

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0666

Reversed & Remanded

PROCEDURAL HISTORY: On April 25, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant did not actively seek work from March 13, 2016 through April 2, 2016 (decision # 101334). Claimant filed a timely request for hearing. On May 17, 2016, ALJ Triana conducted a hearing, and on May 18, 2016 issued Hearing Decision 16-UI-59847, affirming the Department's decision. On June 3, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-59847 should be reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further development of the record.

To be eligible to receive benefits, unemployed individuals must be able to work, available for work, and actively seek work during each week claimed. ORS 657.155(1)(c). An individual is actively seeking work when doing what an ordinary and reasonable person would do to return to work at the earliest opportunity. OAR 471-030-0036(5)(a) (February 23, 2014). OAR 471-030-0036(5) states that the minimum requirements for an individual to be considered "actively seeking work" are five work-seeking activities per week, with at least two of those being direct contact with an employer who might hire the individual. OAR 471-030-0036(5)(b) provides, in pertinent part:

...(b) For an individual on temporary layoff of four weeks or less with the individual's regular employer:

(A) If the individual had, as of the layoff date, been given a date to return to work, such individual is actively seeking work by remaining in contact with and being capable of accepting and reporting for any suitable work with that employer for a period of up to four calendar weeks following the end of the week in which the temporary layoff occurred. After four calendar weeks have passed following the week in which the temporary layoff occurred, the individual must seek work with other employers in addition to the individual's regular employer.

Here, there was no dispute that the employer placed claimant on temporary layoff on February 22, 2016, gave her a return to work date of March 16, 2016, and then, on March 16, 2016, informed her that her return to work date had been extended to April 1, 2016. At issue is whether claimant actively sought work and is eligible to receive benefits for the weeks March 13 through April 2, 2016 (weeks 11-16 through 13-16).

In Hearing Decision 16-UI-59847, the ALJ found, in part, that the employer notified claimant on March 16 that she would not return to full-time work until April 1 and that claimant continued to perform some work for her employer during each week claimed and thus concluded she was not on temporary layoff as she reported when she filed her claims for the weeks at issue. Hearing Decision 16-UI-59847 at 1. The ALJ concluded that because claimant was not on temporary layoff, she was obligated under ORS 657.155 and OAR 471-030-0036(5)(a) to conduct an active work search during each week claimed and because claimant did not perform at least five work seeking activities during any such week, she was ineligible for benefits. Hearing Decision 16-UI-59847 at 3.

However, OAR 471-030-0060 sets forth the procedure for payment of benefits during a period of partial unemployment. It requires that a claimant who is “partially unemployed” to submit a “Notice and Verification of Partial Unemployment” form to the Department within a specified time period in order to be eligible benefits if she or he has not registered for work with the Department.¹ The “Notice and Verification of Partial Unemployment” form is furnished to claimants by the Department and explains the procedures for filing for benefits during periods of partial unemployment. *Id.* The back of the form notifies claimant to complete his or her portion of the form, to request the employer to complete its portion and to mail it to the Department. It cautions the claimant “to be able to work and available for work offered by your regular employer” but is silent with regard to the claimant’s work-seeking requirements.² The front of the form notifies the employer to confirm the partial unemployment of the claimant by completing the form and informs the employer that such workers “are not required to register for and seek work as long as they continue to qualify as ‘partially unemployed.’” *Id.* Consequently, the Department’s Form 192-A appears to be in conflict with OAR 471-030-0036(5)(a).

Although the ALJ essentially concluded that claimant was partially unemployed, she failed to elicit testimony or any other evidence from the Department regarding the applicability of OAR 471-030-0060(1) to claimant’s circumstances. She failed to ask the Department representative to explain how the Department interprets and applies OAR 471-030-0060(2), and to clarify whether claimant qualified as “partially unemployed” under this interpretation. She also failed to inquire if the Department considered the possibility that claimant qualified as a “partially unemployed” individual” when claimant filed her claims for benefits for the weeks at issue. Finally, she failed to inquire whether claimant was expected to conduct a work search that complied with OAR 471-030-0036(5)(a) during the weeks at issue.

¹ OAR 471-030-0060(2).

² A copy of the Department’s “Notice and Verification of Partial Unemployment,” Department form 192-A, has been marked as EAB Exhibit 1 and is included with this decision. Any party that objects to the admission of EAB Exhibit 1 must submit its objections to this office in writing, setting forth the basis of the objection, within ten days of the date on which this decision is mailed. Unless such an objection is received, EAB Exhibit 1 will remain part of the record.

Under ORS 657.270, an ALJ must give all parties a reasonable opportunity for a fair hearing. That obligation necessarily requires that 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 a record sufficient to determine if claimant is eligible for benefits for the weeks at issue, Hearing Decision 16-UI-59847 is reversed, and this matter remanded to the ALJ for development of the record.

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-59847 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.

DECISION: Hearing Decision 16-UI-59847 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: July 14, 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. 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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