

EMPLOYMENT APPEALS BOARD DECISION
2022-EAB-0907

Affirmed
Late Request to Reopen Dismissed

PROCEDURAL HISTORY: On October 26, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that the employer discharged claimant for misconduct, disqualifying claimant from receiving unemployment insurance benefits effective August 15, 2021 (decision # 164234). Claimant filed a timely request for hearing. On April 12, 2022, the Office of Administrative Hearings (OAH) served notice of a hearing scheduled for April 25, 2022. On April 25, 2022, ALJ M, Davis conducted a hearing at which the employer failed to appear and issued Order No. 22-UI-192079, reversing decision # 164234 by concluding that claimant was discharged, but not for misconduct, and was not disqualified from receiving benefits based on the work separation. On May 16, 2022, Order No. 22-UI-192079 became final without the employer having filed a request to reopen the hearing. On June 6, 2022, the employer filed a late request to reopen the hearing. On August 18, 2022, ALJ Davis conducted a hearing on whether to allow the employer's late request to reopen, and on August 19, 2022 issued Order No. 22-UI-200859, dismissing the request and leaving Order No. 22-UI-192079 undisturbed. On August 23, 2022, the employer filed an application for review of Order No. 22-UI-200859 with EAB.

WRITTEN ARGUMENT: The employer submitted written arguments on August 23, 2022, September 7, 2022, September 12, 2022, and September 19, 2022. EAB did not consider the employer's August 23, 2022 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). The employer's September 7, 2022 and September 12, 2022 arguments contained information that was not part of the hearing record, and did not show that factors or circumstances beyond the employer'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. EAB considered the employer's September 7, 2022 and September 12, 2022 written arguments to the extent they are based on the record. Because the employer's September 19, 2022 written argument was not received by EAB within the time period allowed under OAR 471-041-0080(1), the argument was not considered by EAB when reaching this decision. OAR 471-041-0080(2)(b).

In the employer's September 7 and September 12, 2022 written arguments, the employer suggested that the ALJ was prejudiced during the August 18, 2022 hearing regarding whether to allow the employer's late request to reopen because the same ALJ had presided over the April 25, 2022 hearing at which the employer failed to appear. September 7, 2022 Written Argument at 4; September 12, 2022 Written Argument at 3. To the extent the employer asserted that the hearing proceedings were unfair or the ALJ was biased, EAB reviewed the hearing record in its entirety, which shows that the ALJ inquired fully into the matters at issue and gave all parties reasonable opportunity for a fair hearing as required by ORS 657.270(3) and (4) and OAR 471-040-0025(1) (August 1, 2004).

Claimant submitted a written argument on September 14, 2022. Claimant's argument contained information that was not part of the hearing record, and did not show that factors or circumstances beyond claimant's reasonable control prevented her 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. EAB considered claimant's argument to the extent it was based on the record.

FINDINGS OF FACT: (1) The employer retained a third party company to handle their payroll matters, but not to serve as a third-party representative in appeals of unemployment insurance claims. The employer handled unemployment insurance appeals themselves and expected notice documents to be mailed to their address in Keizer, Oregon. Prior to May 27, 2022, the Department and OAH mistakenly believed the employer's payroll company handled the employer's unemployment insurance appeals and, as a result, used the payroll company's address in West Henrietta, New York as the employer's address of record.

(2) On October 26, 2021, the Department served notice of decision # 164234, which concluded that the employer discharged claimant for misconduct, disqualifying from receiving unemployment insurance benefits effective August 15, 2021 (decision # 164234). The employer did not initially receive decision # 164234. However, prior to the issuance of decision # 164234, the employer had been interviewed by the Department adjudicator who was adjudicating the work separation. After some time passed without learning the outcome of the adjudication, the employer called the Department and received decision # 164234. The employer agreed with the administrative decision and "that was the last . . . that [the employer] knew about it." Transcript at 6.

(3) On November 14, 2021, claimant requested a hearing on decision # 164234. On April 12, 2022, OAH mailed a notice scheduling a hearing for April 25, 2022 at 8:15 a.m. to the addresses of record on file for the parties. The notice of hearing intended for the employer was sent to the West Henrietta, New York address of the employer's payroll company. The payroll company did not advise the employer of the notice of hearing. As a result, the employer did not receive the notice of hearing and was not aware of the April 25, 2022 hearing.

(4) On April 25, 2022, the employer did not appear for the scheduled hearing. The same day, ALJ Davis issued Order No. 22-UI-192079, which reversed decision # 164234 and concluded that claimant was not disqualified from receiving benefits based on the work separation.

(5) Order No. 22-UI-192079 stated, in pertinent part, "If you did not appear at the hearing, you may request to reopen the hearing. . . . Your request to reopen the hearing must . . . show good cause for

failing to appear at the hearing; “Good cause” exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant’s reasonable control; [the request also must] be filed within 20 days of when the order from the hearing you missed was mailed, or else show good cause to extend the period the [sic] request reopening of your case, and show that you filed your hearing request within seven days of when those factors or circumstances ceased to exist.” Order No. 22-UI-192079 at 3.

(6) Some time later, the employer’s owner learned that claimant had been receiving unemployment insurance benefits. The owner contacted the Department for more information. The Department told the owner that he needed to contact OAH.

(7) On May 27, 2022, the owner contacted OAH, and an OAH representative emailed a copy of Order No. 22-UI-192079 to the owner and provided information in the email about how to request to reopen the April 25, 2022 hearing.

(8) On June 6, 2022, the employer filed a request to reopen the hearing with OAH.

CONCLUSIONS AND REASONS: The employer’s late request to reopen is dismissed.

ORS 657.270(5) provides that any party who failed to appear at a hearing may request to reopen the hearing, and the request will be allowed if it was filed within 20 days of the date the hearing decision was issued and shows good cause for failing to appear. The period within which a party may request reopening may be extended if the party requesting reopening has good cause for failing to request reopening within the time allowed, and acts within a reasonable time. OAR 471-040-0041(1) (February 10, 2012). “Good cause” exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant’s reasonable control. OAR 471-040-0041(2). “A reasonable time,” is seven days after the circumstances that prevented a timely filing ceased to exist. OAR 471-040-0041(3). The party requesting reopening shall set forth the reason(s) for filing a late request to reopen in a written statement, which OAH shall consider in determining whether good cause exists for the late filing, and whether the party acted within a reasonable time. OAR 471-040-0041(4).

The employer filed their request to reopen on June 6, 2022. The deadline to timely file the reopen request was within 20 days of the April 25, 2022 date that OAH issued Order No. 22-UI-192079, which was May 16, 2022. The employer therefore did not file their request to reopen by the timely filing deadline. As a result, under OAR 471-040-0041, the employer must show: (1) that they had good cause for failing to request reopening of the hearing by the timely filing deadline, and (2) that they filed their request to reopen within seven days after the circumstances that prevented them from filing the request by the deadline had ceased.

The employer established good cause for failing to file a request to reopen the April 25, 2022 hearing by May 16, 2022. The employer’s failure to file their request to reopen by May 16, 2022 was due to their failure to receive Order No. 22-UI-192079 because OAH sent it to the address of the employer’s third party payroll company instead of to the employer’s address. The fact that OAH sent Order No. 22-UI-192079 to the wrong address was a factor beyond the employer’s reasonable control.

However, the circumstances that prevented the employer from timely filing ceased to exist on May 27, 2022, which is the date an OAH representative emailed the employer a copy of Order No. 22-UI-192079. The hearing order stated, in pertinent part that, “If you did not appear at the hearing, you may request to reopen the hearing. . . . Your request to reopen the hearing must . . . show good cause for failing to appear at the hearing; “Good cause” exists when an action, delay, or failure to act arises from an excusable mistake or from factors beyond an applicant’s reasonable control; [the request also must] be filed within 20 days of when the order from the hearing you missed was mailed, or else show good cause to extend the period the [*sic*] request reopening of your case, and show that you filed your hearing request within seven days of when those factors or circumstances ceased to exist.” Order No. 22-UI-192079 at 3. Thus, as of May 27, 2022, the circumstances that prevented a timely filing of the reopen request ceased because the employer became aware of Order No. 22-UI-192079 and was instructed on how to file a reopen request.

The deadline to file a request to reopen was therefore extended to June 3, 2022, which is the seven-day “reasonable time” from the May 27, 2022 date when the circumstances that prevented a timely filing ceased to exist. The employer did not file their request to reopen until June 6, 2022, after the seven-day “reasonable time” period ended. Accordingly, the employer did not file their late request to reopen within a reasonable time.

In the employer’s September 7, 2022 and September 12, 2022 written arguments, the employer asserted that they could not have known of the seven-day “reasonable time” requirement because the OAH representative did not mention it in their May 27, 2022 email to the employer. September 7, 2022 Written Argument at 4; September 12, 2022 Written Argument at 3. It is correct that the seven-day “reasonable time” requirement went unmentioned in the body of the OAH representative’s email. Nevertheless, the representative attached Order No. 22-UI-192079 to the email they sent the employer. As mentioned above, Order No. 22-UI-192079 stated, among other things, that a late request to reopen must be filed “*within seven days* of when those factors or circumstances [that prevented a timely filing] ceased to exist.” Order No. 22-UI-192079 at 3 (emphasis added). This language was sufficient to put the employer on notice of the seven-day “reasonable time” requirement.

The employer also contended in their September 7, 2022 and September 12, 2022 written arguments that their reopen request was filed within a seven-day “reasonable time” because June 6, 2022 was only six business days after May 27, 2022. September 7, 2022 Written Argument at 4; September 12, 2022 Written Argument at 3. However, with the exception of whether the last day of the time period falls on a day of office closure, all calendar days count for purposes of computing the seven-day “reasonable time” period, not merely business days.

Subject to some exceptions not applicable here, OAR 137-003-00501(1) (January 31, 2012) provides that “OAR 137-003-0501 to 137-003-0700 apply to the conduct of all contested case hearings conducted for an agency by an administrative law judge assigned from the Office of Administrative Hearings[.]” OAR 137-003-0520(11) (January 31, 2012) further provides:

In computing any period of time prescribed or allowed by OAR 137-003-0501 through 137-003-0700, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the time period shall be included, unless it is a scheduled day of office closure, in which event the time period runs until the end of the next day that the office is

open. Scheduled days of office closure include, but are not limited to Saturdays and the legal holidays identified in ORS 187.010 and 187.020, including Sundays.

This computation method is in accord with the rule that applies when computing any period of time prescribed or allowed by statute or court rule. *See* ORS 419B.854. Further, that this computation method governs calculating the seven-day “reasonable time” period in this case is reinforced by the fact that when business days are to be used for a computation of time under the administrative rules, the rules take special care to point that out, which suggests that use of business days is a departure from the usual rule. For example, OAR 471-060-0005 (December 3, 2021), which governs making a request for a change of ALJ in an unemployment insurance case, states that such a request must be made “within 10 business days after an administrative law judge is assigned to the case,” and then defines what a business day is for purposes of the rule. OAR 471-060-0005(4), (4)(a). The fact that OAR 471-060-0005 makes it a point to state that business days are applicable for that rule bolsters the conclusion that the administrative rules found elsewhere in Chapter 471—like OAR 471-040-0041, above—require that all calendar days are to be counted, not merely business days.

Applying this computation method, the seven-day “reasonable time” period began to run on May 28, 2022 and concluded on June 3, 2022. Because the employer did not file their late request to reopen until June 6, 2022, they did not file within a reasonable time. Because the employer’s late request to reopen was not filed within a reasonable time, the late request to reopen is dismissed and Order No. 22-UI-192079 remains undisturbed.

DECISION: Order No. 22-UI-200859 is affirmed.

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

DATE of Service: November 3, 2022

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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

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 الإستئناف 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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