

EMPLOYMENT APPEALS BOARD DECISION
2021-EAB-0557

Affirmed
Late Request for Hearing Dismissed

PROCEDURAL HISTORY AND FINDINGS OF FACT: On December 4, 2020, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant, but not for misconduct, and claimant was not disqualified from receiving unemployment insurance benefits based on the work separation (decision # 140632). On December 24, 2020, decision # 140632 became final without the employer having filed a request for hearing. On January 15, 2021, the employer filed a late request for hearing. On July 2, 2021, ALJ McGorin conducted a hearing at which claimant failed to appear, and issued Order No. 21-UI-169811, dismissing the employer's request for hearing as late without good cause. On July 8, 2021, the employer filed an application for review with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer's argument contained information that was not part of the hearing record. In their written argument, the employer explained that prior to the hearing, the employer was advised that only one person was permitted to testify on behalf of the employer, that the owner chose the manager to testify because "she was the person responsible for overseeing our business and had dealt with" claimant, and that the owner otherwise would otherwise have testified and offered the new information into evidence. Employer's Written Argument at 3. Even assuming, however, that OAH so advised the employer, and that the owner otherwise would have testified and offered the new information into evidence, the employer has not shown that factors or circumstances beyond the employer's reasonable control prevented them from offering the new information at the hearing. It was within the employer's reasonable control, for example, to have the owner, and not the manager testify at the hearing. Alternatively, it was within the employer's reasonable control to have the owner convey the information to the manager before the hearing, so that the manager could offer the information into evidence at the hearing. It also was within the employer's reasonable control to submit documents containing the information and offering them into evidence at the hearing. For that reason, 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. EAB considered the employer's argument to the extent it was based on the record.

CONCLUSIONS AND REASONS: The employer's late request for hearing on decision # 140632 is dismissed.

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 request for hearing may be filed on forms provided by the Employment Department or similar offices in other states. Use of the form is not required provided the party specifically 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(1) (July 15, 2018). A request for hearing on an administrative decision related to the payment or amount of unemployment insurance benefits may be filed by mail, fax, e-mail, or other means as designated by Employment Department with the appealable document; or in person at any publicly accessible Employment Department office in Oregon. OAR 471-040-0005(2).

The request for hearing on decision # 140632 was due by December 24, 2020. Because the employer did not file their request for hearing until January 15, 2021, the request for hearing was late. At hearing, the employer's witness, who was the company's manager, testified that the employer received a copy of decision # 140632 around the time it was issued, and confirmed that the employer's address had been correctly listed on the administrative decision. Audio Record at 9:04. The manager also testified that the employer opened the administrative decision when they received it, and that they reviewed it and understood what it meant. Audio Record at 9:28. However, the manager was unable to testify regarding the efforts the employer had made to appeal the administrative decision, as she was not involved in that effort.

The employer enclosed a letter with their January 15, 2021 request for hearing stating that they had "called the phone numbers listed on the decision dozens of times, have left voice mail at the Medford office and faxed a letter to the Oregon Employment Department *prior to the appeal deadline . . . all with no response for almost a month.*" Exhibit 2 at 1 (emphasis in original). The employer did not offer into the hearing record further explanation of the circumstances that caused them to file the late request for hearing. Although their statement enclosed with the hearing implies that they had made efforts to contact the Department about decision # 140632 prior to the filing deadline, the letter does not state that they indicated in any of those prior communications that they wished to challenge the administrative decision. Further, contacting the Department by phone is not a method of filing a request for hearing specifically contemplated under OAR 471-040-0005(2), and the record does not show that the Department had designated on the administrative decision that contact by phone was a valid means of requesting a hearing. For those reasons, the employer did not show that any of their previous attempts at contacting the Department constituted timely requests for hearing. *See Kroetch v. Employment Department*, 289 Or App 291, 409 P3d 60 (2017) (submission of a statement or documentation of facts that is inconsistent with an existing determination, by itself, is not a request for hearing; the submission must include some indication that the party is aware the underlying decision exists and that the party wants to challenge it).

Ultimately, the employer submitted the January 15, 2021 request for hearing by mail. The employer did not show that factors beyond their reasonable control prevented them from submitting the request for hearing by mail, fax, or email prior to the timely filing deadline. Although the employer's delay in submitting the request for hearing was likely the result of a mistake on their part, it was not an "excusable mistake" within the meaning of the administrative rules because it did not, for example, raise a due process issue, and was not the result of inadequate notice, reasonable reliance on another, or the inability to follow directions despite substantial efforts to comply.

Therefore, the employer's late request for hearing on decision # 140632 is subject to dismissal under ORS 657.875 and OAR 471-040-0010.

DECISION: Order No. 21-UI-169811 is affirmed.

D. Hettle and A. Steger-Bentz;
S. Alba, not participating.

DATE of Service: July 27, 2021

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. 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 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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