

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1227

Reversed & Remanded

PROCEDURAL HISTORY: On August 31, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant had not demonstrated that she had the aptitude to complete the Training Unemployment Insurance (TUI) program (decision # 160838). Claimant filed a timely request for hearing. On October 13, 2016, ALJ M. Davis conducted a hearing and issued Hearing Decision 16-UI-69162, concluding claimant was not eligible to receive TUI benefits. On November 2, 2016, claimant filed an application for review with the Employment Appeals Board (EAB).

EAB considered the entire hearing record, including Exhibit 1, which the ALJ received into evidence at the hearing, although Hearing Decision 16-UI-69162 mistakenly states that no exhibits were offered or admitted into evidence. Audio Record at 4:15 to 5:45; Hearing Decision 16-UI-69162 at 1. EAB also considered claimant's written argument to the extent it was based on information received into evidence at the hearing. *See* ORS 657.275(2) and OAR 471-041-0090 (October 29, 2006).

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-69162 should be reversed, and this matter remanded to the Office of Administrative Hearings (OAH) for further development of the record.

An individual with a valid unemployment insurance claim who is determined to be an eligible dislocated worker under ORS 657.335 may be eligible to participate in the Training Unemployment Insurance (TUI) program, which allows a TUI participant to attend school and receive benefits without having to look for work. However, Oregon rule prohibits the Department from approving career and technical training if the "planned curriculum of classes and course activity is less than the equivalent of full-time student status as defined by the training provider." OAR 471-030-0080(1) (March 5, 2012). The Department may permit the TUI participant to attend school part time and receive benefits if the classes needed by the claimant are not available, or "the number of classes needed to complete the training is less than the equivalent of a full-time schedule." OAR 471-030-0080(2)(a), (b).

The Department approved claimant for the TUI program on March 4, 2016. Claimant attended OHSU and claimed and was paid benefits for the weeks from June 19 through August 27, 2016 (weeks 25-16 through 34-16), the weeks at issue. The Department subsequently denied the weeks at issue, concluding

that claimant failed to show she had the aptitude to complete the TUI program because claimant was not a full-time student during the weeks at issue. Decision # 160838, Audio Record 9:31 to 10:53. In Hearing Decision 16-UI-69162, the ALJ concluded that claimant was not eligible for benefits for the weeks at issue because she was a part-time student and the Department did not waive that requirement. Hearing Decision 16-UI-69162 at 2. Where, as here, the Department initially pays a claimant benefits, the Department has the burden to establish that claimant is not eligible for those benefits. *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976).

The record shows that OAR 471-030-0080(2)(a) probably does not apply to this case because claimant considered herself to be a part-time student during the weeks at issue, and the record does not show that claimant was part-time because the classes she needed were not available during the summer term. However, the record does not provide the facts necessary for EAB to determine if claimant's classes and course activity during the weeks at issue were less than the "equivalent of full-time student status" as defined by OHSU, or whether her remaining coursework to complete her training was "less than the equivalent of a full-time schedule" under OAR 471-030-0080(2). Moreover, the ALJ failed to have the Department provide or, at minimum, read into the record, the TUI approval letter that allegedly informed claimant she was required to attend school full time. The record fails to show how many credits claimant had remaining to complete her training when she began the summer term (the weeks at issue), and how many credits she took during that term. Was there any reason, other than her son's wedding, why claimant decided to reduce to less than a "full-time" schedule? How did claimant divide her credits between the summer and subsequent fall sessions? How many school sessions did claimant have to complete to finish her training after the summer session? How does the Department interpret OAR 471-030-0080(2)(b) where a claimant is nearing completion of her training? Does the Department require a TUI participant to attend school full-time even if she might have only one credit remaining in the subsequent term, rather than dividing those credits equally between terms? How many credits did claimant have to take per term for OHSU to consider her to be a full-time student for claimant's course of study? Did OHSU's definition of full-time differ between summer and other sessions? The ALJ must seek answers to these questions during the hearing on remand.

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 to determine whether claimant was eligible for benefits through the TUI program, Hearing Decision 16-UI-69162 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 16-UI-69162 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: November 16, 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.

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.