

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0149

Reversed & Remanded

PROCEDURAL HISTORY: On December 27, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 83839). Claimant filed a timely request for hearing. On February 1, 2017, ALJ M. Davis conducted an interpreted hearing, and on February 1, 2017 issued Hearing Decision 17-UI-75976, concluding the employer discharged claimant for misconduct. On February 6, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-75975 is set aside, and this matter remanded for a new hearing and hearing decision.

Oregon law requires that, “to secure the constitutional rights and other rights of persons who are unable to readily understand or communicate in the English language because of a non-English-speaking cultural background . . . , and who as a result cannot be fully protected in administrative proceedings . . . unless qualified interpreters are available to provide assistance,” such persons “shall” be provided with an interpreter. *See* ORS 45.273, ORS 45.275(1)(a); OAR 471-040-0007.

Although the ALJ appointed a Vietnamese interpreter to interpret the proceedings in this case, it is apparent from the record that the interpreter lacked the skills and/or experience to effectively do so. Rather than translating exactly what the witnesses or ALJ actually stated, the interpreter rephrased and began most interpreted phrases by stating, “He said . . .” or “Doan . . . say . . .” *See e.g.* Transcript at 4-8, 10, 13. Although the ALJ admonished the interpreter, apparently repeatedly, to “just interpret exactly what’s being said” and not to “say he said, he said, he said,” the interpreter continued to rephrase the majority of claimant’s responses throughout the hearing. *See* Transcript at 6. The interpreter did not interpret, or promptly interpret, portions of the hearing. *See e.g.* Transcript at 4, 8, 9, 11, 12. The interpreter’s delays at certain points obscured the record, rendering portions of the testimony unintelligible. *See e.g.* Transcript at 11. The quality of the interpretive services were such that, at one point, the following exchange occurred:

ALJ: [Witness], I’m going to swear you in now. Please raise your right hand. [ALJ swears in the witness.]

ALJ: [Interpreter], you are supposed to be interpreting all of this.

Interpreter: Okay.

ALJ: Do you – do you understand what your role is here? ([Interpreter] finally interpreted the oath.) Again, [Interpreter], you need to interpret what she said. Her responses for [claimant] to understand what's going on.

Transcript at 9. It is clear on this record that the interpretive services provided in this matter did not result in a clear record. Due process and state law require that this matter be remanded for another hearing, with a different interpreter who understands his or her role in the hearing and is capable of performing an exact interpretation of the entire proceeding.

Aside from the interpreter problems, we also find that the record was not sufficiently developed to support a decision as to whether claimant quit or was discharged, and whether his work separation was disqualifying for purposes of unemployment insurance benefits. On remand, the ALJ must also develop a complete record that includes an inquiry into the following areas: what was claimant's mental condition; when was he diagnosed; what was his prognosis; was his condition stable at the time of the work separation; whether claimant had prior leaves of absence for medical reasons; how did claimant request any prior leave(s); when did the prior leave(s) of absence begin and end; how long had claimant been back at work since the end of his last leave of absence before his employment ended; why did claimant decide to go to Vietnam for health care instead of remaining in the United States; what date did claimant decide to go to Vietnam; how long did he plan to be away from his job; did claimant ask the employer to allow him time off work to travel to Vietnam; who did he ask; did he ask for time off work the same way he did the previous time(s) he had been allowed medical leave(s) of absence, and, if not, why not; what was the response he received from the employer; did he (or his sister) provide the employer with a doctor's note; what did the note say; when did claimant or his sister provide the note to the employer; did the employer receive it and, if so, what did the employer do in response to the note; did claimant have accrued leave available; were there any circumstances under which the employer would have allowed claimant time off to travel to Vietnam for medical care if he lacked enough accrued leave time; what would claimant have had to do to get approval for time off; did claimant know what he needed to do to get approval for time off and, if so, did he take those steps; if the employer had denied claimant's request for time off or claimant lacked sufficient accrued leave did claimant consider delaying his trip to Vietnam until he had the employer's approval or sufficient accrued leave, and, if not, why did claimant not consider delaying his trip; did claimant know that traveling to Vietnam when he did would cause his employment to end and, if so, why did he choose to travel to Vietnam. In addition, the ALJ should ask the parties any other questions necessary to develop a complete record.

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). Due to the poor quality of interpreter services in this case and because the ALJ failed to develop the record necessary for a determination of the nature of claimant's work separation and whether or not it was

disqualifying, Hearing Decision 17-UI-75976 is reversed, and this matter is remanded for development of the record.

DECISION: Hearing Decision 17-UI-75976 is set aside, and this matter remanded for further proceedings consistent with this order.¹

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

DATE of Service: February 23, 2017

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 **NOTE:** The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-75976 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.