

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0707

Reversed & Remanded

PROCEDURAL HISTORY: On August 11, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant willfully made misrepresentations and failed to report material facts to obtain unemployment insurance benefits, and assessing a \$1,370 overpayment, a \$411 monetary penalty, and a 9-week penalty disqualification from future benefits (decision # 202228). Claimant filed a request for hearing. On October 13, 2020, ALJ Kangas issued Order No. 20-UI-155153 dismissing claimant's request for hearing as late, subject to claimant's right to renew the request by responding to an appellant questionnaire by October 27, 2020.

On November 2, 2020, claimant filed a late response to the appellant questionnaire and a timely application for review of Order No. 20-UI-155153 with the Employment Appeals Board (EAB). On November 4, 2020, ALJ Kangas mailed a letter stating that because claimant's response to the questionnaire was late, the Office of Administrative Hearings (OAH) would not consider it or issue another order, and Order No. 20-UI-155153 remained in effect. This matter is before EAB based upon claimant's timely application for review of Order No. 20-UI-155153.

EVIDENTIARY RULING: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). The additional evidence consists of claimant's response to the appellant questionnaire, and has been marked as EAB Exhibit 1, and a copy provided to the parties with this decision. Any party that objects to our admitting 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, the exhibit will remain in the record.

FINDINGS OF FACT: (1) On August 11, 2020, the Department mailed decision # 202228 to claimant's address on file with the Department. Claimant received the decision shortly after it was mailed. Decision # 202228 stated, "To be timely, any appeal from this decision must be filed on or before AUGUST 31, 2020." Exhibit 1.

(2) Claimant filed, by fax, a request for hearing on decision # 202228. The encoded date and time of the faxed request for hearing appears to be "09 01 20 02:56a," although the "09" is partially illegible.

Exhibit 2. The encoded date and time received by the office to which claimant faxed the document is illegible, but the document also has a date stamp that reads as follows:

RECEIVED
SEP 01 2020
BPC

Exhibit 2.

(3) Claimant asserted in her response to the appellant questionnaire that she faxed her request for hearing on August 31, 2020 at 6:57 p.m., but that “[her] fax machine time [was] off by EIGHT hours!” EAB Exhibit 1 at 3. She also requested, “Please note the time stamp on the fax you received.” EAB Exhibit 1 at 3.

(4) Claimant also asserted in her response to the appellant questionnaire, “Please note: I will call once I fax this to record the actual time. Please look at the original fax I sent and the time your fax machine received it. There was no time deadline on the notice only the date. I faxed it @ 6:57 p.m. on [August 31, 2020].” EAB Exhibit 1 at 2. The encoded date and time at the bottom of a page faxed by claimant is “Nov 02 20 05:41 p.” EAB Exhibit 1 at 1. The encoded date and time received at the top of the same page received by the Department office to which it was faxed stated, in relevant part, as follows: “RCVD at 11/2/2020 10:04:04 AM [Pacific Standard Time].” EAB Exhibit 1 at 1.

CONCLUSIONS AND REASONS: Order No. 20-UI-155153 is set aside and this matter remanded for further development of the record.

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. ORS 657.875 provides that the 20-day deadline may be extended a “reasonable time” upon a showing of “good cause.” OAR 471-040-0010 (February 10, 2012) provides that “good cause” includes factors beyond an applicant’s reasonable control or an excusable mistake, and defines “reasonable time” as seven days after those factors ceased to exist. The filing date for a request for hearing filed by fax 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) (July 15, 2018).

The order under review concluded that based on the deadline for a timely request for hearing stated on the administrative decision (August 31, 2020) and the encoded date and time stamp on the request for hearing claimant faxed to the Department, claimant filed her request for hearing on September 1, 2020. Order No. 20-UI-155881 at 1. The order therefore dismissed claimant’s request for hearing as late. Order No. 20-UI-155881 at 1. Claimant’s request for hearing appears to show that claimant filed her request for hearing on decision # 202228 by fax at approximately 2:56 a.m. on November 1, 2020, approximately three hours after the August 31, 2020 deadline for a timely request for hearing on that decision. However, a close examination of claimant’s request for hearing appears to show that the date and time referenced on the document originated from claimant’s source fax machine and not the receiving fax machine. Exhibit 2. The request for hearing also shows that the encoded date and time of

the receipt of claimant's fax by the receiving fax machine is blocked out. Exhibit 2. In claimant's response to the appellant questionnaire, which was not considered before Order No. 20-UI-155881 was issued, claimant asserted that she filed her request for hearing on the deadline date of August 31, 2020 at 6:57 p.m., but that because the time on her fax machine was off by "EIGHT hours" it showed an encoded date and time faxed on the document faxed of "09 01 20 02:56a." EAB Exhibit 1 at 3. A page of claimant's response to the appellant questionnaire shows both a fax encoded date and time sent of "Nov 2 20 05:41 p" and a fax encoded date and time received of "11/2/2020 10:04:04 AM." EAB Exhibit 1 at 1. Those fax times show that the page in question was received by a Department office approximately eight hours (7 hours and 37 minutes) before the time the fax was sent, as shown on the same document. This substantiates claimant's assertion that the time on her fax machine was "off" by approximately eight hours.

Together, claimant's request for hearing and her response to the appellant questionnaire indicate that claimant may have filed a timely request for hearing by fax on the deadline date of August 31, 2020. Exhibit 2, EAB Exhibit 1. To determine whether that is the case, this matter must be remanded for a hearing in which the record is developed regarding several issues in order to apply OAR 471-040-0005(4)(c). For example, the record does not show if the Department had a copy of claimant's request for hearing by fax that shows the encoded date and time claimant's fax was actually received by the Department office in question. If not, do the Department's fax machines generally put an encoded date and time received on faxes its machines receive and print, and do the machines keep an internal log of the dates and times faxes are received? If so, is there a record of the date and time claimant's fax at issue was received by the Department? For faxes that arrive at the Department after business hours, how does the Department determine the date on which a document is considered to be received? What does the stamp on claimant's request for hearing signify, and what does "BPC" stand for? Exhibit 2.

If the record, as developed, shows that both the encoded date and the date stamp on claimant's request for hearing are potentially wrong, and a filing date cannot otherwise be determined, claimant may establish that the most probable date of filing her request for hearing is August 31, 2020. If, after a thorough inquiry on this issue, claimant's request for hearing is allowed, an inquiry into the merits of decision # 202228 should also be conducted.

The parties may offer new information into evidence at the remand hearing. At that time, it will be determined if the new information will be admitted into the record. The parties must follow the instructions on the notice of the remand hearing regarding documents they wish to have considered at the hearing. These instructions will direct the parties to provide copies of such documents to the ALJ and the other parties in advance of the hearing at their addresses as shown on the certificate of mailing for the notice of hearing.

Because further development of the record is necessary for a determination of whether claimant's request for hearing on decision # 202228 should be allowed, Order No. 20-UI-155153 is set aside, and this matter is remanded.

DECISION: Order No. 20-UI-155153 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: December 3, 2020

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-155153 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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