

EMPLOYMENT APPEALS BOARD DECISION
2015-EAB-1168

Reversed and Remanded

PROCEDURAL HISTORY: On July 27, 2015, the Oregon Employment Department (the Department) served 31 notices of 31 administrative decisions concluding claimant had good cause for refusing offers of unsuitable work on May 13, 2015 (decision # 113010), April 12, 2015 (decision # 91942), May 12, 2015 (decision # 112045), April 28, 2015 (decision # 102014), May 3, 2015 (decision # 103432), April 28, 2015 (decision # 102338), May 3, 2015 (decision # 104007), May 4, 2015 (decision # 104758), May 7, 2015 (decision # 150829), May 7, 2015 (decision # 105526), May 7, 2015 (decision # 110045), April 23, 2015 (decision # 101638), April 7, 2015 (decision # 83540), April 1, 2015 (decision # 80255), May 13, 2015 (decision # 112457), April 10, 2015 (decision # 90251), April 9, 2015 (decision # 84659), April 13, 2015 (decision # 92603), April 19, 2015 (decision # 94052), April 15, 2015 (decision # 93543), April 19, 2015 (decision # 94700), April 21, 2015 (decision # 101425), April 19, 2015 (decision # 94435), April 16, 2015 (decision # 93825), April 13, 2015 (decision # 92911), April 13, 2015 (decision # 92256), April 10, 2015 (decision # 90816), April 10, 2015 (decision # 85449), April 7, 2015 (decision # 84235), April 6, 2015 (decision # 83059), and April 3, 2015 (decision # 82038). The employer filed timely requests for hearing. On September 8, 2015, ALJ M. Davis conducted a consolidated hearing, and on September 10, 2015 issued Hearing Decisions 15-UI-44194, 15-UI-44162, 15-UI-44192, 15-UI-44179, 15-UI-44183, 15-UI-44181, 15-UI-44185, 15-UI-44188, 15-UI-44190, 15-UI-44189, 15-UI-44191, 15-UI-44178, 15-UI-44154, 15-UI-44152, 15-UI-44193, 15-UI-44159, 15-UI-44156, 15-UI-44164, 15-UI-44171, 15-UI-44168, 15-UI-44175, 15-UI-44176, 15-UI-44173, 15-UI-44170, 15-UI-44166, 15-UI-44163, 15-UI-44161, 15-UI-44157, 15-UI-44155, 15-UI-44153, and 15-UI-44151, affirming the Department's decisions. On September 30, 2015, the employer filed timely applications for review of all 31 decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 15-UI-44194, 15-UI-44162, 15-UI-44192, 15-UI-44179, 15-UI-44183, 15-UI-44181, 15-UI-44185, 15-UI-44188, 15-UI-44190, 15-UI-44189, 15-UI-44191, 15-UI-44178, 15-UI-44154, 15-UI-44152, 15-UI-44193, 15-UI-44159, 15-UI-44156, 15-UI-44164, 15-UI-44171, 15-UI-44168, 15-UI-44175, 15-UI-44176, 15-UI-44173, 15-UI-44170, 15-UI-44166, 15-UI-44163, 15-UI-44161, 15-UI-44157, 15-UI-44155, 15-UI-44153, and 15-UI-44151. For case-tracking purposes, one EAB Decision is being issued to correspond with each hearing decision, so this decision is being issued as EAB Decisions 2015-EAB-1170, 2015-EAB-1150, 2015-EAB-1169, 2015-EAB-1161, 2015-EAB-1163, 2015-EAB-1162, 2015-EAB-1164, 2015-EAB-1165, 2015-EAB-1167, 2015-EAB-1166, 2015-EAB-1168, 2015-EAB-1160, 2015-EAB-1144, 2015-EAB-1142, 2015-EAB-1140, 2015-EAB-1148, 2015-EAB-1146, 2015-EAB-1152, 2015-EAB-1156, 2015-EAB-1154, 2015-EAB-1158, 2015-EAB-1159, 2015-EAB-1157, 2015-EAB-1155, 2015-EAB-1153, 2015-EAB-1151, 2015-EAB-1149, 2015-EAB-1147, 2015-EAB-1145, 2015-EAB-1143, and 2015-EAB-1141.

CONCLUSION AND REASONS: The hearing decisions under review are reversed, and these matters 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 and substitute library media assistant by the employer, the Salem Keizer Public Schools. The ALJ based her conclusion on the rate of pay for each of the substitute assignments offered. Because the rate of pay offered for the each of the assignments 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. 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 correctly apply this rule, however. Instead, she 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, she 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

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.”

“using available research data compiled by the department.” OAR 471-030-0037(2). At the hearing, the Department representative testified that the Department determined the median rate of pay by looking at “Oregon Wage and Labor” information for Marion County, obtained “[o]ff the internet.” Transcript at 8. The representative testified that he was unaware how the median rate of pay was calculated. Transcript at 9. 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.

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 reverse the hearing decisions at issue and remand these matters for further development of the record.

DECISION: Hearing Decisions 15-UI-44194, 15-UI-44162, 15-UI-44192, 15-UI-44179, 15-UI-44183, 15-UI-44181, 15-UI-44185, 15-UI-44188, 15-UI-44190, 15-UI-44189, 15-UI-44191, 15-UI-44178, 15-UI-44154, 15-UI-44152, 15-UI-44193, 15-UI-44159, 15-UI-44156, 15-UI-44164, 15-UI-44171, 15-UI-44168, 15-UI-44175, 15-UI-44176, 15-UI-44173, 15-UI-44170, 15-UI-44166, 15-UI-44163, 15-UI-44161, 15-UI-44157, 15-UI-44155, 15-UI-44153, and 15-UI-44151 are reversed, and these matters remanded for further development of the record.

Susan Rossiter and J. S. Cromwell

DATE of Service: October 20, 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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