

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0265

Reversed & Remanded

PROCEDURAL HISTORY: On January 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 75905). Claimant filed a timely request for hearing. On February 18, 2016, ALJ Monroe conducted a hearing, and on February 26, 2016 issued Hearing Decision 16-UI-53919, reversing the Department's decision. On March 8, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

In Hearing Decision 16-UI-53919, the ALJ admitted Exhibit 1 into the record. Although claimant had not received a copy of it, he submitted a statement on February 22, 2016 in which he requested that the ALJ proceed to issue a decision despite his non-receipt of the exhibit. Given EAB's disposition of this matter, claimant will have an opportunity, as appropriate, to address and respond to Exhibit 1 during remand proceedings. To ensure claimant receives Exhibit 1 in advance of remand proceedings, a copy of it is included with this decision.¹

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-53919 is reversed and this matter this remanded for further proceedings.

In Hearing Decision 16-UI-53919, the ALJ concluded that, although claimant's behavior during a customer's call on December 16, 2015 was at least a wantonly negligent violation of the employer's standards, that violation was did not constitute misconduct since it was excused as an isolated instance of poor judgment under OAR 471-030-0038(b) (August 3, 2011). The ALJ reasoned that claimant's behavior on December 16, 2015 was "isolated" and properly excusable since the employer did not demonstrate that the one prior occasion on which claimant allegedly did not comply with its expectations, on August 20, 2015, was the result of his willful or wantonly negligent behavior. Hearing Decision 16-UI-53919 at 4. However, the ALJ did not sufficiently develop the evidence about

¹ Any party who objects to the service of Exhibit 1 in this manner must submit such objection to this office in writing, setting forth the basis of the objection, within ten days of our mailing this decision. OAR 471-041-0090(3) (October 29, 2006). Unless such objection is received and sustained, the service of Exhibit 1 will be considered acceptable.

claimant's prior violation to allow EAB to conclude whether or not it arose from willful or wantonly negligent behavior, and whether or not there were other any other alleged instances of prior misconduct.

In Hearing Decision 16-UI-53919, the ALJ focused her inquiry into the August 20, 2015 incident on claimant's failure to transfer a customer's call to a supervisor, which claimant contended had been caused by his accidental release or disconnection of the call. Hearing Decision 16-UI-52919 at 4. Although accidents and negligent errors generally fall short of showing wanton negligence, the employer raised many problems with the call on August 20, 2015 in addition to those the ALJ considered, including claimant's alleged condescension when speaking with the customer, his alleged failure to notate the call, his alleged failure to change the customer's account from autopay to invoice billing as the customer requested, and his failure to call that customer back, as required, after he allegedly accidentally disconnected the customer's call. Transcript at 16-17; Exhibit 1 at 9, 10. The ALJ should have inquired into these other alleged violations during the August 20, 2015 call sufficient to allow EAB to determine if claimant's behavior during that call was misconduct. On remand, the ALJ should ask the employer's witness what were the employer's expectations in regard to notating calls, what were its expectations about calling customers back if their calls were disconnected, what was the appropriate response to customer requests to change billing methods, and how and when those expectations were communicated to claimant. In addition, the ALJ should ask for details about the specific ways claimant's handling of that call did not meet the employer's standards. Claimant should be allowed to respond to the employer's contentions about the August 20, 2015 call and to explain why he behaved as he did. The ALJ should also inquire about any instances other than on August 20, 2015 where claimant allegedly failed to comply with the employer's standards, and conduct an inquiry sufficient to allow a determination of whether those prior incidents involved claimant's willful or wantonly negligent behavior. Absent such inquiries, EAB cannot conclude whether claimant's behavior on December 16, 2015 was an "isolated" instance of willfully or wantonly negligently disregarding the employer's standards, and whether it was or was not properly excused from constituting misconduct as an isolated instance of poor judgment.

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's behavior on December 16, 2015 was excused as an isolated instance of poor judgment, Hearing Decision 16-UI-53919 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 16-UI-53919 is set aside, and this matter remanded for further proceedings consistent with this order.

DATE of Service: April 15, 2016

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-53919 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.

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.

Please help us improve our service by completing an online customer service survey. To complete the survey, please go to <https://www.surveymonkey.com/s/5WQXNJH>. If you are unable to complete the survey online and wish to have a paper copy of the survey, please contact our office.