

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-1253

Reversed & Remanded

PROCEDURAL HISTORY: On May 16, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding that claimant quit working for the employer without good cause (decision # 74954). On June 16, 2016, decision # 74954 became final without claimant having filed a request for hearing. On August 26, 2016, claimant filed a late request for hearing. On August 31, 2016, ALJ Kangas issued Hearing Decision 16-UI-66607, dismissing claimant's late request for hearing subject to his right to renew the request by responding to an appellant questionnaire by September 14, 2016. On September 15, 2016, claimant filed a response to the appellant questionnaire and a timely application for review of Hearing Decision 16-UI-66607 with the Employment Appeals Board (EAB). On September 26, 2016, EAB issued EAB Decision 2016-EAB-1083, reversing Hearing Decision 16-UI-66607, and remanding this matter to the Office of Administrative Hearings (OAH) for a hearing on whether to allow claimant's late request for hearing on decision # 74954 and, if necessary, whether claimant is disqualified from receiving benefits based on his work separation from the employer.

On October 7, 2016, OAH served notice of a telephone hearing scheduled for October 21, 2016 at 10:45 a.m. Pacific time. On October 19, 2016, the employer telephoned OAH and requested that the hearing be postponed, and OAH denied the request. On October 21, 2016, ALJ Wyatt conducted a hearing at which the employer failed to appear, and on October 26, 2016 issued Hearing Decision 16-UI-69931, allowing claimant's late request for hearing on decision # 74954, and concluding the employer discharged claimant, not for misconduct. On November 8, 2016, the employer filed an application for review of Hearing Decision 16-UI-69931 with EAB.

CONCLUSIONS AND REASONS: Hearing Decision 16-UI-69931 is reversed, and his matter remanded to OAH for further proceedings.

With its application for review, the employer submitted written argument in which it requested another hearing on whether claimant is disqualified from receiving benefits based on his work separation from the employer, asserting that its owner, president and chief executive officer (CEO), and its vice president

and chief operating officer (COO), were unable to attend the October 21, 2016 hearing. The employer's request is construed as a request for EAB to review OAH's denial of the employers' October 19, 2016 request to have the October 21, 2016 hearing postponed. OAR 471-040-0021(2) (August 1, 2004) states that a postponement may be granted by OAH at the request of a party if the request is promptly made after the party becomes aware of the need for postponement, and the party has good cause, as stated in the request, for not attending the hearing at the time and date set. "Good cause" exists when the circumstances causing the request are beyond the reasonable control of the requesting party, and failure to grant the postponement would result in undue hardship to the requesting party. OAR 471-040-0021(3).

In its written argument, the employer asserts that it did not receive the October 7, 2016 notice of the October 21, 2016 hearing until October 19, 2016, suggesting that the employer's October 19, 2016 request to have the hearing postponed was made promptly after becoming aware of the need for a postponement. The employer further asserts that its CEO and COO were "out of the area on business development trips" for the employer, and unable to attend the October 21, 2016 hearing. Employer's Written Argument at 1. Finally, the employer asserts that its CEO and COO had first-hand knowledge of information establishing that claimant voluntarily left work by refusing their offer of continued employment, and was not discharged. The employer's written argument and its failure to appear at the October 21, 2016 hearing suggest that the circumstances causing the employer's request for a postponement were beyond its reasonable control, and that OAH's failure to grant the postponement resulted in undue hardship to the employer.

The hearing record contains no information regarding the employer's request for a postponement other than an October 19, 2016 document written by an OAH employee entitled "Memo To File / Telephone Record," stating, in relevant parts, "Postponement Denied" and "Employer called to request [postponement] due to vacation." The document contains no additional information regarding the employer's stated reason for requesting a postponement, and no explanation of the basis upon which OAH denied the request. Nor does Hearing Decision 16-UI-69931 address those issues. The hearing record therefore lacks sufficient information to determine whether OAH erred in denying the employer's request for a postponement.

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). Absent sufficient information in the hearing record to determine whether OAH erred in denying the employer's request for a postponement, Hearing Decision 16-UI-69931 is reversed, and this matter remanded for a hearing on that issue and, if necessary, another hearing on whether claimant is disqualified from receiving benefits based on his work separation from the employer.

On remand, the ALJ should conduct a full inquiry into whether the employer requested to have the hearing postponed promptly after becoming aware of the need for a postponement, including the employer's assertion that it did not receive the October 7, 2016 notice of the October 21, 2016 hearing until October 19, 2016. The ALJ also should conduct a full inquiry into whether the employer had good cause, as stated in its request for a postponement, for not attending the hearing, including whether the employer explained that its CEO and COO were out of the area on business development trips, how that

prevented them attending the hearing by telephone, and why the employer could not attend the hearing without them. If the ALJ determines that OAH erred in denying the employer's request for a postponement, the ALJ should then conduct another hearing on whether claimant is disqualified from receiving benefits based on his work separation from the employer, including whether claimant quit work with or without good cause, or was discharged for misconduct, or not for misconduct.

DECISION: Hearing Decision 16-UI-69931 is set aside, and this matter remanded for further proceedings consistent with this order.¹

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

DATE of Service: November 15, 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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¹ The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 16-UI-69931 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.