

EMPLOYMENT APPEALS BOARD DECISION
2014-EAB-1867

Reversed & Remanded

PROCEDURAL HISTORY: On October 10, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 150907). Claimant filed a timely request for hearing. On November 24, 2014, ALJ Seideman conducted a hearing, and on November 26, 2014 issued Hearing Decision 14-UI-29424, affirming the Department's decision. On December 8, 2014, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 14-UI-29424 should be reversed, and this matter remanded for additional proceedings consistent with this order.

This matter comes before EAB to determine whether, on the facts developed at the hearing, claimant should be disqualified from receiving benefits based on her discharge from her position as director of health and wellness for the employer's assisted living facility. In a discharge case, the employer has the burden to establish that claimant should be disqualified from benefits because the discharge was for misconduct. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976). However, 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).

The employer's position at hearing was that claimant's discharge was for misconduct, alleging repeated instances of insubordination, refusals to complete resident observation and evaluation reports, refusing to participate in disciplining a medication aide for a medication error, failing to timely complete a

resident intake assessment and unlawfully backdating the assessment when she did complete it. In support, the employer's executive director referred to a 96-page packet of information that had, inadvertently, not been sent to the Office of Administrative Hearings prior to the hearing. *See* Transcript at 7-8. The executive director described the content of the packet to include specific information supporting its allegations of misconduct, including information about claimant's performance history with respect to documentation. *See e.g.* Transcript at 8, 23. Repeatedly throughout the hearing, claimant also told the ALJ that she was unable to answer questions or recall specific information about her conduct because she lacked documentation. *See e.g.* Transcript at 12, 23, 40.

The comments by both the employer and claimant established the materiality of the employer's documentation, not only to the employer's ability to prove misconduct, but claimant's ability to refute the allegations. However, the ALJ failed to ask the employer to list the specific instances listed in the documentation, and tacitly refused to allow the employer to submit the documentation, explaining that the employer should have done so prior to the hearing, and stating that, in any event, "I don't judge by the ream of paper and 97 pages, I've gotta say, probably 95 of it isn't that important, matter – or maybe I shouldn't say it that way, but we don't go through and digest every single page . . . I don't think 97 pages is gonna help that much." Transcript at 27-28. Although the ALJ is correct that the employer should, ideally, have submitted any documentation to OAH and claimant prior to the hearing, and that the employer or its representative had received instructions to that effect, nothing in the laws or rules applicable to the conduct of administrative hearings prohibits or precludes the ALJ from continuing a hearing, or holding a record open after the close of testimony, to allow submission of documents where, as here, both parties to the hearing indicated that the lack of documentation impaired their abilities to present their cases, and it is probable that the documents are relevant, material, and necessary to the development of a complete record. ORS 657.270; OAR 471-040-0025.

Additionally, although the employer's executive director testified that claimant was discharged, in part, for insubordination, based on claimant's alleged repeated circumvention of the chain of command despite having been instructed otherwise, the ALJ did not inquire with the employer about any specific instances of such conduct, nor did the ALJ ask the employer to read from any documentation it might have had concerning any such instances, which also impaired claimant's ability to respond to the employer's allegations. Finally, although the employer's executive director specifically stated during the hearing that the assistant executive director, a witness at the hearing, saw every conversation the executive director had with claimant about her record keeping and insubordination, the ALJ did not ask that witness whether that was true, what she had observed on any of those occasions, how many times she observed such conversations, or when the conversations occurred. *Compare* Transcript at 7, 33; Transcript at 36-39. Nor did the ALJ ask claimant whether or how frequently the assistant executive director was present during her conversations with the executive director.

Because the ALJ failed to allow the employer to either submit its documentation, or, in the alternative, to provide detailed testimony concerning its contents, and failed to conduct a thorough inquiry of both parties, the record fails to support a decision that claimant's discharge was, or was not, for misconduct. Therefore, we must reverse Hearing Decision 14-UI-29424 as unsupported by a complete record, and remand this matter for development of the record.

Because the ALJ's commentary concerning the employer's proffered documentation packet suggests that the ALJ might have already reached a determination as to the evidentiary value of its content

(Transcript at 27-28), and to avoid any perception of bias or impropriety by either party, it is recommended that the ALJ consider recusing himself from further participation in this matter, and a different ALJ be assigned to conduct new proceedings on remand.

NOTE: If on remand the employer wishes to have its documentation packet considered by the ALJ, the employer must submit its documentation to the Office of Administrative Hearings and send a copy of it to claimant in time for both to receive that documentation prior to the remand hearing.

The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 14-UI-29424 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.

DECISION: Hearing Decision 14-UI-29424 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: January 5, 2015

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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