

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0107-R

Requests for Reconsideration Allowed
EAB Decisions 2024-EAB-0107 and 2024-EAB-0108 Adhered to on Reconsideration

PROCEDURAL HISTORY AND FINDINGS OF FACT: On March 12, 2021, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant willfully made a misrepresentation and failed to report a material fact to obtain benefits, and assessed a \$17,312 overpayment of combined state and federal unemployment insurance benefits that claimant was required to repay to the Department, a \$1,737.60 monetary penalty, and a 36-week disqualification from future benefits. On April 1, 2021, the March 12, 2021, overpayment decision became final without claimant having filed a request for hearing. On February 3, 2022, the Department served notice of an administrative decision denying claimant's request for a waiver of the overpayment (decision # 163252). On February 13, 2022, claimant filed a late request for hearing on the March 12, 2021, overpayment decision and a timely request for hearing on decision # 163252.

On December 6, 2023, ALJ Chiller conducted hearings on decision # 163252 and the March 12, 2021, overpayment decision, with the hearing on the March 12, 2021, overpayment decision continuing on December 21, 2023. On January 8, 2024, ALJ Chiller issued Orders No. 24-UI-244920 and 24-UI-244922, dismissing claimant's late request for hearing on the March 12, 2021, overpayment decision and leaving that decision undisturbed, and affirming decision # 163252, respectively. On January 25, 2024, claimant filed applications for review of Orders No. 24-UI-244920 and 24-UI-244922 with the Employment Appeals Board (EAB).

On February 16, 2024, EAB issued EAB Decisions 2024-EAB-0107 and 2024-EAB-0108, affirming Orders No. 24-UI-244922 and 24-UI-244920 by adopting the findings of fact and conclusions of those orders. On February 21, 2024, claimant filed requests for reconsideration of EAB Decisions 2024-EAB-0107 and 2024-EAB-0108 with EAB. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of claimant's requests for reconsideration of EAB Decisions 2024-EAB-0107 and 2024-EAB-0108. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2024-EAB-0107-R and 2024-EAB-0108-R).

CONCLUSIONS AND REASONS: Claimant’s requests for reconsideration are allowed. EAB Decisions 2024-EAB-0107 and 2024-EAB-0108 are adhered to on reconsideration, as clarified herein.

ORS 657.290(3) authorizes the Employment Appeals Board to reconsider any previous decision of the Employment Appeals Board, including “the making of a new decision to the extent necessary and appropriate for the correction of previous error of fact or law.” “Any party may request reconsideration to correct an error of material fact or law, or to explain any unexplained inconsistency with Employment Department rule, or officially stated Employment Department position, or prior Employment Department practice.” OAR 471-041-0145(1) (May 13, 2019). The request is subject to dismissal unless it includes a statement that a copy was provided to the other parties, and is filed on or before the 20th day after the decision sought to be reconsidered was mailed. OAR 471-041-0145(2).

Claimant’s requests for reconsideration were filed within 20 days of the date EAB Decisions 2024-EAB-0107 and 2024-EAB-0108 were mailed, and included a statement that a copy was provided to the other parties. Claimant has therefore met the threshold requirements to request reconsideration, and her requests are allowed. However, EAB Decisions 2024-EAB-0107 and 2024-EAB-0108 are adhered to on reconsideration.

The parties have the right to a fair and impartial hearing. *See* OAR 471-040-0025(2) (August 1, 2004). Claimant’s first contention was, essentially, that she was denied a fair and impartial hearing because the ALJ delayed the start of the December 6, 2023, hearing on the March 12, 2021, overpayment decision for approximately 11 minutes while the ALJ made efforts on her own initiative to have a Department representative appear at the hearing. Claimant’s Reconsideration Request at 1. For context, the hearing on decision # 163252 was scheduled for 9:30 a.m. on December 6, 2023, while the hearing on the March 12, 2021, overpayment decision was scheduled for 10:45 a.m. that day. When the 9:30 a.m. hearing was convened, only the Department representative was present. Order No. 24-UI-244922, Audio Record at 0:01. The ALJ delayed the hearing to give claimant a chance to appear, and claimant did appear approximately three minutes after the hearing was convened. Order No. 24-UI-244922, Audio Record at 0:01 to 3:16. At the conclusion of that hearing, the ALJ reminded the parties that they would need to call in again to appear at the 10:45 a.m. hearing, and neither party gave any indication that they did not intend to appear. *See* Order No. 24-UI-244922, Transcript at 29-31. When the 10:45 a.m. hearing was convened, only claimant was present. Order No. 24-UI-244920, December 6, 2023 Audio Record at 0:01 to 1:20. The ALJ stated, “There needs to be a representative from the Employment Department on the line for the case so I am going to ask you to hold on just for a few moments, [claimant], so I can get an answer as to if someone from the Employment Department is going to appear.” Order No. 24-UI-244920, December 6, 2023, Audio Record at 1:20 to 1:37. The hearing was delayed for approximately eleven minutes, until a Department representative appeared. Order No. 24-UI-244920, December 6, 2023, Audio Record at 0:01 to 11:34.

Under these circumstances, the ALJ’s expectation that a Department representative would appear is understandable given the Department’s appearance at the preceding hearing. Further, the ALJ’s delay of the 10:45 a.m. hearing to give the Department an opportunity to appear was similar to the delay afforded claimant at the 9:30 a.m. hearing. The delay itself is therefore not necessarily evidence of disparate treatment. However, the ALJ made no efforts during the 9:30 a.m. hearing delay to secure claimant’s appearance, while the ALJ apparently had the Office of Administrative Hearings (OAH) contact the Department during the 10:45 a.m. hearing delay, resulting in the Department’s representative appearing

approximately eleven minutes after the hearing was convened. This evinced disparate treatment of the parties prior to the taking of testimony at the March 12, 2021, overpayment decision hearing.

However, this disparate treatment resulted in no prejudice to claimant because, even had the Department not appeared or given evidence at that hearing, the record still would not have shown good cause to allow claimant's late request for hearing on the March 12, 2021, overpayment decision. Claimant did not allege in her request for reconsideration that her late request for hearing should have been allowed because she had good cause for the late filing. Instead, claimant contended that "if a party should not appear than the party that did appear wins." Claimant's Reconsideration Request at 1. The rules contain no such provision, instead only allowing the dismissal of a request for hearing if the party that requested the hearing (in this case, claimant) fails to appear. *See* OAR 471-040-0035(3)(c) (August 1, 2004). As the Department did not request the hearing, if claimant appeared but the Department did not, the hearing should simply have been held without the Department and an order issued by the ALJ based on the resulting record.

Analyzing the record as if the Department had not appeared for the hearing, claimant's testimony independently established that she received the March 12, 2021, overpayment decision in the mail, likely within the timely filing period, but was "so upset" and "traumatized" by it that she could not file an appeal until February 13, 2022. Order No. 24-UI-244920, December 6, 2023, Transcript at 8; Order No. 24-UI-244922, Transcript at 12. However, claimant was able to file a request to waive the overpayment on July 9, 2021, suggesting that even if claimant's emotional difficulties constituted a factor beyond her reasonable control that delayed timely filing, that factor ceased no later than July 9, 2021, and her request for hearing was not filed within a seven-day "reasonable time" thereafter.¹ Accordingly, even if the ALJ erred in acting to secure the Department's appearance at the December 6, 2023 10:45 a.m. hearing, such error would have been harmless, as the record would have supported dismissal of claimant's late request for hearing on the March 12, 2021 overpayment decision absent any participation by the Department at that hearing. The consolidated hearing record does not show, and claimant does not assert, any other evidence of bias or prejudice for or against a party to the proceedings. Therefore, an error of law has not been shown in this regard.

Claimant's other contention was that repayment of the overpayment and penalty, given the amounts at issue in contrast to her income, assets, and expenses, was "not considered a hardship," while claimant considered repayment under the circumstances "a great hardship." Claimant's Reconsideration Request at 1. No conclusion was drawn by decision # 163252, Order No. 24-UI-244922, or EAB regarding whether repayment would have caused claimant to face financial hardship. This was proper because claimant's late request for hearing as to the March 12, 2021, overpayment decision was dismissed and the decision left undisturbed. Therefore, because waiver is not available for overpayments that are the result of willful misrepresentation, the March 12, 2021, overpayment decision's conclusion that claimant was overpaid because she willfully underreported her earnings to obtain benefits prevents waiver of the overpayment as a matter of law, regardless of claimant's financial circumstances or any hardship repayment might cause. *See* ORS 657.317(2)(b); ORS 657.310(2). Accordingly, no error of law occurred in failing to consider claimant's financial circumstances when denying the waiver of overpayment recovery.

¹ ORS 657.875 provides that the 20-day deadline to request a hearing 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.

Claimant also advanced a related argument that the underreporting of her earnings was not willful, but instead the result of her misunderstanding of reporting requirements or misinformation provided by the Department. Claimant's Reconsideration Request at 1-2. For the same reasons discussed above, because claimant failed to file a timely request for hearing on the March 12, 2021, overpayment decision or show good cause to allow her late request for hearing, she was not entitled to a hearing on the merits of the March 12, 2021, overpayment decision and, accordingly, there was no error in failing to consider evidence of whether any misrepresentation was not willful.

For these reasons, EAB Decisions 2024-EAB-0107 and 2024-EAB-0108 are adhered to on reconsideration.

DECISION: Claimant's requests for reconsideration are allowed. EAB Decisions 2024-EAB-0107 and 2024-EAB-0108 are adhered to on reconsideration.

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

DATE of Service: March 27, 2024

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

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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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