

EMPLOYMENT APPEALS BOARD DECISION
2023-EAB-1034

Reversed
Request to Reopen Allowed
Merits Hearing Required

PROCEDURAL HISTORY: On January 29, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer for misconduct and disqualified from receiving benefits effective January 3, 2021 (decision # 113801). Claimant filed a timely request for hearing. On December 2, 2021, the Office of Administrative Hearings (OAH) served a notice of hearing scheduled for December 17, 2021. On December 17, 2021, ALJ Micheletti conducted a hearing at which the employer failed to appear, and on December 21, 2021, issued Order No. 21-UI-182357, reversing decision # 113801 by concluding that claimant's discharge was not for misconduct and did not disqualify claimant from receiving benefits. On December 30, 2021, the employer filed a timely request to reopen the hearing. On September 6, 2023, ALJ Micheletti conducted a hearing at which claimant failed to appear, and on September 7, 2023, issued Order No. 23-UI-235230, denying the employer's request to reopen the December 17, 2021, hearing. On September 12, 2023, the employer filed an application for review of Order No. 23-UI-235230 with the Employment Appeals Board (EAB).

WRITTEN ARGUMENT: The employer did not declare 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 argument also 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 as required by OAR 471-041-0090 (May 13, 2019). Other than EAB Exhibit 1, as indicated below, EAB considered only information received into evidence at the hearing when reaching this decision. *See* ORS 657.275(2).

The parties may offer new information into evidence at the remand hearing. This may include the information in the employer's written argument or the documents the employer sought to have admitted at the September 6, 2023, hearing but which the ALJ did not address because the ALJ did not reach the merits of decision # 113801. At the remand hearing, 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.

EVIDENTIARY MATTER: EAB has considered additional evidence when reaching this decision under OAR 471-041-0090(1). The additional evidence is the employer's request to reopen, 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 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.

FINDING OF FACT: On December 2, 2021, the Office of Administrative Hearings (OAH), mailed notice of a hearing on decision # 113801 scheduled for December 17, 2021, to the parties at their addresses of record. The employer did not receive the notice of hearing. EAB Exhibit 1 at 1. On December 17, 2021, the employer failed to appear for the hearing because they had not received the notice and did not know a hearing was scheduled for that date.

CONCLUSIONS AND REASONS: The employer's request to reopen the December 17, 2021, hearing is allowed. A hearing on the merits of decision # 113801 is required.

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. "Good cause" exists when the requesting party's failure to appear at the hearing arose from an excusable mistake or from factors beyond the party's reasonable control. OAR 471-040-0040(2) (February 10, 2012). The party requesting reopening shall set forth the reason(s) for missing the hearing in a written statement, which the Office of Administrative Hearings (OAH) shall consider in determining whether good cause exists for failing to appear at the hearing. OAR 471-040-0040(3).

The order under review concluded that the employer did not establish good cause to reopen the December 17, 2021, hearing. Order No. 23-UI-235230 at 3. The record does not support this conclusion.

The record shows that the employer did not receive in the mail the notice of hearing that scheduled the December 17, 2021, hearing in this matter. The employer offered documentary evidence in the form of their request to reopen to show that they did not receive the notice of hearing. *See* EAB Exhibit 1 at 1 ("We did not receive notification of a hearing on December 17, 2021, as indicated in the Final Order."). Also, at hearing, the employer's witness testified, based on her review of documents, that the employer did not receive the notice of hearing. *See* September 6, 2023, Audio Record at 7:26 ("They got the initial notice and they denied the claim. They did not get the appeal notice, where they needed to come testify."). This evidence is sufficient to conclude that the employer did not receive the notice of hearing in the mail.

The order under review deemed this evidence to be insufficient because it was hearsay. Order No. 23-UI-235230 at 3. However, hearsay is admissible in unemployment insurance hearings. Although the status of evidence as hearsay can diminish its weight, there is no reason to doubt the reliability of the documentary and testimonial evidence the employer offered showing that the employer failed to receive the notice of hearing. The order under review also concluded that the employer's evidence was

insufficient to overcome OAR 137-003-0520(10) (January 31, 2012), which provides, “Documents sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary.” Order No. 23-UI-235230 at 3. However, the employer *offered* evidence to the contrary, in the form of the documentary and testimonial evidence showing that the employer failed to receive the notice of hearing. The employer therefore overcame the presumption that the notice of hearing was received by the employer.

Because the employer failed to receive the notice of hearing in the mail, they were not aware that the hearing was scheduled to take place on December 17, 2021. This constituted a factor beyond their reasonable control that caused them to fail to appear at the December 17, 2021, hearing. Because the employer’s failure to appear arose from a factor beyond their reasonable control, the employer established good cause to reopen the hearing.

Accordingly, the employer’s request to reopen the December 17, 2021, hearing is allowed. The employer is entitled to a hearing on the merits of decision # 113801.

DECISION: Order No. 23-UI-235230 is set aside and this matter remanded for additional proceedings, as outlined above.

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

DATE of Service: October 18, 2023

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 23-UI-235230 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 ໄດ້ໂດຍປະຕິບັດຕາມຄໍາແນະນໍາທີ່ບອກໄວ້ຢູ່ຕອນທ້າຍຂອງຄໍາຕັດສິນນີ້.

Arabic

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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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