

EMPLOYMENT APPEALS BOARD DECISION
2020-EAB-0760

Reversed & Remanded

PROCEDURAL HISTORY: On September 15, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for committing a disqualifying act under Department drug and alcohol adjudication policy,¹ and that claimant was disqualified from receiving unemployment insurance benefits effective March 22, 2020 (decision # 101406). On October 5, 2020, decision # 101406 became final without claimant having filed a timely request for hearing. On October 12, 2020, claimant filed a late request for hearing. On October 19, 2020, ALJ Kangas issued Order No. 20-UI-155406, dismissing claimant's late request for hearing, subject to claimant's right to renew the request by responding to an appellant questionnaire by November 2, 2020.

On October 28, 2020, claimant filed a timely response to the appellant questionnaire, and the Office of Administrative Hearings (OAH) mailed a letter stating that Order No. 20-UI-155406 was vacated. On November 3, 2020, OAH mailed notice of a hearing scheduled for November 17, 2020 to consider claimant's late request for hearing, and if granted, the merits of decision # 101406. On November 17, 2020, ALJ Griffin conducted a hearing and on November 18, 2020 issued Order No. 20-UI-156545, re-dismissing claimant's late request for hearing as without good cause. On December 6, 2020, claimant filed a timely application for review of Order No. 20-UI-156545 with the Employment Appeals Board (EAB).

EAB considered claimant's written argument in reaching this decision.

EVIDENTIARY MATTER: With his application for review, claimant submitted a chronological summary of his correspondence with the Department related to his unemployment benefits claim and decision # 101406. That additional evidence has been marked as EAB Exhibit 1. Because that evidence is necessary to complete the record in this matter, EAB has considered it when reaching this decision under OAR 471-041-0090(1) (May 13, 2019). EAB also considered claimant's appellant questionnaire and the documents claimant submitted with the appellant questionnaire. Those documents were not

¹ Although decision # 101406 concluded that claimant was discharged for misconduct, the decision's findings state that claimant was discharged for committing a disqualifying act under Department drug and alcohol adjudication policy.

marked in the record. That evidence has been marked as EAB Exhibit 2. A copy of EAB Exhibits 1 and 2 are provided to the parties with this decision. Any party that objects to our admitting EAB Exhibits 1 and 2 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 exhibits will remain in the record.

FINDINGS OF FACT: (1) At all relevant times, the claimant's address of record was listed correctly in the Department's records. On September 15, 2020, the Department mailed decision # 101406 to claimant's address of record. The decision stated that the appeal deadline for that decision was October 5, 2020. The decision was not returned to the Department as undeliverable by the United States Postal Service (USPS). During 2020, claimant subscribed to the USPS "informed delivery" email service, which provided claimant with a daily digital preview of his incoming mail. EAB Exhibit 1. The USPS informed delivery never showed that decision # 101406 would be delivered to claimant. EAB Exhibit 1.

(2) On September 25, 2020, the Department mailed a different administrative decision regarding an overpayment and fraud to claimant at his address of record. On September 28, 2020, claimant received notification from the USPS "informed delivery" email service that he would receive a letter from the Department. EAB Exhibit 2. On September 28, 2020, claimant received the September 25 decision. EAB Exhibit 2. That decision referred to an "administrative decision issued on September 15, 2020," but did not include the deadline to appeal decision # 101406. Audio Record at 24:35, EAB Exhibit 1. The September 25, 2020 decision contained a form regarding claimant's appeal rights for that decision, and stated that any appeal of the September 25, 2020 decision had to be filed on or before October 15, 2020.

(3) Claimant tried to call the Department after September 28, 2020, but claimant got "nothing but holds" every time he tried to contact the Department, and "it said to email." Audio Record at 24:57, 21:02. Claimant tried to email the Department, and his email was "returned." Audio Record at 21:05.

(4) On October 12, 2020, claimant faxed a request for hearing to the Department, which the Department considered to be a request for hearing on decision # 101406.

(5) Claimant first received a copy of decision # 101406 on November 7, 2020 as an enclosure to the Notice of Hearing for the November 17, 2020 hearing.

CONCLUSIONS AND REASONS: Order No. 20-UI-156545 is reversed, and this matter remanded to OAH for further development of the record on whether claimant's late request for hearing on decision # 101406 should be allowed and, if so, the merits of decision # 101406.

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. A letter duly directed and mailed was received in the regular course of the mail. ORS 40.135(1)(q).

The record shows that claimant's request for hearing on decision # 101406 was late, but it also shows that claimant rebutted the presumption that he received that decision after the Department mailed it to him. Although individuals are generally presumed to receive documents sent to them in the ordinary course of the mail, claimant rebutted that presumption with evidence that the USPS informed delivery service did not show him a digital image of mail from the Department after it mailed decision # 101406, which was corroborated by claimant's responses to the appellant questionnaire and his conduct in waiting until after he received the September 25, 2020 decision to request a hearing. The preponderance of the evidence shows that claimant did not receive decision # 101406 until November 7, 2020, when it was enclosed with the notice of hearing for the November 17, 2020 hearing.

That claimant did not receive decision # 101406 until November 7, 2020 was a factor beyond his reasonable control. However, on remand, the record must be developed to show if factors beyond claimant's reasonable control, or an excusable mistake, were good cause to extend the filing deadline, and if claimant filed a request for hearing within a "reasonable time" after those factors ceased to exist.

Although claimant has shown that he did not receive decision # 101406 until November 7, 2020, the record must be developed to show what claimant understood about the denial of his unemployment benefits claim when he received the September 25, 2020 decision referring to an "administrative decision issued on September 15, 2020." The record does not show what, if anything, claimant understood about appealing the September 15, 2020 decision when he received the September 25, 2020 decision. The record does not show what claimant did to inquire about the deadline to request a hearing for the September 15, 2020 decision. The record does not provide sufficient detail about claimant's attempts to obtain information about the "administrative decision issued on September 15, 2020," or why he did not request a hearing until October 12, 2020. Although the record shows that claimant contacted the Department about his claim by email, the record does not show when he did so, what he told the Department, or what information the Department gave him in response. The record does not show whether claimant was lacking information before October 12, 2020 that would have enabled him to request a hearing on decision # 101406 before that time. Nor does the record show if there were other reasons, other than not receiving decision # 101406, that caused claimant to miss the deadline to request a hearing.

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). Claimant's evidence established that he did not receive decision # 101406 until November 7, 2020. However, the record must be developed to determine if not having received the decision and other factors beyond claimant's reasonable control, or an excusable mistake constituted good cause to extend the deadline to request a hearing. If good cause existed to extend the deadline, the record must be developed to show if October 12, 2020 was within a reasonable time after the factors that caused claimant to file a late request for hearing ceased to exist. If it was, then a hearing on the merits of decision # 101406 is required. For these reasons, Order No. 20-UI-156545 is reversed, and this matter is remanded.

DECISION: Order No. 20-UI-156545 is set aside, and this matter remanded for further proceedings consistent with this order.

S. Alba and D. P. Hettle.

DATE of Service: January 5, 2021

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 20-UI-156545 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 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.

Employment Appeals Board - 875 Union Street NE | Salem, OR 97311
 Phone: (503) 378-2077 | 1-800-734-6949 | Fax: (503) 378-2129 | TDD: 711
www.Oregon.gov/Employ/eab

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