

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-0371

Reversed & Remanded

PROCEDURAL HISTORY: On December 5, 2014, the Oregon Employment Department (the Department) served two notices of two administrative decisions, one concluding claimant was not available for work from October 12, 2014 through November 8, 2014 (decision # 90835), and the other concluding claimant voluntarily left work without good cause from Hush Puppies Retail Inc. (decision # 83623). On December 18, 2014, claimant filed timely requests for hearing on both decisions.

On January 15, 2015, the Office of Administrative Hearings (OAH) mailed notice of a hearing on decision # 83623 scheduled for January 29, 2015 at 10:45 a.m. Claimant subsequently contacted OAH and requested that the hearing be rescheduled due to a conflict with claimant's class schedule. On January 28, 2015, OAH mailed notice of a hearing on decision # 83623 scheduled for January 28, 2015 at 8:15 a.m., and notice of a hearing on decision # 90835 scheduled for the same date at 9:30 a.m.

On February 17, 2015, ALJ Vincent mailed two hearing decisions, both dismissing claimant's hearing requests for failure to appear at both of the January 28, 2015 hearings, Hearing Decisions 15-UI-33605 and 15-UI-33606. On March 6, 2015, claimant filed timely requests to reopen. With one of his requests, claimant wrote:

I'm requesting my hearing to be reopened because it was set for a date & time that I had previously asked to be cancelled. I had a quiz in my anatomy class at that time. My classes are from 8am – 1³⁰pm Tuesday & Thursday. The record will show I called multiple times about this class. Thanks.

On March 12, 2015, ALJ Kangas issued two hearing decisions, both denying claimant's request to reopen, Hearing Decisions 15-UI-35026 and 15-UI-35355. On April 1, 2015, claimant filed an application for review of Hearing Decisions 15-UI-35026 and 15-UI-35355 with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-35026 and 15-UI-35355. For case-tracking purposes, this decision is being issued in duplicate (EAB Decisions 2015-EAB-0370 and 2015-EAB-0371).

CONCLUSIONS AND REASONS: Hearing Decisions 15-UI-35026 and 15-UI-35355 must be reversed, and the matter remanded to OAH.

In Hearing Decisions 15-UI-35026 and 15-UI-35355, the ALJ concluded that claimant did not show good cause to reopen the hearings in these matters because, in part, "Appellant's choosing to attend school is not good cause for missing the scheduled hearing."¹ Assuming *arguendo* that claimant missed the hearing to attend school, the ALJ did not cite to any law or rule plainly stating that choosing school over hearing attendance is not good cause. OAR 471-040-0040 defines "good cause" to include "an action, delay, or failure to act [that] arises from an excusable mistake or from factors beyond an applicant's reasonable control," and the record must be developed with facts about that decision sufficient to make a determination under the cited rule.

It appears more likely that claimant missed the hearings in these matters because his attempts to have the hearings rescheduled failed, because of a mistaken belief that his attempts to have the hearings rescheduled was successful, or because of confusion resulting from his attempts to reschedule the hearings. Therefore, the relevant question is whether claimant's attempts to reschedule the hearings, mistaken belief that he had rescheduled the hearings or confusion about the hearings was the result of an excusable mistake or factors beyond claimant's reasonable control. Regarding that question, the ALJ "considered the information he provided that he had asked to have the hearing 'cancelled,'" but because claimant did not provide any information about his attempts or contacts with OAH or the Department and because there was "no evidence" of record that claimant had requested postponement, he did not show that he missed the hearing because of an excusable mistake or factors beyond his reasonable control.² The record fails to support the ALJ's conclusion, however, because OAH records show evidence of at least one contact between claimant and OAH that caused the hearing to be rescheduled "Due to Claimant Request" because "Participant School Schedule Conflicts with Hearing."³

The existence of that evidence lends credence to claimant's claim that he had provided OAH with information about his class schedule, undertaken to request postponement at least once, and that OAH staff had, in fact, rescheduled at least one hearing based on claimant's request. However, the quality of that evidence is inadequate to support reopening the hearings without an additional inquiry into the circumstances that caused claimant to miss the hearings on January 28th, for example, information from claimant about his conversation or conversations with OAH staff about his availability for the hearings and information from OAH records concerning claimant's postponement request(s). Additionally,

¹ Hearing Decision 15-UI-35255 at 2; Hearing Decision 15-UI-35026 at 2.

² Hearing Decision 15-UI-35255 at 2-3; Hearing Decision 15-UI-35026 at 2.

³ We take notice of this fact, which is contained in Employment Department records. Any party that objects to our doing so 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(3) (October 29, 2006). Unless such objection is received and sustained, the noticed fact will remain in the record of both cases as EAB Exhibit 1.

claimant's reopen request listed his class and quiz schedule on Tuesdays and Thursdays, but does not include information about what claimant's class schedule was on Wednesday, January 28th, when he missed the hearings, or what it was that prevented his attendance at one or both hearings.

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 showed good cause to reopen the hearings, Hearing Decisions 15-UI-35026 and 15-UI-35355 are reversed, and these matters remanded for development of the record.

DECISION: Hearing Decisions 15-UI-35026 and 15-UI-35355 are set aside, and this matter remanded for further proceedings consistent with this order.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decisions 15-UI-35026 and 15-UI-35355 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.

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

DATE of Service: May 14, 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 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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