

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1113-R

Reconsideration Granted
Hearing Decisions 15-UI-43819, 15-UI-43838 and 15-UI-43811 Reversed and Remanded

PROCEDURAL HISTORY: On June 19, 2015, the Oregon Employment Department (the Department) served notice of the following three administrative decisions: decision # 150248 concluded that claimant did not fail to accept suitable work offered on March 31, 2015; decision # 150600 concluded that claimant did not fail to accept suitable work offered on April 5, 2015; and decision # 145309 concluded that claimant did not fail to accept suitable work offered on March 23, 2015. The employer filed timely requests for hearing. On August 25, 2015, ALJ Wyatt conducted a consolidated hearing, and on September 2, 2015, issued the following hearing decisions: Hearing Decision 15-UI-43819 affirmed decision # 150248; Hearing Decision 15-UI-43838 affirmed decision # 150600; and Hearing Decision 15-UI-43811 affirmed decision # 145309. On September 21, 2015, the employer filed applications for review with the Employment Appeals Board (EAB). On October 9, 2015, EAB issued Appeals Board Decisions 2015-EAB-1113, 2015-EAB-1114 and 2015-EAB-1115 in which it affirmed the hearing decisions at issue. Also on October 9, 2015, EAB received the employer's written argument. Under the authority granted to us by ORS 657.290(3), we will reconsider Appeals Board Decisions 2015-EAB-1113, 2015-EAB-1114, and 2015-EAB-1115 to consider the employer's written argument.

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review in this matter. For case-tracking purposes, this decision is being issued in triplicate (EAB Decisions 2015-EAB-1113-R, 2015-EAB-1114-R and 2015-EAB-1115-R).

EVIDENTIARY MATTER: In its written argument, the employer provided documents marked as Exhibit 2, which consisted of information regarding employment of teacher assistants taken from the Department’s website, qualityinfo.org. Exhibit 2 was not offered into evidence at the hearing in these cases. Under OAR 471-041-0090 (October 29, 2006), EAB may consider new information if the information is relevant and material to EAB’s determination and the party offering the information shows it was prevented by circumstances beyond its reasonable control from presenting the information at the hearing. For the reasons explained below, the information contained in Exhibit 2 is not relevant to EAB’s determination to reverse and remand these cases, and EAB will therefore not consider this evidence. We note, however, that this information may become relevant during further proceedings in these matters; if so, the employer will have the opportunity to offer Exhibit 2 at that time.

CONCLUSION AND REASONS: The employer’s request for reconsideration is granted. On reconsideration, Hearing Decisions 15-UI-43819, 15-UI-43838, and 15-UI-43811 are reversed and remanded to the Office of Administrative Hearings (OAH) for further development of the record.

In the hearing decisions at issue, the ALJ concluded that claimant was not subject to disqualification from receipt of unemployment benefits under ORS 657.176(2)(e)¹ for failing to accept work offered as a substitute instructional assistant by the employer, the Salem Keizer Public Schools. The ALJ based his conclusion on the rate of pay for the work offered, which was \$13.17 per hour. Because the ALJ found that this wage was ten percent lower than the median rate of pay for similar work in the locality, which the Department determined was \$16.33 per hour, the ALJ held that the work was not suitable. Hearing Decision 15-UI-43838 at 4. The ALJ erred in reaching this conclusion, however.

ORS 657.195(1)(b) provides that unemployment benefits will not be denied to an individual for refusing to accept new work if the remuneration is “substantially less favorable to the individual than those prevailing for similar work in the locality.” OAR 471-030-0037(2) (August 3, 2011) states, in relevant part: “[i]n applying the provisions of ORS 657.176(2)(e) and 657.195(1)(b), if inadequate rate of pay *is one of the reasons* for refusing to accept new work, the work is not suitable if the rate of pay is substantially less favorable than the rate of pay prevailing in the locality.” (Emphasis added). The ALJ did not apply this rule, however. Instead, he held that claimant was not disqualified for failing to accept suitable work under OAR 471-030-0037(1) which applies only to individuals disqualified from receipt of unemployment benefits for failure to apply for suitable work when referred by the Department or director under ORS 657.176(2)(d). Because the ALJ did not consider the appropriate rule, he did not conduct an inquiry into the facts sufficient to determine why claimant rejected each of the substitute assignments the employer offered her.

On remand, the ALJ must ask claimant the reasons why she rejected each of the assignments the employer offered her, and ask whether inadequate pay was one of these reasons. If the ALJ determines that inadequate rate of pay was one of the reasons claimant refused to accept any of these assignments, then the ALJ must conduct additional inquiry to determine whether the rate of pay was “substantially less favorable than the rate of pay prevailing in the locality” as determined by Department employees “using available research data compiled by the department.” OAR 471-030-0037(2). We agree with the employer that the record lacks substantial evidence to support the Department’s conclusion regarding

¹ Under ORS 657.176(2)(e), an individual is disqualified from the receipt of unemployment benefits if the individual “[f]ailed without good cause to accept suitable work when offered.”

the prevailing rate of pay for an instructional assistant in the appropriate locality. At the hearing, the Department representative testified that the Department determined the prevailing rate of pay as \$16.33 per hour because that was the median pay for teachers' assistants in Marion, Polk and Yamhill counties. Transcript at 5. The representative referred to data on a Department website, qualityinfo.org, as the basis for this determination, but never indicated what data on this website was used to calculate the wage of \$16.33 per hour. Transcript at 8. If evidence regarding the prevailing rate of pay becomes relevant at the hearing on remand, the Department must provide the data upon which its calculations of the prevailing wage rate were made, and also provide more detailed testimony to explain how this data was obtained, how and why this data was used to calculate the prevailing wage rate, and why this prevailing wage rate is appropriate for use in these cases.

Under ORS 657.290(3), EAB may reconsider a decision to correct an error of fact or law. EAB erred in affirming the ALJ's mistaken conclusion in Hearing Decisions 15-UI-43819, 15-UI-43838, and 15-UI-43811. ORS 657.270 requires the ALJ to give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires the ALJ 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 failed to accept suitable work when offered, we will, on reconsideration, reverse the hearing decisions at issue and remand these matters for further development of the record.

DECISION: Reconsideration is granted. Hearing Decisions 15-UI-43819, 15-UI-43838, and 15-UI-43811 are reversed, and these matters remanded for further development of the record.

Susan Rossiter and J.S. Cromwell

DATE of Service: October 15, 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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