

EMPLOYMENT APPEALS BOARD DECISION

2014-EAB-1197

Reversed & Remanded

PROCEDURAL HISTORY: On May 21, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct but that claimant's benefit rights based on wages earned prior to his discharge were not canceled (decision # 12571). Claimant filed a timely request for hearing. On June 24, 2014, ALJ Vincent conducted a hearing, and on July 3, 2014 issued Hearing Decision 14-UI-20878, reversing the Department's decision. On July 14, 2014, the employer filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-20878 is reversed and this matter is remained for further proceedings.

At hearing, the employer's president testified that claimant's alleged sabotaging of the employer's computer network on April 19 and 20, 2014 was the proximate claimant's discharge. Transcript at 21, 22. In Hearing Decision 14-UI-20878, the ALJ concluded that, based on claimant's testimony that the employer's computer network did not keep sufficiently detailed records of users' activities after they logged in to demonstrate that claimant engaged in the alleged acts of sabotage and at least five other employees had sufficient access to the network to sabotage it, the employer did not establish that claimant had committed the sabotage for which the employer discharged claimant. Hearing Decision 14-UI-20878 at 3; *see also* Transcript at 39, 40, 41, 46, 48. At hearing the employer's president disputed claimant's testimony. The president contended that the employer had generated various network activity logs from its system and had various screen shots of claimant's activities while on his laptop to show definitively that claimant had sabotaged the employer's network on April 19 to 20, 2014 by deleting certain servers and information back-ups from the network and by removing certain users from having access to the network and deleting their passwords. Transcript at 18-19, 31, 46, 47, 48-49. To resolve this conflict, the ALJ held the record open until June 28, 2014 to allow the employer to submit copies of

the activity logs and screen shots to corroborate its testimony. Transcript at 51, 52. Although the employer sent its documents to the ALJ on June 25, 2014, complying with the stated deadline, the ALJ did not mark them as a hearing exhibit or otherwise refer to them in Hearing Decision 14-UI-20878. EAB has marked these documents as EAB Exhibit 1 and admitted them into the evidence to complete the record. A copy of EAB Exhibit 1 is enclosed with this decision. Any party that objects to our admitting EAB Exhibit 1 into the record must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090 (October 29, 2006). Unless such objection is received and sustained, EAB Exhibit 1 will remain in the record. On remand, the ALJ should consider the significance of EAB Exhibit 1 to a determination of whether claimant sabotaged the employer's computer network.

In reviewing them, EAB has questions about the logs and screen shots that the employer submitted on June 25, 2014 and cannot determine their evidentiary weight without further inquiry. First, the ALJ should inquire as to the sources from which and how the logs and screen shots were generated as well as whether there are any indications on the face of them that indicate their authenticity, i.e., that they were created by some computer software or program as opposed to being fraudulently created for purposes of the hearing. For each log entry, the ALJ should further inquire as to what change(s) each indicates was made to the employer's network and what part of the entry led the employer to conclude that only claimant could have made the indicated change(s). For example, although the entry for 4/19/2014 at 10:08:57 p.m. shows that the account name "dougf" created a new user account for "Good Luck," there does not appear to us to be any basis to rule out that some other employee created the new user account using claimant's account name to do so and subsequently accessed the network as "Good Luck." EAB Exhibit 1 at 10. While the log entry for 4/20/2014 at 2:17:24 p.m. appears to indicate in the "network information" section that the network was accessed by the user "Good Luck" from claimant's laptop computer when it refers to "DOUGFLAPTOP," none of the other log entries appears to show any basis on which to infer the network was accessed by claimant or through his laptop. *See* EAB Exhibit 1 at 12 (4/19/2014 at 10:10:29 p.m.), 13 (4/19/2014 at 10:25:46), 14 (4/19/2014 at 10:28:18), 16 (4/19/2014 at 10:29:26 p.m.), 16-17 (4/19/2014 also at 10:29:26 p.m.), 17-18 (4/19/2013 also at 10:29:26) 18-19 (4/19/2014 at 10:31:45), 19-20 (4/19/2014 at 10:32:24), 21 (4/20/2014 at 2:17:24 p.m.). The ALJ should ask the employer's witness on remand to confirm that we have correctly interpreted the log entries, to provide an explanation of what activities each log entry shows (including, particularly, the significance of the log entry for 4/20/2014) and how the employer determined from these entries that only claimant could have been engaged in the activities that they recorded. If the employer is relying on the apparent fact that "dougf" created the user "Good Luck" and all subsequent changes to the network were effected by "Good Luck," the ALJ should inquire about the employer's safeguards to ensure that the account "dougf" could only have been used by claimant and whether other network users might have had obtained access to the network as "dougf" or "Good Luck." Further needed inquiries include whether the reference to "DOUGFLAPTOP" in the "network information" section for the entry on 4/20/2014 means that the network was accessed by a laptop computer believed to be only in claimant's possession and, if so, whether anyone else might have obtained access to claimant's laptop on April 19-20, 2014. Additionally, the ALJ should inquire as to the reason that there is no "network information" section in any of the log entries for 4/19/2014 showing that the network was accessed from claimant's laptop to make the indicated changes as there was for 4/20/2014.

In connection with the screen shots, as above, the employer needs to explain what alleged act of sabotage each of them indicates, from what information it drew these conclusions and from what

information displayed on each of them did the employer conclude that only claimant could have made the changes effected. Although the first screen shot appears to indicate in the "Data" section that the network was accessed by "dougflaptop.ad.cusolution.com," which we interpret as claimant's laptop, our interpretation requires confirmation, the significance of the "Data" section requires explanation and it also needs to be explained why that, and some other screen shots, did not include information in the "requester" section when many of the other screen shots did and the significance of the information in the "requester" section. EAB Exhibit 1 at 23; See EAB Exhibit 1 at 24 (includes requestor information), 25 (includes requester information), 26 (does not include requester information), 27 (includes as requester information that user was dougf), 28 (includes user information but no data information), 29 (includes requester information) The subsequent screen shots do not clearly indicate to us who might have made the indicated changes to the network and further explanation is needed to enable a determination of how the employer concluded that claimant made the changes indicated. In addition, we require an explanation of why the times of day shown on the screen shots do not match the times of day shown on the activity logs for the network access and why claimant as the requester or claimant's laptop as the point of access to the network was only shown on some of the screen shots. As well, it would be appropriate to inquire why the activity logs do not appear to match the activities shown in the screen shots.

Although we have presented many points of inquiry about the logs and screen shots that would properly be raised with the employer's witnesses in the first instance, claimant and his witness should also be allowed to address each of them and have an opportunity to respond. Claimant should also be allowed to respond to and explain the purposes for which he sent the several emails that the employer submitted in EAB Exhibit 1. Moreover, since there was no evidence at hearing about why claimant might have sabotaged the computer network, the ALJ should inquire about claimant's alleged motives. Furthermore, the ALJ should inquire whether, if it appears that the employer's logs and screen shots show that claimant accessed the network on April 19-20, 2014, whether there might have been innocent explanations for the type of access they indicate.

In addition, the ALJ determined that claimant's witness, who was apparently the employer's network engineer or network security administrator, would not be allowed to testify at hearing because his testimony would have been cumulative and duplicative of other testimony. Transcript at 44, 54-55. Given the technical nature of the network sabotage that the employer contended claimant engaged in, and the apparent expertise of claimant's witness in that network, the ALJ should have taken evidence from that witness. On remand, to the extent that claimant is able to secure the witness's attendance, the ALJ should confirm that witness's qualifications, and, if they are acceptable, to inquire of that witness about ability of the network to monitor users' activities, whether the employer's logs and screen shots appear to be authentic and if he agrees or disagrees with the employer's interpretations of them or any other evidence that the employer presents about how it determined that only claimant could have made the changes to the network indicated in them. Furthermore, the employer's president testified at hearing that communicated with the witness on April 19, 2014 about what was occurring on the network and that, on April 20, 2014, another employee communicated with the witness and the witness locked claimant out of the network at that time. Transcript at 20, 23. The ALJ should inquire of the witness what was discussed during both of those contacts, if he had any other contacts on the weekend of April 19 to 20, 2014 about any alleged changes to the network or about claimant and what they were, what information was relayed to the witness and, if the witness locked claimant out of the network on April 20, 2014 or any other day, why he did so. The ALJ also should pursue appropriate inquiries with the

witness to determine whether he has any other information about claimant's alleged acts of sabotage to the employer's computer network or relevant to claimant's contention that the employer created the sabotage as a pretext to discharge him. Absent the inquiries described above, EAB is unable to determine whether claimant engaged in the acts that the employer contended and whether the employer discharged claimant for misconduct.

ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ to ensure that the record developed at the hearing shows a full and fair inquiry into the facts necessary for consideration of all issues properly before the ALJ in a case. ORS 657.270(3); *see accord Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether claimant was discharged for misconduct, Hearing Decision 14-UI-20878 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 14-UI-20878 is set aside, and this matter remanded for further proceedings consistent with this order.

Tony Corcoran and J. S. Cromwell;
Susan Rossiter, not participating.

DATE of Service: August 28, 2014

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-20878 or return this matter to EAB. Only a timely application for review of the subsequent hearing decision will cause this matter to return to EAB.

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 website at court.oregon.gov. Once on the website, click on the blue tab for "Materials and Resources." On the next screen, click on the tab that reads "Appellate Case Info." On the next screen, select "Appellate Court Forms" from the left panel. On the next page, select the forms and instructions for the type of Petition for Judicial Review that you want to file.

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