

EMPLOYMENT APPEALS BOARD DECISION
2024-EAB-0571-R

Request for Reconsideration Allowed
EAB Decision 2024-EAB-0571 Adhered to on Reconsideration

PROCEDURAL HISTORY AND FINDINGS OF FACT: On May 15, 2024, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant was discharged by the employer, but not for misconduct, and was not disqualified from receiving benefits based on the work separation (decision # L0004236771). The employer filed a timely request for hearing. On July 12, 2024, ALJ Fraser conducted a hearing and issued Order No. 24-UI-258927, affirming decision # L0004236771. On July 24, 2024, the employer filed an application for review with the Employment Appeals Board (EAB).

On August 23, 2024, EAB issued EAB Decision 2024-EAB-0571, affirming Order No. 24-UI-258927. On August 26, 2024, the employer filed a written argument, which EAB treated as a request for reconsideration of EAB Decision 2024-EAB-0571. This decision is issued pursuant to EAB's authority under ORS 657.290(3).

WRITTEN ARGUMENT: Claimant submitted a written argument by mail on August 20, 2024. Claimant's August 20, 2024, argument was received by EAB within the time period allowed under OAR 471-041-0080(1) and included a statement declaring that she provided a copy of her arguments to the opposing party (employer) as required by OAR 471-041-0080(2)(a). However, the argument was not received by EAB until August 23, 2024, the same day EAB Decision 2024-EAB-0571 was issued, and so could not be reviewed prior to the issuance of the decision. EAB has now reviewed claimant's August 20, 2024, written argument. The 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 EAB Decision 2024-EAB-0571. EAB considered claimant's August 20, 2024, argument to the extent it was based on the record.

On August 29 and 30, 2024, claimant made additional arguments and purported to rebut aspects of the employer's August 26, 2024, submission, which EAB construes as a request for reconsideration of EAB

Decision 2024-EAB-0571, and requested an extension of time to submit additional written arguments. EAB denied claimant's requests for an extension of time to submit additional written arguments.¹ Accordingly, EAB did not consider the arguments contained in claimant's August 29 and 30, 2024 emails to EAB because the arguments were not received by EAB within the time period allowed under OAR 471-041-0080(1) (May 13, 2019). Even if the arguments contained in claimant's August 29 and 30, 2024 emails had been timely, or claimant's requests for an extension of the deadline had been granted, EAB would not have considered the arguments because claimant did not include a statement declaring that she provided a copy of her arguments to the opposing party (employer) as required by OAR 471-041-0080(2)(a).

CONCLUSIONS AND REASONS: The employer's request for reconsideration is allowed. EAB Decision 2024-EAB-0571 is adhered to on reconsideration.

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).

On August 23, 2024, EAB issued EAB Decision 2024-EAB-0571. On August 26, 2024, the employer filed a written argument for EAB Decision 2024-EAB-0571, which EAB construes as a request for reconsideration. The employer's August 26, 2024, request for reconsideration was filed within 20 days of the mailing of EAB Decision 2024-EAB-0571 and included a statement that a copy was provided to the opposing party. The employer therefore filed a request for reconsideration consistent with the requirements set forth in OAR 471-041-0145, and the request for reconsideration is allowed.

However, the employer's request for reconsideration does not show that EAB Decision 2024-EAB-0571 contained an error of material fact or law, or was inconsistent with any Department rule, officially stated Department position, or prior Department practice. EAB Decision 2024-EAB-0571 therefore is adhered to on reconsideration.

The employer's August 26, 2024, submission followed a format in which the employer provided some written information as responses to the findings of fact in Order No. 24-UI-258927, and referred the reader to numerous attached documents: namely, the employer's employee handbook, some timesheets attributed to claimant, office messaging app chat messages between claimant and another person, and a few pages of the hearing transcript in the case. Some of the written information, such as the employer's assertion that they have now reviewed claimant's timesheets from before five months previous to January 2024, and all of the attached documents (except for the transcript pages) were not part of the hearing record. *See Request for Reconsideration at 2-3, 5-58.* EAB therefore also construes the employer's August 26, 2024, submission as a request for EAB to consider additional evidence per OAR

¹ To extend the deadline to file a written argument beyond August 28, 2024 would mean the total period allowed for written argument, including all extensions, would exceed 35 days from the July 24, 2024 application for review filing date, which is not permitted under OAR 471-041-0080(4)(a)(E).

471-041-0090(1)(b). Under that provision, “Any party may request that EAB consider additional evidence, and EAB may allow such a request when the party offering the additional evidence establishes that: (A) The additional evidence is relevant and material to EAB’s determination, and (B) Factors or circumstances beyond the party’s reasonable control prevented the party from offering the additional evidence into the hearing record.”

The employer’s request for EAB to consider additional evidence is denied. The employer failed to show under OAR 471-041-0090(1)(b)(B) that factors or circumstances beyond their reasonable control prevented them from offering the additional evidence into the record at hearing. At the hearing in this matter, the burden was on the employer to establish misconduct by a preponderance of evidence. *See Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). It was reasonably foreseeable that claimant would dispute material aspects of employer’s testimony at the hearing, and so was incumbent upon the employer to offer and ensure admission of the information contained in their August 26, 2024, submission at the time of hearing.

Indeed, the vast majority of the documents attached to the employer’s August 26, 2024, submission were among the documents the ALJ marked as Exhibit 1, and declined to admit into the hearing record because the employer failed to serve copies of them on claimant before the hearing. The employer’s owner conceded at the hearing in this matter that she had not served claimant with copies of the documents. Audio Record at 5:22. The ALJ reminded the employer’s owner that service on claimant was required, reading from the notice of hearing that “if you have other documents that you wish to have considered, you must provide copies of your documents to all parties and to the ALJ at the Office of Administrative Hearings at their addresses as listed on the certificate of mailing.” Audio Record at 5:29. The ALJ asked claimant if she objected to admission of the documents, and claimant advised that she did. Audio Record at 6:19. The ALJ then ruled that the documents would not be admitted. Audio Record at 6:21. Given that the employer did not serve claimant with the documents prior to the start of the hearing, the ALJ’s ruling was correct. *See OAR 471-040-0023(4)* (August 1, 2004) (“Prior to commencement of an evidentiary hearing that is held by telephone, each party and the Department shall provide to all other parties and to the Department copies of documentary evidence that it will seek to introduce into the record.”).

Thus, the employer has not shown that it was beyond their reasonable control to provide the new information contained in their August 26, 2024, submission at hearing. To the extent the new information was offered as part of Exhibit 1, but excluded at hearing because the employer failed to serve them on claimant, the ALJ ruled correctly, and the ALJ’s ruling did not constitute a factor beyond the employer’s reasonable control because it was within the employer’s reasonable control to comply with the administrative rule and serve copies of the documents on claimant.

Because the employer failed to establish that our decision contained an error of material fact based on the evidence received into evidence at the hearing, EAB Decision 2024-EAB-0571, which concluded that claimant was discharged, but not for misconduct, is adhered to on reconsideration and remains undisturbed.

DECISION: The employer’s request for reconsideration is allowed. EAB Decision 2024-EAB-0571 is adhered to on reconsideration.

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

DATE of Service: September 19, 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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