could have continued to work for the same employer for an additional period of time, the work separation is a voluntary leaving. OAR 471-030-0038(2)(a) (December 23, 2018). If the employee is willing to continue to work for the same employer for an additional period of time but is not allowed to do so by the employer, the separation is a discharge. OAR 471-030-0038(2)(b). “Work” means “the continuing relationship between an employer and an employee.” OAR 471-030-0038(1)(a) (December 23, 2018).

Order No. 20-UI-146723 concluded that the work separation was a voluntary leaving which occurred on December 23, 2019. The order reasoned as follows:

At the outset of the hearing, claimant testified that on January 3, 2020, the employer had discharged her without explanation. By the end of her testimony, she was conceding that the employer reminded her on January 3 that she had quit her job during telephone conversation on December 23, 2019...Claimant’s inconsistent testimony, as well as the consistency and detail of the employer’s account based on notes composed immediately after these conversations, supports the employer’s position that claimant quit her job. She did not deny having done so upon being reminded of the fact on January 3, 2020. Claimant also acknowledged that the earlier exchange on December 23, 2019 had become “heated” when she reacted upon being confronted with evidence of a policy violation.

Order No. 20-UI-146723 at 3. However, the order’s reasoning is not supported by the record. At hearing, the president asserted that when he spoke with claimant over the phone on December 23 about violating the new cash handling protocol, a heated exchange ensued and claimant eventually stated that she “effing quit.” Audio Record at 21:25 to 22:00. However, the record also shows that claimant denied that she quit that day and further explained that when she met with the president on January 3 she also denied that she had quit and told him she did not want to quit. Audio Record at 13:45 to 15:50. Claimant explained that during her “heated” exchange with the president on December 23,

2019 she only told him that if he intended to treat customers poorly by not cashing their checks for over month she “didn’t know that [she] wanted to work with that.” Audio Record at 15:00 to 15:30. The record shows that claimant was never asked to respond to the president’s specific statements about what he said occurred during their December 23 and January 3 conversations. Finally, the record shows that when the president was asked if, on January 3, claimant denied that she had previously quit her job, he did not directly answer the question but only responded that he had written notes regarding an exchange they had that day. Audio Record at 25:30 to 25:45. On remand, the record should be developed regarding the actual statements made by the parties on December 23 and January 3, and each party should be given the opportunity to respond to the other’s testimony.

Although the order concluded that the work separation occurred on December 23, 2019 and the president denied that claimant worked after that date, claimant asserted that she worked approximately 15 hours between December 23, 2019 and January 3, 2020. Audio Record at 13:55 to 15:00. The record also shows that the president asked claimant to meet with him on January 3, which is when he asked claimant to disclose employer passwords, return her keys and remove her personal belongings. Audio Record at 22:00 to 23:00. On remand, the record needs to be developed regarding whether claimant worked any days or hours between December 23rd and January 3rd, what date or at what point each party concluded claimant was no longer an employee, whether and when a final check was sent to claimant, and if so, for which dates of work. The record also fails to show whether the employer sent any paperwork or correspondence to claimant about the work separation. Without this additional information, the record is unclear with regard to the date and nature of claimant’s work separation and whether and when it was disqualifying.

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 further development of the record is necessary for a determination of the date and nature of the work separation, and whether it is disqualifying, Order No. 20-UI-146723 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-146723 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: June 12, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-146723 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 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 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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