

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0745

Reversed & Remanded

PROCEDURAL HISTORY: On April 26, 2017, the Oregon Employment Department (the Department) served notice of an administrative decision concluding claimant voluntarily left work without good cause (decision # 105541). Claimant filed a timely request for hearing. On June 5, 2017, ALJ Amesbury conducted a hearing, and on June 9, 2017, issued Hearing Decision 17-UI-85387, affirming the Department's decision. On June 20, 2017, claimant filed an application for review with the Employment Appeals Board (EAB).

CONCLUSIONS AND REASONS: Hearing Decision 17-UI-85387 is reversed and this matter is remanded for further proceedings.

In Hearing Decision 17-UI-85387, after finding that “the terms of the performance improvement plan were not fully determined,” the ALJ concluded claimant voluntarily left work without good cause on April 3, 2017, when, given the choice, he chose to resign and accept a severance package rather than continue his employment under the performance improvement plan in question, which did require that “claimant achieve certain goals within 30 days or...be discharged.” Hearing Decision 17-UI-85387 at 1, 2. The ALJ reasoned that, although “it may have been difficult or challenging for claimant to satisfy the expectations of the performance improvement plan” and “he had doubts about his ability to successfully complete it,” claimant failed to establish the plan presented a grave situation that left him with no reasonable alternatives to quitting. *Id.* We conclude that the evidence was not sufficiently developed to support those conclusions.

At the outset, it was apparent that claimant decided to leave work after concluding that two of three expectations set forth in the performance improvement plan (PIP) were “unattainable”, which the employer did not dispute. Audio Record ~ 24:40 to 25:30. If true, leaving work to avoid a discharge not for misconduct may have been good cause to leave work under appropriate circumstances. *McDowell v. Employment Department*, 348 Or 605, 612, 236 P3d 722 (2010). On remand, the ALJ should develop the evidence as to what the precise terms of the PIP were for claimant, as an account executive, and precisely why claimant thought at least two of those terms were unattainable and whether a discharge for failure to attain them would or would not have been for misconduct.

As for claimant, the ALJ never asked him why attempting and even probably failing at meeting the expectations of the PIP presented him with such a grave circumstance that it was unreasonable for him to try rather than accept a severance package that gave him only one month's wages and health insurance coverage, the same amount he would have earned over the 30 day PIP. In that regard, if claimant had attempted the PIP, did it truly guarantee claimant at least 30 days of employment, which would have made the attempt, from a compensation standpoint, at least as attractive as accepting the severance package? And if claimant was guaranteed 30 days of employment under the PIP, why did he not attempt to work under the PIP for up to 29 days before deciding whether to quit work? And if he did quit before the PIP expired, would he still have been allowed to accept the severance package?

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 *Dennis v. Employment Division*, 302 Or 160, 728 P2d 12 (1986). Because the ALJ failed to develop the record necessary for a determination of whether, viewed objectively, claimant had good cause for leaving work when he did, Hearing Decision 17-UI-85387 is reversed, and this matter remanded for further development of the record.

DECISION: Hearing Decision 17-UI-85387 is set aside, and this matter remanded for further proceedings consistent with this order.

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

DATE of Service: July 20, 2017

NOTE: The failure of any party to appear at the hearing on remand will not reinstate Hearing Decision 17-UI-85387 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.

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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