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State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0650

Hearing Decision 17-UI-82786 Modified – Late Request for Hearing Allowed, No Disqualification
Hearing Decision 17-UI-82784 Modified – Late Request for Hearing Allowed, No Disqualification
Hearing Decision 17-UI-82799 Modified – Late Request for Hearing Allowed, No Disqualification
Hearing Decision 17-UI-82796 Modified – Late Request for Hearing Allowed, No Disqualification
Hearing Decision 17-UI-82829 Modified – Late Request for Hearing Allowed, No Disqualification
Hearing Decision 17-UI-82879 Reversed – Timely Request for Hearing, No Disqualification
Hearing Decision 17-UI-82831 Reversed – No Overpayment

PROCEDURAL HISTORY: On February 10, 2017, the Oregon Employment Department (the Department) served five notices of five administrative decisions concluding claimant refused offers of suitable work without good cause on October 31, 2016 (decision # 82726), November 7, 2016 (decision # 94250), November 8, 2016 (decisions # 94723 and 95207), and November 17, 2016 (decision # 100909). On March 2, 2017, those decisions became final without claimant having filed timely requests for hearing. On March 10, 2017, the Department served notice of a sixth administrative decision concluding that claimant refused an offer of suitable work without good cause on November 3, 2016 (decision # 93936). On March 16, 2017, the Department served notice of a seventh administrative decision, based on its six previous decisions, assessing a $6,237 overpayment that claimant was required to repay (decision # 112437). On March 23, 2017, claimant filed late requests for hearing on decisions # 82726, 94250, 94723, 95207 and 100909, and timely requests on decisions # 93936 and 112437.[1]

On April 19, 2017, the Office of Administrative Hearings (OAH) mailed two notices of two hearings, both scheduled for May 2, 2017. On May 2, 2017, ALJ S. Lee conducted both hearings. On May 5, 2017, the ALJ issued the following: Hearing Decision 17-UI-82786, which allowed claimant's late request for hearing and affirmed decision # 82726; Hearing Decision 17-UI-82784, which allowed claimant's late request for hearing and affirmed decision # 94250; Hearing Decision 17-UI-82799, which allowed claimant's late request for hearing and affirmed decision # 94723; and Hearing Decision 17-UI-82796, which allowed claimant's late request for hearing and affirmed decision # 95207. On May 8, 2017, the ALJ issued the following: Hearing Decision 17-UI-82829, which allowed claimant's late request for hearing and affirmed decision # 100909; Hearing Decision 17-UI-82879, which

[1] The Department issued three additional decisions disqualifying claimant on the basis of alleged job refusals, and claimant requested and had hearings on them. Because the hearing decisions in those three cases were in claimant's favor and were not appealed to EAB, however, we will make no further mention of them.

purported to allow claimant's late request for hearing and affirmed decision # 93936; and Hearing Decision 17-UI-82831, which affirmed decision # 112437. On May 25, 2017, claimant filed timely applications for review of all seven hearing decisions with the Employment Appeals Board (EAB).

Pursuant to OAR 471-041-0095 (October 29, 2006), EAB consolidated its review of Hearing Decisions 17-UI-82786, 17-UI-82784, 17-UI-82799, 17-UI-82796, 17-UI-82829, 17-UI-82879 and 17-UI-82831. For case-tracking purposes, this decision is being issued in septuplicate (EAB Decisions 2017-EAB-0644, 2017-EAB-0645, 2017-EAB-0646, 2017-EAB-0647, 2017-EAB-0648, 2017-EAB-0649, 2017-EAB-0650).

On June 14, 2017, claimant requested and was granted a 14-day extension of time to file a written argument in these matters. OAR 471-040-0080(4) (October 29, 2006). Because these decisions are all in claimant's favor, however, and in the interest of ensuring a prompt resolution to this matter, we have not waited to receive claimant's argument before issuing these decisions.

FINDINGS OF FACT: (1) Claimant filed an initial claim for benefits effective May 15, 2016 (BYE week 19-17).

(2) Claimant filed weekly claims for benefits each week from October 30, 2016 to January 28, 2017 (weeks 44-16 to 4-17). Claimant reported to the Department each week that he had not refused any jobs because he did not believe he had. Based on claimant's weekly claims and reports, the Department paid claimant benefits; although the weekly amount varied, the Department paid claimant a total of $6,237 in unemployment insurance benefits for weeks 44-16 through 4-17.

(3) At all relevant times, claimant was registered to work as an emergency substitute teacher in the Evergreen School District. An emergency substitute teacher is an individual who has a bachelor's degree but is not a trained or certified teacher. Washington state law allows the employer to hire emergency substitutes who lack the educational background and teaching certifications usually necessary for teachers because there is a shortage of trained and certified teachers in the state.

(4) Claimant had a bachelor's degree in business administration. He was not trained as a teacher, did not have any experience as a teacher, did not have any teaching certifications and did not have training or experience with young children or children with special education needs. His first emergency substitute assignment occurred on October 12, 2016.

(5) The employer paid established rates for full- and half-days of substitute teaching work that were within the median wage range for teachers in claimant's labor market. The employer notified substitute teachers of available jobs using an automated system called AESOP, which placed calls to substitutes that included details about the locations, shifts and starting times of available substitute assignments. The AESOP system created records of whether substitutes it called had answered the call, failed to answer the call, or refused an available job. The AESOP system did not differentiate between calls answered by a person and those answered by a person's voicemail system; in both cases the AESOP system created a record that the call had been "answered aborted and not accepted." Transcript at 20.

(6) Between October 31, 2016 and November 17, 2016, the AESOP system recorded that at least six calls to claimant had been "answered aborted and not accepted." On October 31, 2016, AESOP called

claimant at 9:46 a.m. with information about an available job at Silver Star Elementary for a full day of work with a fifth grade music or P.E. class. Claimant would not have accepted the job because Silver Star Elementary began classes at 9:20 a.m. He had previously tried to accept a job after the school day began and had been told to "forget it." Transcript at 76.

(7) On November 3, 2016, AESOP called claimant at 9:17 p.m. with information about a job on November 4, 2016 at Evergreen High School. The job was a full day teaching American Sign Language (ASL). Claimant would not have accepted the job because it was an ASL class and he did not have any experience with ASL or ASL students.

(8) On November 7, 2016, AESOP called claimant at 12:13 p.m. with information about a half-day of work at Harmony Elementary School. The job was likely going to begin before claimant could arrive. Claimant would not have accepted a job that would have begun before he could have arrived to work.

(9) On November 8, 2016, AESOP called claimant at 6:17 a.m. with information about a full day of work teaching first graders at Columbia Valley School. Claimant would not have accepted the job because he was not qualified or prepared to teach first graders and felt the job was unsuitable.

(10) On November 8, 2016, AESOP called claimant again at 9:10 a.m. with information about another full day job teaching fourth graders at Sifton Elementary School. Claimant would not have accepted the job because it was scheduled to begin at 9:20 a.m., and claimant could not have accepted the job and arrived at the school before school began for the day.

(11) On November 17, 2016, AESOP called claimant at 7:12 a.m. with information about a job at Sifton Elementary School. The job was for a full day teaching fifth graders. The call was answered by either claimant or his voicemail system, but claimant did not accept the job. Had claimant been aware of the job, he would have accepted it.

CONCLUSIONS AND REASONS: Claimant's late requests for hearing on decisions # 82726, 94250, 94723, 95207, and 100909 are allowed. Claimant's request for hearing on decision # 93936 was timely, making the ALJ's conclusion that he had good cause for filing a late request for hearing an error. Claimant did not refuse six offers of suitable work without good cause, and may not be disqualified from receiving benefits on that basis. Claimant was, therefore, not overpaid benefits and is not liable to repay them to the Department.

Late requests for hearing. Claimant filed late requests for hearing on decisions # 82726, 94250, 94723, 95207, and 100909. In Hearing Decisions 17-UI-82786, 17-UI-82784, 17-UI-82799, 17-UI-82796 and 17-UI-82829 the ALJ allowed each of those late requests for hearing, finding in each case that claimant had good cause to extend the filing period a reasonable time. EAB has reviewed the hearing record regarding those late filings in its entirety. On *de novo* review and pursuant to ORS 657.275(2), the portions of the referenced hearing decisions that allowed claimant's late requests for hearing on those five decisions are **adopted**.

In Hearing Decision 17-UI-82879, the ALJ also purported to allow claimant's late request for hearing on decision # 93936. The ALJ erred in doing so, however, because claimant actually filed a timely request for hearing on decision # 93936. Because claimant's request for hearing was not filed late, the ALJ

erred in finding that it was, and erred in purporting to allow a late request for hearing on that basis. Rather, claimant's request for hearing on decision # 93936 must be allowed because it was timely.

Job refusals. ORS 657.176(2)(e) requires a disqualification from benefits if an individual failed without good cause to accept suitable work when offered. ORS 657.190 provides, in determining whether any work is "suitable" for an individual, the factors to be considered include, among other things, the prior training and experience of the individual. OAR 471-030-0038(6) (August 3, 2011) defines "good cause" in relevant part as "such that a reasonable and prudent person, exercising ordinary common sense, would refuse to . . . accept suitable work when offered by the employer."

In cases involving job refusals and in cases in which the Department has paid claimant benefits and seeks to have them repaid, the employer and the Department have the burden of proving that there was a job offer and that benefits should not have been paid. *See accord Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976) (employer's burden of proof in a disqualification); *Nichols v. Employment Division*, 24 Or App 195, 544 P2d 1068 (1976) (the Department's burden of proof when seeking to deny benefits after benefits were allowed). Once the existence of a job offer is established, the burden shifts to claimant to prove that the work was not suitable or that he had good cause to refuse the offer. *See accord Vail v. Employment Division*, 30 Or App 365, 567 P2d 129 (1977). The standard of proof in an unemployment insurance case is by a preponderance, meaning that to disqualify claimant from benefits and require him to repay them, the evidence must show it is more likely than not that claimant refused offers of suitable work and that benefits should not have been paid.

The ALJ found in each of the six job refusal cases under review that claimant had refused an offer of suitable work without good cause, and was therefore disqualified from receiving unemployment insurance benefits beginning week 44-16. We disagree. As a preliminary matter, neither the employer nor the Department presented evidence suggesting that claimant personally answered any of the six calls at issue in these cases or received the job offers through those six calls, much less that he chose to reject the job offers associated with each call. Although there is evidence is that each of the six calls made through the AESOP system to claimant's phone was answered, neither the Department nor the employer established that claimant answered the calls. The AESOP system created a record that each of the six calls had been "aborted, answered, and not accepted." *See e.g.* Transcript at 26. When asked what that meant, the Department's witness testified that the employer said it meant "the sub employee's phone was answered either live or with voicemail and the job was not accepted, so the system hung up and it went on to the next person." Transcript at 17. The employer's witness did not dispute the Department's account of what "aborted, answered, and not accepted" meant, and when asked again whether "not accepted" meant claimant "actually said, 'I don't accept this assignment', or that there was no response" the employer's witness testified, "honestly it could mean either." Transcript at 30. Therefore it is just as likely that claimant's voicemail "answered" the six calls as it is that claimant did.

The employer and the Department both testified that the AESOP system placed many additional calls to claimant on a regular basis. *See e.g.* Transcript at 33-34. We note, however, that the evidence about whether or not claimant received any of those other calls is even scarcer than the evidence that he received the six calls at issue in this case, and the Department determined that claimant should not be disqualified from benefits on the basis of those other calls because of the lack of evidence that he actually received them. Transcript at 16. The employer's witness also testified that the employer had up to hundreds of substitute jobs posted on the AESOP website, including the six jobs in the job refusal

cases at issue, which claimant "would have been able to see" when he logged on to the website. Transcript at 50. The employer's witness also testified that many of those jobs went unfilled, and suggested that claimant could have worked each day at issue in these cases, had he wanted to work. Transcript at 44-50, 69. However, claimant's failure to follow up on jobs available through a job list, particularly where there is no evidence that claimant actually saw the relevant job postings, does not constitute a job refusal for purposes of disqualifying him from benefits.

In sum, although there is evidence that each of the six AESOP calls at issue in these cases was placed to claimant's phone and answered, it is just as likely that the calls were "answered" because they rang through to claimant's voicemail as it is that claimant actually answered them. Therefore it is just as likely that claimant did not know about the available jobs as it is that he did. In the absence of evidence establishing that it is more likely than not that claimant answered the calls, and chose not to accept the jobs, he may not be disqualified from receiving benefits on the basis of these six alleged job refusals.

Even if we had concluded that claimant refused the six offers of work at issue in these cases, the outcomes of five of the cases – Hearing Decisions 17-UI-82786, 17-UI-82784, 17-UI-82799, 17-UI-82796 and 17-UI-82879 – would remain the same for the reasons that follow. The October 31st job had already begun at the time AESOP called claimant; the November 7th job and the November 8th job at Sifton were both beginning within ten minutes of the AESOP call, meaning that claimant could not have commuted to any of those jobs before they began. Although the employer's witness stated that the schools "would accommodate" a late start if claimant had just received the offers, claimant had been told to "forget it" when he inquired about a similar job in the past. *Compare* Transcript at 59, 76. A reasonable and prudent person, particularly one who had been told to "forget" reporting to a job he could not start on time, would refuse to accept an offer of work he could not start on time. Moreover, it is not reasonable to expect an individual to accept a job within the automated AESOP system and then call the school to find out if he should bother reporting to it, particularly on such tight timelines as the three jobs at issue here. We therefore conclude that, had claimant received those three job offers, he would have had good cause to refuse them.

With regard to the November 3rd job and the November 8th job at Columbia, the work was not suitable given claimant's education, experience and training. Although the employer's witness testified that Washington state's emergency substitute law "does give you the right to substitute in any classroom . . . and all of our teachers do have – are required to have emergency substitute plans . . . that someone can follow," the fact that it would not have been illegal for claimant to teach first grade and an ASL class did not make those jobs suitable for him. Transcript at 43-44. Claimant's educational background was in business administration, he was not trained or certified as a teacher, and at the time of the November 3rd and November 8th jobs he would have had less than a month of experience working as a substitute teacher. While he apparently felt qualified to handle classrooms of older children and children without special needs, he was reasonably concerned about his ability to handle small children and children with special needs. Absent evidence that claimant had some sort of experience, training or aptitude working with small children or ASL students, we cannot conclude that teaching such students was consistent with claimant's education, training and experience. That sort of work was, therefore, unsuitable for claimant, and he may not be disqualified from benefits for refusing to accept unsuitable offers of work.

Overpayment. ORS 657.310(1) provides that an individual who received benefits to which the individual was not entitled is liable to either repay the benefits or have the amount of the benefits

deducted from any future benefits otherwise payable to the individual under ORS chapter 657. The Department concluded, and the ALJ agreed, that on the basis of decisions # 82726, 94250, 94732, 95207, 100909 and 93936 claimant was disqualified from receiving the benefits paid to him between weeks 44-16 and 4-17, and because he received the benefits based upon his weekly reports that he had not refused offers of suitable work, he was liable to repay those benefits to the Department. Having concluded in these consolidated Employment Appeals Board decisions that claimant did *not* refuse six offers of suitable work without good cause, however, we further conclude that claimant was not disqualified from receiving benefits during the weeks at issue, and, as such, was not overpaid. Claimant is not liable to repay the Department for the benefits he received between weeks 44-16 and 4-17 on the basis of the decisions at issue in these consolidated cases.

DECISION: Hearing Decisions 17-UI-82786, 17-UI-82784, 17-UI-82799, 17-UI-82796 and 17-UI-82829 are modified, as outlined above. Hearing Decisions 17-UI-82879 and 17-UI-82831 are set aside, as outlined above.

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

DATE of Service: June 19, 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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