

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0337

Order No. 24-UI-251026 Modified
Request to Reopen and Late Request for Hearing Allowed
Merits Hearing Required
Order No. 24-UI-251027 Application for Review Dismissed
No Justiciable Controversy

PROCEDURAL HISTORY: On May 4, 2021, the Oregon Employment Department (the Department) served a Notice of Determination for Pandemic Unemployment Assistance (PUA) concluding that claimant was ineligible to receive PUA benefits effective December 27, 2020. On May 24, 2021, the May 4, 2021, PUA determination became final without claimant having filed a request for hearing. On December 8, 2021, the Department served an amended Notice of Determination for PUA which replaced the May 4, 2021, PUA determination and concluded that claimant was ineligible to receive PUA benefits for the weeks of May 10, 2020, through September 4, 2021 (weeks 20-20 through 35-21). On December 28, 2021, the December 8, 2021, PUA determination became final without claimant having filed a request for hearing. On May 20, 2023, claimant filed late requests for hearing on the May 4, 2021, and December 8, 2021, PUA determinations.

On September 20, 2023, notices were mailed to claimant that a consolidated hearing was scheduled on both PUA determinations for October 9, 2023, at 1:30 p.m. On October 9, 2023, at 1:30 p.m., ALJ Frank convened a hearing at which claimant failed to appear, and on October 10, 2023, issued Orders No. 23-UI-238080 and 23-UI-238081, dismissing claimant's late requests for hearing on the May 4, 2021, and December 8, 2021, PUA determinations, respectively, due to claimant's failure to appear. On October 16, 2023, claimant filed a timely request to reopen the October 9, 2023, hearing. On March 12, 2024 and continued to March 19, 2024, ALJ Nyberg conducted a consolidated hearing on both PUA determinations, and on March 27, 2024 issued Orders No. 24-UI-251027 and 24-UI-251026, denying claimant's requests to reopen the hearing and leaving Orders No. 23-UI-238080 and 23-UI-238081, respectively, undisturbed.¹ On April 2, 2024, claimant filed applications for review of Orders No. 24-UI-251027 and 24-UI-251026 with the Employment Appeals Board (EAB).

¹ Orders No. 24-UI-251027 and 24-UI-251026 also concluded that claimant's late requests for hearing on the May 4, 2021, and December 8, 2021 PUA determinations should be allowed. Order No. 24-UI-251027 at 3; Order No. 24-UI-251026 at 3. However, OAH did not have jurisdiction over that issue because claimant's request to reopen the October 9, 2023, hearing

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 24-UI-251027 and 24-UI-251026. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2024-EAB-0336 and 2024-EAB-0337).

FINDINGS OF FACT: (1) On May 4, 2021, the Department issued the May 4, 2021, PUA determination, concluding that claimant was ineligible to receive PUA benefits effective December 27, 2020.

(2) On December 8, 2021, the Department issued the December 8, 2021, PUA determination. This determination stated that it was an “amended” notice, and concluded that claimant was ineligible to receive PUA benefits for the weeks of May 10, 2020, through September 4, 2021 (weeks 20-20 through 35-21). Order No. 24-UI-251026, Exhibit 1 at 3.

(3) The Department’s records show that on January 7, 2022, the Department mailed a letter to claimant “vacating . . . the duplicate decision.”²

(4) On May 20, 2023, claimant filed a request for hearing online with the subject “Over payment” and the text of the request stating, “I would like to appeal the decision dated on May 11 2023[.]” Order No. 24-UI-251026, Exhibit 1 at 2. This was processed as a timely request for hearing on an administrative decision denying claimant’s request for a waiver of overpayment recovery. It was also processed as late requests for hearing on the underlying overpayment administrative decision and the May 4, 2021, and December 8, 2021, PUA determinations, the latter of which formed the basis for the overpayment at issue in the other decisions.

(5) On September 20, 2023, three notices of hearing were mailed to claimant stating that three hearings had been scheduled for October 9, 2023, as follows: at 1:30 p.m. on the May 4, 2021, and December 8, 2021, PUA determinations; at 2:30 p.m. on the overpayment decision; and, at 3:30 p.m. on the waiver denial.

(6) On October 9, 2023, claimant appeared and participated only in the 2:30 p.m. and 3:30 p.m. hearings. Claimant was asked at the 2:30 p.m. hearing why she had not appeared at the 1:30 p.m. hearing. Claimant testified that she had only received two hearing notices, one for 2:30 p.m. and one for 3:30 p.m., and was unaware that the other hearing had been scheduled. Order No. 23-UI-238745, Audio Record at 27:17 to 27:52.³

was denied. Nonetheless, the record was sufficiently developed on that issue, as were the orders’ findings of fact and conclusions of law. As such, EAB affirms those findings and conclusions as to Order No. 24-UI-251026, as adopted herein.

² EAB has taken notice of this fact which is contained in Employment Department records. OAR 471-041-0090(1) (May 13, 2019). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

³ EAB has taken notice of this fact which is contained in Employment Department records. OAR 471-041-0090(1). Any party that objects to our taking notice of this information 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 noticed fact will remain in the record.

CONCLUSIONS AND REASONS: Claimant’s application for review of Order No. 24-UI-251027 presents no justiciable controversy and is dismissed. Order No. 24-UI-251026 is modified. Claimant’s request to reopen the October 9, 2023, hearing as to the December 8, 2021, PUA determination is allowed, claimant’s late request for hearing on the December 8, 2021, PUA determination is allowed, and a hearing on the merits of the December 8, 2021, PUA determination is required.

Application for review of Order No. 24-UI-251027. OAR 471-040-0035 (August 1, 2004) provides, in relevant part, that a request for hearing may be dismissed when the Department has “withdrawn or cancelled the determination or decision upon which the request for hearing was based.” OAR 471-040-0035(2)(b).

The December 8, 2021, PUA determination stated that it was an *amended* notice and concluded that claimant was ineligible for benefits during a period that encompassed all of the weeks for which the May 4, 2021, PUA determination had concluded that claimant was ineligible for PUA benefits. Additionally, the Department’s records note that a letter was mailed to claimant on January 7, 2022, approximately a month after the amended PUA determination was issued, to vacate a “duplicate” administrative decision that had been issued to claimant. It is therefore reasonable to infer, based on these circumstances, that the Department withdrew or cancelled the May 4, 2021, PUA determination, and intended that the December 8, 2021, PUA determination replace it. As the May 4, 2021, PUA determination is no longer in effect, claimant’s request for hearing on that decision is subject to dismissal as moot because it presents no justiciable controversy.⁴

Accordingly, there is no justiciable controversy, based upon claimant’s application for review of Order No. 24-UI-251027, in which relief could ultimately be granted to claimant. *See accord Barcik v. Kubiacyk*, 321 Or 174, 895 P2d 765 (1995). Because the case before EAB presents no justiciable controversy, the application for review of Order No. 24-UI-251027 is dismissed.

Request to reopen on the December 8, 2021, PUA determination. 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).

Order No. 23-UI-238081, dismissing claimant’s request for hearing on the December 8, 2021, PUA determination for failure to appear, was issued October 10, 2023. Claimant filed her request to reopen the hearing within 20 days, on October 16, 2023, and the request to reopen explained why claimant missed the hearing. Order No. 24-UI-251027, Exhibit 1 at 3. Therefore, the request was timely and met the threshold requirements for consideration.

⁴ While claimant’s application for review of Order No. 24-UI-251027 presents a controversy as to the order’s conclusion that claimant did not have good cause to reopen the hearing, the only relief that could be afforded claimant by EAB’s review would be remanding the matter for a hearing on the merits of the May 4, 2021 PUA determination, which would then present no justiciable controversy for the Office of Administrative Hearings (OAH) to resolve.

Claimant testified that she missed the hearing because she did not receive the notice of hearing for the 1:30 p.m. consolidated hearing, though she received the two notices of hearing for the hearings scheduled later that day. Transcript at 36-37. The order under review concluded that claimant missed the 1:30 p.m. hearing without good cause because she received all three hearing notices but misunderstood that they gave notice of three, rather than two, hearing times. Order No. 24-UI-251026 at 5. Further, the order concluded that the statutory presumption⁵ that claimant received documents properly mailed, combined with the fact that claimant admitted receiving two of the three notices, outweighed evidence that claimant did not receive the 1:30 p.m. hearing notice. Order No. 24-UI-251026 at 5. The record does not support these conclusions.

Claimant's testimony at hearing that she did not receive the 1:30 p.m. hearing notice is supported by the written explanation in her October 16, 2023, request to reopen, stating, "I did not receive a letter to appear at a phone hearing on October 9, 2023, at 1:30 p.m. I had received two packets stating for me to appear by phone on 10/9/2023 at 2:30 p.m. and the other one for 3:30 p.m." Order No. 24-UI-251027, Exhibit 1 at 3. Further, when asked at the 2:30 p.m. hearing why she had not appeared for the 1:30 p.m. hearing, claimant offered the same explanation. Moreover, as claimant's May 20, 2023, request for hearing only referred to appealing an overpayment and gave the date the overpayment waiver denial decision was issued, it is unlikely that claimant would have expected more than a total of two hearing notices for those two administrative decisions. The consistency of this evidence is sufficient to overcome the statutory mailing presumption, and the facts have been found accordingly. Therefore, the record shows that claimant missed the 1:30 p.m. hearing due to not receiving the notice of that hearing, which was a circumstance beyond her reasonable control. Accordingly, claimant has shown good cause for missing the hearing, and the request to reopen is allowed as to the December 8, 2021, PUA determination.

Late Request for Hearing on the December 8, 2021, PUA Determination. EAB considered the entire consolidated hearing record. Notwithstanding the jurisdictional issue discussed in footnote one of this decision, EAB agrees with the portion of Order No. 24-UI-251026 concluding that claimant's late request for hearing on the December 8, 2021, PUA determination should be allowed. Pursuant to ORS 657.275(2), that portion of Order No. 24-UI-251026 is **adopted**.

For these reasons, Order No. 24-UI-251026 is modified, claimant's request to reopen the hearing on the December 8, 2021, PUA determination is allowed, claimant's late request for hearing on the December 8, 2021, PUA determination is allowed, and the matter is remanded for a hearing on the merits of the December 8, 2021, PUA determination.

DECISION: The application for review of Order No. 24-UI-251027 presents no justiciable controversy and is dismissed. Order No. 24-UI-251026 is modified. Claimant's request to reopen the October 9, 2023, hearing on the December 8, 2021, PUA determination is allowed, claimant's late request for hearing on the December 8, 2021, PUA determination is allowed, and a hearing on the merits of the December 8, 2021, PUA determination is required.

⁵ It is presumed that a letter duly directed and mailed was received in the regular course of the mail. ORS 40.135(1)(q).

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

DATE of Service: April 29, 2024

NOTE: If the December 8, 2021, PUA determination is modified or reversed on remand or subsequent appeals, any other administrative decision that was issued based on the conclusions of the December 8, 2021, PUA determination, such as an assessment of overpayment or denial of an overpayment waiver, may be affected, even if such decisions are under appeal or would otherwise be considered final. The Department should therefore consider whether attempts to recover such an overpayment while the overpayment's validity is subject to direct or indirect appellate review would violate claimant's right to due process or statutory provisions. *See, e.g.,* ORS 657.310(3); ORS 657.315(2).

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Order No. 24-UI-251026 or return this matter to EAB. Only a timely application for review of the subsequent order will cause this matter to return to EAB.

NOTE: You may appeal this decision's dismissal of the application for review of Order No. 24-UI-251027 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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