

**EMPLOYMENT APPEALS BOARD DECISION**  
**2016-EAB-0114**

*Reversed & Remanded*

**PROCEDURAL HISTORY:** On December 1, 2015, the Oregon Employment Department (the Department) served notice of a wage and potential benefit report. On December 11, 2015, the wage and potential benefit report became final. On January 2, 2016, the Department served notice of another decision that included a notice that claimant had a 10-day deadline within which to request a hearing. On January 5, 2016, claimant filed a request for hearing. The Office of Administrative Hearings (OAH) determined that claimant's request applied to the December 1, 2015 wage and potential benefit report. On January 6, 2016, ALJ Kangas concluded claimant's request for hearing was late, and issued Hearing Decision 16-UI-50584, dismissing claimant's request for hearing subject to her right to renew the request by responding to an appellant questionnaire by January 20, 2016. On January 12, 2016, OAH received claimant's response. On January 28, 2016, ALJ Kangas reviewed claimant's response and issued Hearing Decision 16-UI-51847, re-dismissing claimant's request for hearing. On February 1, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

**CONCLUSIONS AND REASONS:** Hearing Decision 16-UI-51847 should be reversed, and this matter remanded for additional proceedings.

Under ORS 657.266(1), the Department must examine each claim for benefits to determine the total amount of wages paid to the claimant during the base year, whether the amount is sufficient to qualify the claimant for benefits, and, if so, the weekly and maximum benefit amounts payable. ORS 657.266(1) and (3) permit the Department to amend its initial determination. ORS 657.266(5) provides that an individual has 10 days to request a hearing on such an initial or amended determination. OAR 471-040-0005 provides, in pertinent part, that a party may request a hearing by phone to the Department, and may do so by "specifically request[ing] a hearing or otherwise express[ing] a present intent to appeal."

The record must be developed as to which Department decision was the subject of claimant's January 5, 2016 request for hearing. On January 5, 2016, claimant faxed OAH a letter in which she stated, "I would like to request a hearing on the amount of my unemployment benefits." OAH construed claimant's request as a request for hearing on the wage and potential benefit report the Department

mailed claimant on December 1, 2015, which stated, “this report becomes final unless you request redetermination of the report or request a hearing within 10 days,” and concluded that claimant’s request was late. However, it appears on this record that OAH might have misconstrued which Department decision was the subject of claimant’s request for the following reasons.

In addition to the December 1, 2015 wage and potential benefit report, the Department issued another decision on January 2, 2016 that included notice of appeal rights. Included on claimant’s request for hearing was a portion of a document regarding claimant’s claim on Department letterhead, ostensibly part of the decision to which claimant meant her request for hearing to apply. However, the letterhead did not match the appearance of the wage and potential benefit report OAH eventually matched to claimant’s request, indicating that was not the decision claimant intended to appeal. That claimant was not requesting a hearing on the December 1, 2015 wage and potential benefit report is supported by claimant’s subsequent appellant questionnaire response, where she referenced being told within the week following December 18, 2015 that a Department employee told claimant “in about a week I would be getting a letter in the mail, about the denial [*sic*]. I got it on 01/02/2016 and it said I could as for a hearing, so I did! On 01/05/2016 I sent in a request for a hearing.” See DR Exhibit 3. She also reported she had been prompted to request a hearing “when I received the letter from Employment office on 1/2/2016. It said I could request a hearing within 10 days, so I did.” *Id.*

For those reasons, it appears more likely than not that claimant’s January 5, 2016 request for hearing was probably not intended to request a hearing on the Department’s December 1, 2015 wage and potential benefit report, but was instead intended to request a hearing on a January 2, 2016 determination by the Department concerning the amount of claimant’s benefits, likely a denial of claimant’s request for a claim redetermination. Claimant expressed her intent to appeal that determination by stating that she was requesting a hearing on the amount of her benefits and including a copy of a portion of the decision with her January 5, 2016 request. Without claimant and the Department having the opportunity to provide information about her request and its timeliness, however, the record does not support a finding that claimant intended her January 5, 2016 request for hearing to apply to the wage and potential benefit report, or that the request for hearing on that redetermination was late.

The record must also be developed with respect to whether claimant requested a hearing on the wage and potential benefit report itself, and, if so, the timeliness of such a request. In claimant’s response to the appellant questionnaire, claimant described her efforts to get “the information I needed” from her former employer and repeated contacts with the Department. The ALJ concluded that claimant’s first contact with the Department occurred on December 14, 2015, and, regardless whether she requested a hearing by phone during that call, her request was still late and subject to dismissal. Hearing Decision 16-UI-51847 at 2. We disagree. The information claimant provided did not include an explanation of what information claimant “needed,” or how she found out she “needed” the information before contacting the Department, necessitating further information before reaching a conclusion about when she contacted the Department and what occurred when she did. We reasonably infer from the record that claimant had to have been instructed somehow about what information she needed to provide to the Department. A cursory review of Department records shows that claimant made calls to the Department before the deadline for requesting a hearing on the wage and potential benefit report expired, on December 4, 2015 and December 11, 2015. Department records show that claimant expressed disagreement with the Department’s wage and potential benefit report during each call, and was

instructed to provide the Department with proof of her earnings or missing wages.<sup>1</sup> However, the record does not show whether claimant's statements to the Department during those calls should be construed as expressions of a present intent to appeal the wage and potential benefit report, whether she requested a hearing during one or both of the calls, or instead told Department employees that she did not want to request a hearing. Claimant and the Department should both be provided with the opportunity to present evidence about the content of those calls -- *i.e.*, whether either of claimant's calls with the Department should have been construed as timely telephone requests for hearing on the Department's wage and potential benefit report.

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 filed one or more requests for hearings, if so, on which decisions(s), and whether either of the request(s) were late, Hearing Decision 16-UI-51847 is reversed, and this matter is remanded for development of the record.

**DECISION:** Hearing Decision 16-UI-51847 is set aside, and this matter remanded for further proceedings consistent with this order.<sup>2</sup>

Susan Rossiter and J. S. Cromwell

**DATE of Service:** February 2, 2016

**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](http://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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<sup>1</sup> We take notice of the December 4, 2015 and December 11, 2015 notes 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.

<sup>2</sup> **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-51847 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.