

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0338

Late Application for Review Allowed ~ Order No. 24-UI-249547

Affirmed

Ineligible weeks 52-23 through 02-24

PROCEDURAL HISTORY: On January 18, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was not actively seeking work during the week of December 24, 2023 through December 30, 2023 (week 52-23) and was therefore ineligible to receive unemployment insurance benefits during that week. On January 24, 2024, the Department served notice of an administrative decision concluding that claimant was not available for work or actively seeking work during the weeks including December 31, 2023 through January 13, 2024 (weeks 01-24 through 02-24) and was therefore ineligible to receive unemployment insurance benefits during those weeks (decision # 143741). Claimant filed timely requests for hearing on both decisions.

On March 4, 2024, ALJ Enyinnaya conducted a consolidated hearing. On March 6, 2024, ALJ Enyinnaya issued Order No. 24-UI-249547, affirming the January 18, 2024 administrative decision, and on March 13, 2024 issued amended¹ Order No. 24-UI-249966, affirming decision # 143741. On March 26, 2024, Order No. 24-UI-249547 became final without claimant having filed an application for review with the Employment Appeals Board (EAB). On March 28, 2024, claimant filed a late application for review of Order No. 24-UI-249547 and a timely application for review of Order No. 24-UI-249966 with EAB.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Orders No. 24-UI-249547 and 24-UI-249966. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2024-EAB-0338 and 2024-EAB-0320).

FINDINGS OF FACT: (1) On December 22, 2023, claimant's employer laid claimant off due to lack of work, with an expectation that he would return to full-time work on February 5, 2024. Claimant

¹ The amended order replaced an order issued March 6, 2024 regarding decision # 143741 to correct an error in the ineligibility dates. Order No. 24-UI-249966 at 1.

resided in Oregon and maintained contact with his employer during this layoff period. Claimant was not a member of a union.

(2) From December 28, 2023 through January 11, 2024, claimant was in Hawaii visiting his girlfriend's family. He did not seek work during this time.

(3) On January 5, 2024, claimant filed an initial claim for unemployment insurance benefits. The Department determined claimant's claim was monetarily valid. Claimant thereafter claimed benefits for the weeks including December 31, 2023 through January 13, 2024 (weeks 01-24 through 02-24). These are the weeks at issue. The Department did not pay claimant benefits for these weeks.

(4) From January 11, 2024 through February 1, 2024, claimant was in Mexico visiting family. He did not seek work during this time. Claimant returned to his home in Oregon on February 1, 2024.

(5) On February 5, 2024, claimant returned to work for the employer.

(6) On March 6, 2023, Order No. 24-UI-249547 was mailed to claimant's address of record on file with the Office of Administrative Hearings (OAH). Order No. 24-UI-249547 stated, "You may appeal this decision by filing the attached form Application for Review with the Employment Appeals Board within 20 days of the date this decision is mailed." Order No. 24-UI-249547 at 3. Order No. 24-UI-249547's Certificate of Mailing also states, "Any appeal from this Order must be filed on or before March 26, 2024 to be timely."

(7) On March 13, 2024, Order No. 24-UI-249966, which amended and replaced an order issued March 6, 2024 regarding decision # 143741 was mailed to claimant's address of record on file with OAH. Order No. 24-UI-249966's Certificate of Mailing stated, "Any appeal from this Order must be filed on or before April 2, 2024 to be timely."

(8) On March 28, 2024, claimant filed applications for review of Orders No. 24-UI-249547 and 24-UI-249966.

CONCLUSIONS AND REASONS: Claimant's late application for review of Order No. 24-UI-249547 is allowed. Claimant was not available for work or actively seeking work during the weeks at issue.

Late application for review. An application for review is timely if it is filed within 20 days of the date that the Office of Administrative Hearings (OAH) mailed the order for which review is sought. ORS 657.270(6); OAR 471-041-0070(1) (May 13, 2019). The 20-day filing period may be extended a "reasonable time" upon a showing of "good cause." ORS 657.875; OAR 471-041-0070(2). "Good cause" means that factors or circumstances beyond the applicant's reasonable control prevented timely filing. OAR 471-041-0070(2)(a). A "reasonable time" is seven days after the circumstances that prevented the timely filing ceased to exist. OAR 471-041-0070(2)(b). A late application for review will be dismissed unless it includes a written statement describing the circumstances that prevented a timely filing. OAR 471-041-0070(3).

The application for review of Order No. 24-UI-249547 was due by March 26, 2024. Claimant filed his application for review of that order on March 28, 2024, and therefore the application for review was late.

OAH consolidated the hearings on the January 18, 2024 administrative decision and decision # 143741, and issued orders regarding both matters on March 6, 2024. However, Order No. 24-UI-249966 was subsequently issued on March 13, 2024, amending and replacing the order on decision # 143741. This began a 20-day period in which to file an application for review of that amended order. Since the matters were consolidated, it can be inferred that claimant mistakenly believed that the deadline to appeal both orders became April 2, 2024, the deadline stated in Order No. 24-UI-249966. Under these circumstances, this constituted a mistaken belief on claimant's part that amounted to a factor beyond his reasonable control that prevented timely filing. Therefore, good cause exists to extend the deadline for timely filing. Because the factor that prevented timely filing did not cease until claimant filed the late application for review on March 28, 2024, it was filed within a "reasonable time," and claimant's late application for review of Order No. 24-UI-249547 is allowed.

Actively seeking work week 52-23. EAB considered the entire consolidated hearing record. EAB agrees with Order No. 24-UI-249547's findings of fact, reasoning, and conclusion that claimant was not actively seeking work during week 52-23. Pursuant to ORS 657.275(2), Order No. 24-UI-249547 is **adopted**. The rest of this decision addresses the merits of Order No. 24-UI-249966.

Availability for work and actively seeking work weeks 01-24 through 02-24. For an individual to be considered "available for work" for purposes of ORS 657.155(1)(c), they must be:

- (a) Willing to work full time, part time, and accept temporary work opportunities, during all of the usual hours and days of the week customary for the work being sought, unless such part time or temporary opportunities would substantially interfere with return to the individual's regular employment; and
- (b) Capable of accepting and reporting for any suitable work opportunities within the labor market in which work is being sought, including temporary and part time opportunities; and
- (c) Not imposing conditions which substantially reduce the individual's opportunities to return to work at the earliest possible time; and
- (d) Physically present in the normal labor market area as defined by [OAR 471-030-0036(6) (March 25, 2022), every day of the week * * *.

* * *

OAR 471-030-0036(3) (March 25, 2022).

With few exceptions, including temporary unemployment as discussed in further detail below, to be actively seeking work as required under ORS 657.155(1)(c), an individual "must conduct at least five work-seeking activities per week," with two of the five work-seeking activities being a direct contact with an employer who might hire the individual. OAR 471-030-0036(5)(a) (March 25, 2022). "Direct contact" means "making contact with an employer in person, by phone, mail, or electronically to inquire

about a job opening or applying for job openings in the manner required by the hiring employer.” OAR 471-030-0036(5)(a)(B).

For individuals who are temporarily unemployed, OAR 471-030-0036(5)(b) defines “actively seeking work” as follows:

- (A) They are considered to be actively seeking work when they remain in contact with their regular employer and are capable of accepting and reporting for any suitable work with that employer;
- (B) There is a reasonable expectation that they will be returning to work for their regular employer. The work the individual is returning to must be full time or pay an amount that equals or exceeds their weekly benefit amount;
- (C) The department will not consider the individual to be temporarily unemployed if they were separated from their employer for reasons other than a lack of work, the work the individual is returning to is not with their most recent employer, or the length the individual is unemployed is longer than the period described in subsection (D) of this section; and
- (D) The department will consider that the period for which an individual is temporarily unemployed:
 - (i) Begins the last date the individual performed services for the employer. In the case of an individual still working for the employer, it is the last date worked during the week in which the individual had earnings less than their weekly benefit amount; and
 - (ii) Cannot be greater than four weeks between the week the individual became temporarily unemployed and the week the individual returns to work as described in subsection (B) of this section.

Both claimant and the employer testified that claimant was laid off for lack of work on December 22, 2023 with an expected return to full-time work on February 5, 2024. The record shows that claimant was unavailable for work during the weeks at issue because he was physically absent from his labor market for the entirety of those weeks. Claimant’s labor market was the city in Oregon where he resided. During the weeks at issue, claimant was in Hawaii, then Mexico, and was therefore absent from his labor market. The record does not show that claimant sought work or interviewed for jobs in Hawaii, Mexico, or elsewhere during those weeks. Accordingly, claimant was not available for work during those weeks due to his absence from his labor market.

Further, claimant was not actively seeking work during the weeks at issue. Claimant testified that he maintained contact with his employer during the weeks at issue, but did not otherwise conduct any work seeking activities during those weeks. Audio Record at 23:00; 26:30. Therefore, to be considered actively seeking work, claimant must have met the “temporarily unemployed” exception to the work-seeking requirements as set forth in OAR 471-030-0036(5)(b).

Claimant's employer testified that claimant was temporarily separated from their employ due to a lack of work and that claimant and the employer expected at the time of the layoff that he would return to work for the employer full-time on February 5, 2024. Audio Record at 31:29. Claimant became temporarily unemployed during the week of December 22, 2023 and remained unemployed for six weeks thereafter, as was anticipated at the time of the layoff. Because the length of time claimant was unemployed had been expected to exceed four weeks and did exceed four weeks, the temporary unemployment exception in OAR 471-030-0036(5)(b) was inapplicable, and claimant was required to perform five work-seeking activities each week to be considered actively seeking work. Because claimant did not perform five work-seeking activities in either of the weeks at issue, claimant was not actively seeking work those weeks.

For these reasons, claimant was not available for work or actively seeking work during weeks 01-24 through 02-24 and is ineligible to receive unemployment insurance benefits for those weeks.

DECISION: Claimant's late application for review of Order No. 24-UI-249547 is allowed. Orders No. 24-UI-249547 and 24-UI-249966 are affirmed.

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

DATE of Service: May 9, 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

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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